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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1902.

VOLUME LXIV.

LEE HERDMAN,

OFFICIAL REPORTER.

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By Lee Herdman, Reporter of the Supreme Court,
In behalf of the people of Nebraska.

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICE AND JUDGES.

J. J. SULLIVAN, CHIEF JUSTICE.

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SAMUEL H. SEDGWICK, } JUDGES.

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NOTE.—*Assistants*—Attorney General, William B. Rose; Reporter, Pauline Wooster; Clerk, Clara Leese, Mary Fitzgerald; Librarian, Elizabeth Stevens, Mary Isabel Howell. The deputy librarian and Miss Howell are editing the unofficial opinions.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

CHARLES B. LETTON.....Fairbury
JOHN S. STULL.....Auburn

Second District—

PAUL JESSEN.....Nebraska City

Third District—

ALBERT J. CORNISH.....Lincoln
LINCOLN FROST.....Lincoln
EDWARD P. HOLMES.....Lincoln

Fourth District—

IRVING F. BAXTER.....Omaha
CHARLES T. DICKINSON.....Tekamah
LEE S. ESTELLE.....Omaha
JACOB FAWCETT.....Omaha
WILLIAM W. KEYSOR*.....Omaha
GUY R. C. READ†.....Omaha
WILLARD W. SLABAUGH.....Omaha

Fifth District—

BENJAMIN F. GOOD.....Wahoo
SAMUEL H. SORNBORGER.....Wahoo

Sixth District—

JAMES A. GRIMISON.....Schuyler
CONRAD HOLLENBECK.....Fremont

Seventh District—

GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

Ninth District—

JAMES F. BOYD.....Neligh

---

* Has been succeeded by George A. Day.
† Succeeded Benjamin S. Baker.

Tenth District—
ED L. ADAMS.....Minden

Eleventh District—
JAMES N. PAUL*.....St. Paul
JOHN R. THOMPSON.....Grand Island

Twelfth District—
HOMER M. SULLIVAN†.....Broken Bow

Thirteenth District—
HANSON M. GRIMES.....North Platte

Fourteenth District—
GEORGE W. NORRIS‡.....McCook

Fifteenth District—
JAMES J. HARRINGTON.....O'Neill
WILLIAM H. WESTOVER.....Rushville

---

*Succeeded Charles A. Munn.
†Resigned February 3, 1903; resignation accepted February 4; Charles L. Gutterson appointed successor same date.
‡Elected to Congress from fifth district November 4, 1902. Resigned as judge February 12, 1903; resignation accepted February 14; Robert C. Orr appointed successor February 21.

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REPORTER'S NOTES.

The supreme court of Nebraska has repeatedly held the Carlisle table admissible in evidence. *King v. Bell*, 13 Nebr., 409; *City of Lincoln v. Smith*, 28 Nebr., 762; *City of Friend v. Ingersoll*, 39 Nebr., 717.

While the present deputy reporter was at the head of the insurance bureau, afterwards declared unconstitutional in *State, ex rel. Cornell, v. Poynter*, 59 Nebr., 417, he issued a circular containing four expectancy tables. This circular was revised on a suggestion of Hon. John J. McCarthy and verified with the assistance of Miss Edith Long, instructor in mathematics in the Lincoln high school. Its author now offers it editorially for the use of the bar. These tables have been carefully compared by the editor with the publications of Flitcraft, Meech and Scribner.

Expectancy of life is the length of time for which a person, at a given age, may reasonably expect to survive. This estimation is determined from careful observations made of births and deaths. For example, out of a given number of births, a certain percentage of persons born survive for one year; a certain percentage for two years, and so on, *seriatim*. By striking an average, the reasonable expectancy of life for any given age is arrived at. When expectancies thus found are tabulated, they constitute a life expectancy table. The whole system is based on Pascal's Science of Probabilities.

An authenticated and trustworthy life expectancy table is, in a proper case, competent though not conclusive evidence. Such a table is of value in many ways. For example, if a widow were suing for damages under the Ames Law (Compiled Statutes, ch. 50), any person at fault for the loss of her husband, she would first prove his net earning capacity for one year. This, multiplied by his expectancy of life in years, would be the prima-facie measure of her pecuniary damages. For example, his age is 51 years; his expectancy is 20.20 years; his earning capacity is $1,500 annually; $1,500×20.20 equals $30,300. Thirty thousand three hundred dollars, at its present worth—$18,454.04—might be the measure of one element of her damages.

The use of life expectancy tables by insurance men is for the purpose of an equitable adjustment of premiums. The intention is to require every man to pay the same sum for the same amount

of insurance. If the sum which he is to pay is divided by the number of years of his life expectancy, the quotient will be the amount of his yearly premium. For example, it is the purpose of the insurance company to collect $600 for $1,000 of insurance; A is 34 years old; his life expectancy is 32.50 years; $600 divided by 32.50 equals $18.46. B is 39 years old; his life expectancy is 28.90 years; $600 divided by 28.90 equals $20.76. So B has no advantage over A in deferring his insurance for five years. This is what is meant by the equitable adjustment of premiums.

These tables are of commercial use to determine the value of a life estate, and might be used by appraisers at a judicial sale.

The Northampton table was deduced by Doctor Richard Price from the burial registers (1735 to 1780) of All Saints' Church, Northampton. This was practically displaced by the Carlisle table.

The Carlisle table was named from the municipal parish of Carlisle in England, and was prepared by Mr. Joshua Milne, an English actuary, from materials furnished by Doctor John Heysham, a physician of Carlisle, who for nine years (1779 to 1787) kept careful records of births and deaths in the parishes of St. Mary and St. Cuthbert, in the county of Cumberland.

In America, the Carlisle table has been superseded by the American and Actuaries', for it appears that since the formulation of the Carlisle table, antiseptic surgery, quarantine, and an improved pharmacopœia have increased the average length of human life.

There are two or three fractional variations between the figures of different actuaries; and, in such cases, I have selected the figures most consistent with a regularly graduated scale. None of these variations exceed 10 per cent. of one year.

EXPECTANCY OF LIFE FROM 10 TO 95 YEARS.

Age	Actuaries'	American	Carlisle	North-ampton	Age	Actuaries'	American	Carlisle	North-ampton
10	48.36	48.72	48.82	39.78	55	16.86	17.40	17.58	15.58
11	47.68	48.08	48.04	39.14	56	16.22	16.72	16.89	15.10
12	47.01	47.45	47.27	38.49	57	15.59	16.05	16.21	14.63
13	46.33	46.80	46.51	37.83	58	14.97	15.39	15.55	14.15
14	45.64	46.16	45.75	37.17	59	14.37	14.74	14.92	13.68
15	44.96	45.50	45.00	36.51	60	13.77	14.10	14.34	13.21
16	44.27	44.85	44.27	35.85	61	13.18	13.47	13.82	12.75
17	43.58	44.19	43.57	35.20	62	12.61	12.86	13.31	12 28
18	42.88	43.53	42.87	34.58	63	12.05	12.26	12.81	11.81
19	42.19	42.87	42.17	33.99	64	11.51	11.67	12.30	11.35
20	41.49	42.20	41.46	33.43	65	10.97	11.10	11.79	10.88
21	40.79	41.53	40.75	32.90	66	10.46	10.54	11 27	10.42
22	40.09	40.85	40.04	32.39	67	9.96	10.00	10.75	9.96
23	39.39	40.17	39.31	31.88	68	9.47	9.47	10.23	9.50
24	38.68	39.49	38.59	31.36	69	9.00	8.97	9.70	9.05
25	37.98	38.81	37.86	30.85	70	8.54	8.48	9.18	8.60
26	37.27	38.12	37.14	30.33	71	8.10	8.00	8.65	8.17
27	36.56	37.43	36.41	29.82	72	7.67	7.55	8.16	7.74
28	35.86	36.73	35.69	29.30	73	7.26	7.11	7.72	7.33
29	35.15	36.03	35.00	28.79	74	6.86	6.68	7.33	6.92
30	34.43	35.33	34.34	28.27	75	6.48	6.27	7.01	6.54
31	33.72	34.63	33.68	27.76	76	6.11	5.88	6.69	6.18
32	33.01	33.92	33.03	27.24	77	5.76	5.49	6.40	5.83
33	32.30	33.21	32.36	26.72	78	5.42	5.11	6.12	5.48
34	31.58	32.50	31.68	26.20	79	5.09	4.74	5.80	5.11
35	30.87	31.78	31.00	25.68	80	4.78	4.39	5.51	4.75
36	30.15	31.07	30.32	25.16	81	4.48	4.05	5.21	4.41
37	29 44	30.35	29.64	24.64	82	4.18	3.71	4.93	4.09
38	28.72	29.62	28.96	24.12	83	3.90	3.39	4.65	3.80
39	28.00	28.90	28.28	23.60	84	3.63	3.08	4.39	3.58
40	27.28	28.18	27.61	23.08	85	3.36	2.77	4.12	3.37
41	26.56	27.45	26.97	22.56	86	3.10	2.47	3.90	3.19
42	25.84	26.72	26.34	22.04	87	2.84	2.18	3.71	3.01
43	25.12	26.00	25.71	21.54	88	2.59	1.91	3.59	2.86
44	24.40	25.27	25.09	21.03	89	2.35	1.66	3.47	2.66
45	23.69	24.54	24.46	20.52	90	2.11	1.42	3.28	2.41
46	22.97	23.81	23.82	20.02	91	1.89	1.19	3.26	2.09
47	22.27	23.08	23.17	19.51	92	1.67	.98	3.37	1.75
48	21.56	22.36	22.50	19.00	93	1.47	.80	3.48	1.37
49	20.87	21.63	21.81	18.49	94	1.28	.64	3.53	1.05
50	20.18	20.91	21.11	17.99	95	1.12	.50	3.53	.75
51	19.50	20.20	20.39	17.50					
52	18.82	19.49	19.68	17.02					
53	18.16	18.79	18.97	16.54					
54	17.50	18.09	18.28	16.06					

Attest: WILBUR F. BRYANT.

TABLE OF CASES REPORTED.

A.

PAGE

Achenbach v. Pollock 436
DENIAL OF MOTION FOR NEW TRIAL. ASSIGNMENT AS ERROR. REPLEVIN. EVIDENCE.

Albion, City of, Anderson v. 280
Albion Milling Co. v. First Nat. Bank of Weeping Water 116
ASSIGNMENTS OF ERROR. SUFFICIENCY. WAIVER OF DEFECTS IN ANSWER. OPINION OF PARTY. ACTION FOR FRAUD.

Albright, Blumer v. 249
Aldrich v. Bank of Ohiowa 276
FORECLOSURE SALE. TITLE TO GROWING CROPS.

Allen v. Hall 256
VERBAL CONTRACT WITH AGENT FOR SALE OF LAND. DEFENSE IN ACTION FOR RENT. INSTRUCTIONS. HARMLESS ERROR. STATEMENT TO THIRD PARTY. EVIDENCE.

Allen, Wells v. 370
American Exchange Nat. Bank of Lincoln, Holway v. 67
Anderson v. City of Albion 280
DEFECTIVE SIDEWALKS. LIABILITY. NOTICE OF DEFECTS.

Anderson, Coddington Savings Bank v. 205
Anderson, Runquist v. 755
Anthony & Co. v. Karbach 509
JUDGMENT BY DEFAULT. "UNAVOIDABLE CASUALTY." PETITION FOR VACATION OF JUDGMENT. VERIFICATION. FAILURE TO FILE ANSWER. SUFFICIENCY OF GENERAL FINDING.

Apking, Moulthan v. 378
Atherton, German Nat. Bank of Beatrice v. 610
Atwood, Pierce v. 92

B.

Babby v. Musser 175
FORCIBLE DETENTION. APPEAL TO DISTRICT COURT. CONSENT OF PARTIES.

Baldwin, Columbia Nat. Bank of Lincoln v. 732
Bales, Farmers' State Bank v. 870
Bancroft, Chicago Lumber Co. v. 176

PAGE

Bankers' Reserve Life Ass'n v. Finn 105
DEMURRER. TENDER OF ANSWER. LIFE INSURANCE POLICY. TIME TO BRING ACTION. DEFAULT. ASSESSMENT OF DAMAGES.

Bank of Indian Territory, Hewit v. 463, 468
Bank of Miller v. Richmon 111
MALICIOUS PROSECUTION. PREVIOUS GOOD CHARACTER. TERMINATION OF PROSECUTION. PROBABLE CAUSE. QUESTION FOR COURT.

Bank of Ohiowa, Aldrich v. 276
Banning, Falstrom v. 339
Bartes, Grand Lodge of the Ancient Order of United Workmen v. 800
Bartos v. Thomas 193
Bates Machine Co., Webster v. 306
Baumeister, Merchant v. 91
Bellinger, Haines v. 73
Bender v. Kingman & Co. 766
FRAUDULENT CONVEYANCE. PROTECTION OF PURCHASER. TESTIMONY. CONSTRUCTIVE FRAUD. FRAUDULENT INTENT. DIRECTION OF VERDICT.

Benson v. Caulfield 101
INDEMNITY BOND OF SHERIFF. BREACH. LIMITATION OF ACTION. ASSIGNMENT OF INDEMNITY.

Bergthold, Mortenson v. 208
Blessing v. Davis 499
Blumer v. Albright 249
ABANDONMENT OF HOMESTEAD. CONVEYANCES. ACKNOWLEDGMENT. COERCION.

Bond, Youngson v. 615
Bond's Estate, Martin v. 868
Bourke v. Boyd 129
Boyd, Horbach v. 129
Bozarth, Dunn v. 862
Brinkworth v. Hazlett 592
ACTION AGAINST STOCKHOLDERS OF INSOLVENT BANK. RECEIVER. RETURN OF ESTATE ASSIGNED TO HEIRS.

Broghamer, Gonzales-Mandelbaum Co. v. 8
Brown v. Chicago, R. I. & P. R. Co. 62
EMINENT DOMAIN. RAILROAD RIGHT OF WAY. DEPOSIT OF COMPENSATION WITH COUNTY JUDGE. RIGHTS OF PROPERTY OWNERS. ABANDONMENT OF PROCEEDINGS.

Brown, Collins v. 173
Brun v. Brun 782
DIVORCE. DEED TO WIFE. CONSIDERATION. PUBLIC POLICY.

Buckstaff, Ricketts v. 851
Bush v. Tecumseh Nat. Bank 451
REVIEW. RECORD. PRESUMPTIONS. JUDICIAL NOTICE OF RECORDS OF DISTRICT COURT. STATUTE OF LIMITATIONS.

C.

PAGE

Calhoun, Wirth v. ... 316
Carpenter v. City of Red Cloud ... 126
PERSONAL INJURIES. INADEQUATE DAMAGES. INSTRUCTIONS. ADMISSION OF TESTIMONY.
Cassidy, Whelen v. ... 503
Caulfield, Benson v. ... 101
Caywood, Palmer v. ... 372
Chaney, Lydick v. ... 288
Chapin, Kitchen v. ... 144
Chapple v. Sovereign Camp of Woodmen of the World ... 55
BENEFICIAL INSURANCE. FORFEITURES. ASSESSMENTS. VALIDITY. DEFAULT IN PAYMENT.
Chase County, Jarvis v. ... 74
Cheyenne County, Union P. R. Co. v. ... 777
Chicago, B. & Q. R. Co. v. Featherly ... 323
INJURY AT RAILWAY CROSSING. CONTRIBUTORY NEGLIGENCE. BURDEN OF PROOF.
Chicago Lumber Co. v. Bancroft ... 176
UNCHALLENGED FINDINGS OF FACT BY REFEREE. USURIOUS EXTENSION OF NOTE.
Chicago, R. I. & P. R. Co., Brown v. ... 62
Chicago, R. I. & P. R. Co. v. Sattler ... 636
PASSENGER ON RAILROAD. LEAVING TRAIN. PERSONAL INJURY. EVIDENCE.
Citizens Bank of Humphrey v. Fromholz ... 284
AUTHORITY OF BANK PRESIDENT TO MAKE AND APPLY COLLECTIONS. STATUTE OF LIMITATIONS. EXAMINATION OF WITNESS BY TWO COUNSEL.
Citizens Nat. Bank, Godfrey & Sons v. ... 477
City of Albion, Anderson v. ... 280
City of Lincoln v. First Nat. Bank of Lincoln ... 725
ERROR PROCEEDINGS. LIMITATION.
City of Lincoln v. Morrison ... 822
MISAPPROPRIATION OF TRUST FUND. INSOLVENCY OF TRUSTEE. RIGHTS OF CESTUI QUE TRUST. FOLLOWING TRUST FUND.
City of Omaha, Thurman v. ... 490
City of Red Cloud, Carpenter v. ... 126
Clapp, Benson v. ... 101
Clark & Leonard Investment Co. v. Scott's Bluff County ... 419
Clary v. Watkins ... 386
DESCENT AND DISTRIBUTION. INHERITANCE PER STIRPES AMONG COLLATERALS.
Close v. Swanson ... 389
HIGHWAYS. ADVERSE POSSESSION OF LAND OWNED. DEDICATION.
Cobb v. Fawcett ... 496

PAGE

Coddington Savings Bank v. Anderson..... 205
INDORSEMENT OF NOTE. NEGOTIABILITY. PAYMENT.

Colby, Foxworthy v..... 216
Collins v. Brown..... 173
MORTGAGE FORECLOSURE. REVIEW. SUPERSEDEAS.

Colman, Modern Woodmen of America v..... 162
Columbia Nat. Bank of Lincoln v. Baldwin..... 732
PAROL EVIDENCE OF CONSIDERATION IN DEED. PAROL TRUST. CREDITOR'S BILL. FRAUDULENT CONVEYANCE.

Connell, John v..... 233
Conrad, McCoy v..... 150
Crete Mutual Fire Ins. Co. v. Patz..... 676
ACTION FOR SERVICES. INSTRUCTIONS.

Cummins, Gandy v..... 312

D.

Davis, State v..... 499
Davis, Union Trust Co. v..... 340
Decker v. Decker..... 239
DEED ABSOLUTE IN FORM AS MORTGAGE. EXTINGUISHMENT OF LIEN. ADVERSE POSSESSION. ESTOPPEL.

Denman, Knight v..... 814
Doane v. Dunham..... 135
ACTION TO ESTABLISH RESULTING TRUST. PREPONDERANCE OF EVIDENCE. CONVEYANCE TO WIFE. PRESUMPTION.

Dockarty v. Tillotson..... 432
AGENCY. PROOF BY DECLARATIONS OF AGENT. PERSONAL LIABILITY.

Dodge County, Thom v..... 845
Doering, Stewart v..... 298
Dovey, Halmes v..... 122
Dunham, Doane v..... 135
Dunn v. Bozarth..... 862
APPEAL. JUDGMENT ON COST BOND. ISSUANCE OF EXECUTION. ENFORCEMENT OF LIABILITY.

E.

E. & H. T. Anthony & Co. v. Karbach..... 509
Ellis, Huffman v..... 623
Entenmann, Poessnecker v..... 409
Enyart v. Moran..... 401
SETTING ASIDE JUDGMENT. REVIEW. GOOD-FAITH PURCHASER. FORECLOSURE OF MORTGAGE.

E. R. Godfrey & Sons Co. v. Citizens Nat. Bank..... 477
Eskew, State v..... 600
Estate of Bond, Martin v..... 868

PAGE

Estate of Fitzgerald v. First Nat. Bank of Chariton..... 260
CLAIM AGAINST DECEDENT'S ESTATE. JURISDICTION OF COUNTY COURT. PRESENTATION OF CLAIMS. DEFENSE OF NON-CLAIM. WAIVER.

Estate of Thomas, Thomas v..... 581
Evans, Laing v..... 454

F.

Falstrom v. Banning..... 339
CONFIRMATION OF SALE. APPEAL. MATTERS NOT OF RECORD. PRESUMPTION.

Farmers & Merchants' Ins. Co., Houston v..... 138
Farmers & Merchants' State Bank of Beatrice v. Thornburg.... 76
FORECLOSURE OF MORTGAGE. SALE. APPRAISEMENT.

Farmers' Mutual Ins. Co. v. Kinney..... 808
MUTUAL FIRE INSURANCE. SUBSEQUENT BY-LAWS. WAIVER OF DEFAULT IN ASSESSMENTS.

Farmers' State Bank v. Bales..... 870
JUDGMENT OF JUSTICE. FILING TRANSCRIPT. EFFECT. DORMANCY.

Farmers' State Bank of Saronville, Wilson v..... 792
Fawcett, State v..... 496
Featherly, Chicago, B. & Q. R. Co. v..... 323
Felino v. K. S. Newcomb Lumber Co..... 335
DEFAULT IN PAYMENT OF MORTGAGE. ENTRY BY MORTGAGEE. RIGHTS OF SUBSEQUENT PURCHASER. FORECLOSURE OF MORTGAGE. RES JUDICATA.

Ferguson v. Herr.....649, 659
ADOPTION OF CHILDREN. COLLATERAL ATTACK ON DECREE. RIGHT OF INHERITANCE.

Field v. National Council of Knights and Ladies of Security..... 226
MUTUAL BENEFIT ASSOCIATION. SUSPENSION OF MEMBER WITHOUT NOTICE. WAIVER. SICK BENEFITS.

Fillebrown, Moseley v..... 580
Finn, Bankers' Reserve Life Ass'n..... 105
First Nat. Bank of Chariton, Estate of Fitzgerald v..... 260
First Nat. Bank of Greenwood v. Reece..... 292
FRAUDULENT CONVEYANCE. HOMESTEAD RIGHTS. DEATH OF WIFE.

First Nat. Bank of Lincoln, City of Lincoln v..... 725
First Nat. Bank of Weeping Water, Albion Milling Co. v..... 116
Fitzgerald v. First Nat. Bank of Chariton..... 260
Forstedt, United States Nat. Bank of Holdrege v..... 855
Foxworthy v. Colby..... 216
MATERIAL ALTERATION OF INSTRUMENT. WORD "GOLD" BEFORE "DOLLARS."

PAGE

Fraaman v. Fraaman 472
JUDGMENT OF DISTRICT COURT. COLLATERAL ATTACK. JUDGMENT FOR ALIMONY. LIEN ON HOMESTEAD. EXECUTION SALE. POWER OF APPRAISERS. ADJOURNMENT OF SALE.

Franklin, Falstrom v. 339

Frazier, Wells v. 370

Frerking v. Thomas 193
SALE OF MORTGAGED LAND. RIGHT TO FORECLOSE. ASSIGNMENT OF DEBT. FRAUDULENT RELEASE. REINSTATEMENT. GOOD-FAITH PURCHASER. REVIEW ON APPEAL.

Fromholz, Citizens' Bank of Humphrey v. 284

G.

Gage County, Swaney v. 627

Gallen, Milligan v. 561

Gandy v. Cummins 312
FRAUDULENT REPRESENTATIONS. PLEADING. MOTION FOR NEW TRIAL. ASSIGNMENT OF ERROR. REVIEW.

Gannon v. Phelan 220
FORM OF APPEAL BOND. DISMISSAL. NEW BOND. RIGHT TO APPEAL.

German Nat. Bank of Beatrice v. Atherton 610
JUDGMENT. WHEN EFFECTIVE AS LIEN. ADMISSIONS BY COUNSEL. NEWLY-DISCOVERED EVIDENCE.

Gerrard v. State 368
PEDDLERS. OCCUPATION TAX. CONSTITUTIONAL LAW.

Gibson v. Sweet 550
APPRAISERS. WITNESSES. VALUE OF REAL ESTATE.

Globe Savings Bank v. National Bank of Commerce 413
BANK. INDEBTEDNESS OF DEPOSITOR. APPROPRIATION OF DEPOSIT. TRUST FUND. ACTION. BOOKS OF ACCOUNT.

Goble v. Swobe 838
ACTION TO ENFORCE TRUST. MISJOINDER OF PARTIES.

Godfrey & Sons Co. v. Citizens' Nat. Bank of Norfolk 477
VALIDITY OF CHATTEL MORTGAGE WITHHELD FROM RECORD. CHARACTER OF POSSESSION BY CREDITOR. QUESTIONS FOR JURY. GOODS COVERED BY DESCRIPTION IN MORTGAGE.

Gonzales-Mandelbaum Co. v. Broghamer 83
REVIEW OF ERRORS ASSIGNED WHERE BILL OF EXCEPTIONS IS QUASHED.

Gore v. Izer 843
CONVERSATION. KNOWLEDGE OF DEFENDANT. DEMAND.

Gorey v. Kelly 605
INTOXICATING LIQUORS. ACTION FOR LOSS OF SUPPORT. INSTRUCTIONS. DAMAGES.

PAGE

Grand Lodge of Ancient Order of United Workmen v. Bartes.. . 800
BENEFICIARY ASSOCIATION. SERVICE OF SUMMONS. OBJECTION TO JURISDICTION. WAIVER. EVIDENCE. DEFECT IN NAME OF PARTY.

Grandon, Sovereign Camp of Woodmen of the World v..... 39
Grassmeyer, Haines v..... 73
Gray v. Peterson..... 671
SALE. TRANSFER OF TITLE. STATUTE OF FRAUDS.

Green, Leigh v..... 533
Griess, Wilson v..... 792
Gullion v. Traver..... 51
AMENDMENT OF MOTION FOR NEW TRIAL. REVIEW. REFUSAL OF INSTRUCTION. CONFLICTING EVIDENCE.

H.

Haines v. Bellinger..... 73
FORECLOSURE. AFFIDAVIT OF PUBLICATION. APPRAISEMENT.

Hall, Allen v..... 256
Hall v. Hopper..... 633
RATIFICATION OF CONTRACT OF AGENT. LIMITATION OF AUTHORITY.

Halmes v. Dovey..... 122
RIGHT OF EXECUTION. JUDGMENT LIEN. REVIVOR.

Hansen, Noren v..... 858
Hanson v. Hanson..... 506
RES JUDICATA.

Hare v. Winterer..... 551
REVIEW. FINDING OF FACT. USURY. LOAN AGENT. BONUS.

Harris v. Jennings..... 80
CORRECTION OF RECORDS. NUNC-PRO-TUNC ENTRY. MOTION FOR NEW TRIAL. TIME OF FILING. REVIEW.

Hart v. McDonnell..... 856
FORECLOSURE SALE. CONFIRMATION.

Hazlett, Brinkworth v..... 592
Herdman, Weston v..... 24
Herr, Ferguson v.....649, 659
Hewit v. Bank of Indian Territory.....463, 468
NOTE EXECUTED IN SISTER STATE. RATE OF INTEREST. FOREIGN STATUTES. PLEADING. EVIDENCE. RIGHT TO OPEN AND CLOSE. AUTHENTICITY OF STATUTE. RELEVANCY OF EVIDENCE OF FOREIGN CONTRACT. WHAT LAW GOVERNS. CONDITIONAL PAYMENT. EVIDENCE.

Hill v. McGinnis..... 187
ESTABLISHMENT OF HIGHWAY BY PRESCRIPTION.

Holway v. American Exchange Nat. Bank of Lincoln..... 67
GENERAL DEMURRER. PLEADING. OBJECTIONS. REVIEW. ATTACHMENT. DISSOLUTION.

PAGE

Hopkins v. State 10
SERVICE OF SUMMONS IN REPLEVIN ON WARDEN OF PENITENTIARY. MANDAMUS. REMEDY AT LAW. JURISDICTION AT CHAMBERS.

Hopper, Hall v. 633

Horbach v. Boyd 129
DIRECTING VERDICT. OFFER OF PROOF. REVIEW. CONVEYANCE. POSSESSION. AFTER-ACQUIRED TITLE BY ADVERSE POSSESSION.

Houston v. Farmers & Merchants' Ins. Co. 138
INSURANCE. DEFAULT IN PAYMENT OF PREMIUM NOTE. LOSS. SUBSEQUENT PAYMENT.

Howard v. Raymers 213
FRAUDULENT CONVEYANCE. ACTION TO SET ASIDE. HOMESTEAD. ESTABLISMENT OF HOMESTEAD RIGHTS.

Hubenka v. Vach 170
AMENDMENT OF PLEADING. REVIEW. CONSTRUCTION OF FARM LEASE. LIEN ON CROPS.

Huffman v. Ellis 623
WRITTEN CONTRACT. PAROL EVIDENCE.

I.

Iler v. Ross 710
MUNICIPAL CORPORATIONS. REMOVAL OF GARBAGE. EXCLUSIVE PRIVILEGE BY CONTRACT.

Inglehart v. Lull 758
APPEAL FROM JUSTICE. ISSUES. PAROL EVIDENCE.

In re State Life Insurance Company of Indianapolis, Indiana. See Index to Notes (at p. 905) under insurance 895

In re William Rhea. (Coram SULLIVAN, C. J.) 885
CORAM NOBIS. POWER OF GOVERNOR TO REPRIEVE AND FIX DATE OF EXECUTION IN WARRANT. INJUNCTION. CRIMINAL JURISDICTION OF EQUITY COURT.

Insurance Company, Bankers' Reserve Life Ass'n v. Finn 105
Insurance Company, Crete Mutual Fire, v. Patz 676
Insurance Company, Farmers & Merchants', Houston v. 138
Insurance Company, Farmers' Mutual, v. Kinney 808
Insurance Company, Grand Lodge Ancient Order of United Workmen v. Bartes 800
Insurance Company, Modern Woodmen of America v. Colman ... 162
Insurance Company, National Council of Knights and Ladies of Security, Field v. 226
Insurance Company, Nebraska Mercantile Mutual, v. Sasek 17
Insurance Company, Royal Neighbors of America v. Wallace 330
Insurance Company, Sovereign Camp of Woodmen of the World, Chapple v. 55
Insurance Company, Sovereign Camp of Woodmen of the World v. Grandon 39

PAGE

Insurance Company, State Life, of Indianapolis, In re. (Appendix B.) 895

Iodence v. Peters 425

INTERVERNER. INSUFFICIENCY OF PETITION. DISMISSAL. APPEAL. REDEMPTION FROM TAX SALE. FORECLOSURE OF LIEN. DEFINITION OF MORTGAGE.

Ireland, Pittman v..... 675

Izer, Gore v..... 843

J.

Jacobs, Moore v..... 72

Jarvis v. Chase County..... 74

SERVICE OF NOTICE OF APPEAL.

Jeanette, Topping v..... 834

Jennings, Harris v..... 80

John v. Connell 233

MUNICIPAL CORPORATION. LEVY OF SPECIAL TAXES. BOARD OF EQUALIZATION. MEETING.

K.

Karbach, Anthony & Co. v..... 509

Karr, State v..... 514

Kastl, Pecha v..... 380

Keck, Webster v..... 1

Keith County v. Ogalalla Power & Irrigation Co..... 35

CONSIDERATION OF BOND. INTERNAL IMPROVEMENTS. CONTRACTS. POWERS OF COUNTY COMMISSIONERS.

Kelly, Gorey v..... 605

Kingman & Co., Bender v..... 766

Kinney, Farmers' Mutual Ins. Co. v..... 808

Kitchen v. Chapin..... 144

GUARANTY OF NOTE BY MARRIED WOMAN. LIABILITY.

Knight v. Denman..... 814

PLEADING. DENIAL IPSORUM VERBORUM. EJECTMENT. PROOF OF TITLE. ADVERSE POSSESSION.

Knittle, Mayhew v..... 395

K. S. Newcomb Lumber Co., Felino v..... 335

L.

Laing v. Evans..... 454

HUSBAND AND WIFE. REPRESENTATIONS AS TO TITLE TO LANDS. ESTOPPEL. APPARENT OWNERSHIP OF HUSBAND. FRAUD TOWARD CREDITORS.

Lean, Pratt v..... 576

PAGE

Leavitt v. S. D. Mercer Co..... 31
APPEAL. REVIEW OF RULING ON DEMURRER. ANSWER. TAX SALE CERTIFICATE AS EVIDENCE. PAYMENT BY PURCHASER.

Leidigh v. Pribble..... 860
APPEAL UNDERTAKING. SUFFICIENCY. DISMISSAL. ESTOPPEL. OBLIGATION OF SURETY.

Leigh v. Green..... 533
TAX FORECLOSURE. PARTIES. UNKNOWN OWNER. SERVICE BY PUBLICATION. NOTICE. DESCRIPTION. AFFIDAVIT ON INFORMATION AND BELIEF. PROCEEDINGS IN REM. DUE PROCESS OF LAW.

Lemp Brewing Co., Saussay v..... 429
Lexington Bank, Chicago Lumber Co. v..... 176
Lincoln, City of, v. First Nat. Bank of Lincoln..... 725
Lincoln, City of, v. Morrison..... 822
Lucas v. Lucas..... 190
SPECIFIC PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND. PART PERFORMANCE.

Lull, Inglehart v..... 758
Lydick v. Chaney..... 288
DECREE ON EXECUTOR'S FINAL REPORT. PERSONAL LIABILITY. ENFORCEMENT.

M.

McBride, State v..... 547
McCormick Harvesting Machine Co. v. Mills..... 166
CHATTEL MORTGAGE. CONSTRUCTION OF INSTRUMENT. FAILURE TO DISCHARGE. PENALTY. CONDITIONAL SALE.

McCoy v. Conrad..... 150
PROBATE OF WILL. HEIRS AS WITNESSES. EVIDENCE OF EXECUTION.

McDonald v. Tootle-Weakley Millinery Co..... 577
PEREMPTORY INSTRUCTION. LIABILITY OF GUARANTOR. NEGLIGENCE OF PLAINTIFF.

McDonnell, Hart v..... 856
McGavock v. Omaha Nat. Bank..... 440
CONSTRUCTION OF CONTRACT. AGREEMENT TO EXTEND NOTE.

McGinnis, Hill v..... 187
McGuckin, University of Michigan v..... 300
McMurtry, Stanisics v..... 761
Margritz, Snell v..... 6
Martin v. Bond's Estate..... 868
TITLE TO REALTY. PENDING LITIGATION. SALE BY ADMINISTRATOR.

Mayhew v. Knittle..... 395
ERRORS NOT ARGUED IN BRIEF. WAIVER.

Meister v. Bergthold..... 208
Mercer Co., Leavitt v..... 31

PAGE

Merchant v. Baumeister..... 91
CONFIRMATION OF FORECLOSURE SALE. INADEQUATE APPRAISEMENT.

Milligan v. Gallen..... 561
MORTGAGE FORECLOSURE. CONVERSION OF PROCEEDS BY SHERIFF. ACTION ON BOND. RIGHTS OF JUNIOR MORTGAGEE.

Mills, McCormick Harvesting Machine Co. v..... 166
Milton, Perkins v..... 848
Missouri P. R. Co., State v..... 679
Modern Woodmen of America v. Colman..... 162
BENEFIT INSURANCE. COLLECTION OF ASSESSMENTS AFTER FORFEITURE OF CERTIFICATE.

Moore v. Jacobs..... 72
CONFIRMATION. APPEAL. OBJECTION. WAIVER. OBJECTIONS NOT MADE BELOW.

Moore v. Moran..... 84
REPLEVIN BY MORTGAGEE. PURCHASER OF LAND. NOTICE. FIXTURES. PETITION IN ERROR. SIGNATURE.

Moore v. State..... 557
INTOXICATING LIQUORS. SALE ON SUNDAY. AUTHORITY OF SERVANT.

Moran, Enyart v..... 401
Moran, Moore v..... 84
Morgan v. State..... 369
MUNICIPAL CORPORATIONS. REGULATION OF BILLIARD AND POOL ROOMS. OCCUPATION TAX. TITLE OF ACT.

Morrison, City of Lincoln v..... 822
Mortenson v. Bergthold..... 208
BREACH OF ADMINISTRATOR'S BOND. LIMITATION OF ACTION. EVIDENCE.

Moseley v. Fillebrown..... 580
FORECLOSURE SALE. OBJECTIONS TO CONFIRMATION.

Moulthan v. Apking..... 378
CONFIRMATION OF FORECLOSURE SALE. REVENUE STAMPS. QUESTIONS IN BRIEFS NOT PRESENTED BY RECORD.

Murray v. Schneider..... 484
ACTION ON NOTE. INSTRUCTIONS.

Musfelt v. State..... 445
FORNICATION. EVIDENCE. INSTRUCTIONS. FOUNDATION FOR IMPEACHMENT.

Musser, Babby v..... 175

N.

National Bank of Commerce of New London, Globe Savings Bank v..... 413
National Council of Knights and Ladies of Security, Field v..... 226

PAGE

Nebraska Mercantile Mutual Ins. Co. v. Sasek 17
ADDITIONAL INSURANCE. WAIVER OF CONDITION. CONFLICTING EVIDENCE. UNCONTRADICTED EVIDENCE. CUMULATIVE INSTRUCTIONS.

Newcomb Lumber Co., Felino v. 335
Noreen v. Hansen 858
MARRIED WOMAN. NECESSARIES. LIABILITY. LIMITATION OF ACTION.

O.

Ogalalla Power & Irrigation Co., Keith County v. 35
Omaha, City of, Thurman v. 490
Omaha Cooperage Co., Hopkins v. 10
Omaha Loan & Trust Co., Stevens v. 488
Omaha Loan & Trust Co. v. Walenz 89
MOTION TO VACATE FORECLOSURE DECREE. REVIEW ON APPEAL.

Omaha Nat. Bank, McGavock v. 440
Omaha Nat. Bank v. Sanders 444
FORECLOSURE OF MORTGAGE. APPRAISEMENT. PRESUMPTION. REVIEW. CONFLICTING EVIDENCE.

P.

Palmer v. Caywood 372
OVERRULING OF DEMURRER. WAIVER OF ERROR. SUIT ON SUPERSEADEAS BOND. WHEN LIES. POSTPONEMENT OF TRIAL.

Parker, President and Directors of the Ins. Co. of North America, v. 411
Patz, Crete Mutual Fire Ins. Co. v. 676
Paulsen, Stevens v. 488
Pecha v. Kastl 380
PLEADING. REPLY. DENIAL. CONVERSION. EVIDENCE. INSTRUCTIONS.

Peck v. Starks 341
VACATION OF FORECLOSURE SALE. DEDUCTION OF LIEN BY APPRAISERS. PLACE OF SALE.

Perkins v. Milton 848
BASTARDY. RECOGNIZANCE. APPEARANCE AT SUBSEQUENT TERM.

Peters, Iodence v. 425
Peters v. McBride 547
Peterson, Gray v. 671
Peterson v. State 875
INTOXICATING LIQUORS. ILLEGAL SALE. SUFFICIENCY OF INFORMATION. EVIDENCE. INSTRUCTIONS. PRESENCE OF ACCUSED AT VERDICT.

Phelan, Gannon v. 220
Pierce v. Atwood 92
SURETY. RELEASE OF COLLATERAL SECURITIES HELD BY CREDITOR.

PAGE

Pitman v. Ireland 675
FORECLOSURE OF MORTGAGE. INTERVENTION BY MORTGAGOR.

Poessnecker v. Entenmann..... 409
EXECUTOR. APPLICATION TO SELL LAND. REVIEW BY ERROR PROCEEDING.

Pollock, Achenbach v..... 436
Pratt v. Lean 576
FORECLOSURE SALE. OBJECTIONS TO CONFIRMATION.

President and Directors of the Insurance Company of North America v. Parker..... 411
ERRORS AT TRIAL. REVIEW. FORECLOSURE OF MORTGAGE. COUNTER-CLAIM. MALICIOUS PROSECUTION. ALLEGATION OF NO PROCEEDINGS AT LAW. EVIDENCE.

Pribble, Leidigh v..... 860

R.

Railroad Company, Chicago, B. & Q., v. Featherly..... 323
Railroad Company, Chicago, R. I. & P., Brown v..... 62
Railroad Company, Chicago, R. I. & P., v. Sattler..... 636
Railroad Company, Missouri P., State v..... 679
Railroad Company, Union P., v. Cheyenne County..... 777
Raymers, Howard v..... 213
Red Cloud, City of, Carpenter v..... 126
Reece, First Nat. Bank of Greenwood v..... 292
Rhea, In re (Coram SULLIVAN, C. J.)..... 885
Rhea v. State (SEDGWICK, J.)..... 889
MURDER. ADOPTION OF STATUTE OF OTHER STATE. CONSTRUCTION.

Richmon, Bank of Miller v..... 111
Ricketts v. Buckstaff..... 851
CONSTRUCTION OF WRITTEN CONTRACT. SUFFICIENCY OF TENDER.

Rockwell v. Swanson..... 389
Rose v. Siekmann 575
CONFIRMATION OF FORECLOSURE SALE. VALUATION OF PROPERTY.

Rosenbloom v. State..... 342
PEDDLERS. LICENSE TAX. ENFORCEMENT. TITLE OF ACT. CLASSIFICATION. VALIDITY. CONSTITUTIONAL LAW.

Ross, Iler v..... 710
Royal Neighbors of America v. Wallace..... 330
WARRANTIES IN APPLICATION FOR LIFE INSURANCE. COMMON KNOWLEDGE. QUESTION FOR JURY.

Runquist v. Anderson..... **755**
EXECUTION SALE. LEVY. REDELIVERY BOND. ESTOPPEL. EVIDENCE.

S.

PAGE

Sanders, Omaha Nat. Bank v. 444
Sasek, Nebraska Mercantile Mutual Insurance Co. v. 17
Sattler, Chicago, R. I. & P. R. Co. v. 636
Saussay v. William J. Lemp Brewing Co. 429
REVIEW. SUFFICIENCY OF RECORD. CERTIFICATION.

Savage, State v. 684
Schneider, Murray v. 484
Scott's Bluff County, State v. 419
S. D. Mercer Co., Leavitt v. 31
Shriver v. Karr 514
Sidwell, Gibson v. 550
Siekmann, Rose v. 575
Smith v. Smith 563
DEVISE OF REALTY. CONDITIONS SUBSEQUENT. CONSTRUCTION OF WILL. FAILURE TO COMPLY WITH CONDITIONS.

Snell v. Margritz 6
ASSIGNMENT OF MORTGAGE NOTE. PAYMENT TO ORIGINAL MORTGAGEE.

Somers v. Vlazney 383
LICENSE TO SELL LIQUORS. SUFFICIENCY OF PETITION. RIGHT OF REMONSTRANCE.

Sovereign Camp of Woodmen of the World, Chapple v. 55
Sovereign Camp of Woodmen of the World v. Grandon 39
MUTUAL BENEFIT ASSOCIATION. REINSTATEMENT OF SUSPENDED MEMBER. SENDING OF STATEMENT BY MAIL. PHYSICIANS. PRIVILEGED COMMUNICATIONS. RECORD OF BOARD OF HEALTH AS PUBLIC RECORD.

Speer v. State 77
TAXATION OF COSTS IN PROCEEDING FOR PREVENTION OF CRIME.

Springer, Youngson v. 615
Stanisics v. McMurtry 761
ACTION FOR BREACH OF COVENANT. PAROL EVIDENCE.

Starks, Peck v. 341
State, Gerrard v. 368
State v. Missouri P. R. Co. 679
CRIMINAL JURISDICTION OF SUPREME COURT. ENFORCEMENT OF PROVISIONS OF MAXIMUM FREIGHT RATE LAW.

State, Moore v. 557
State, Morgan v. 369
State, Musfelt v. 445
State, Peterson v. 875
State, Rhea v. (SEDGWICK, J.) 889
State, Rosenbloom v. 342
State, Speer v. 77

PAGE

State, ex rel. Blessing, v. Davis..... 499
QUO WARRANTO. TITLE TO OFFICE. BURDEN OF PROOF. RULE WHEN ACTION IS INSTITUTED BY ATTORNEY GENERAL.

State, ex rel. Clark & Leonard Inv. Co., v. Scott's Bluff County... 419
COLLECTION OF JUDGMENT AGAINST COUNTY. WARRANT. MANDAMUS.

State, ex rel. Cobb, v. Fawcett..... 496
BILL OF EXCEPTIONS. CONTENTS. JUDICIAL NOTICE. MANDAMUS. REMEDY AT LAW.

State, ex rel. Omaha Cooperage Co., Hopkins v..... 10

State, ex rel. Peters, v. McBride..... 547
BASTARDY. COMPROMISE OF JUDGMENT.

State, ex rel. Shriver, v. Karr..... 514
CORPORATIONS. "EQUALIZATION OF TAXES." DUTY OF CITY COUNCIL. MODE OF ASSESSMENT. CONSTITUTIONALITY OF REVENUE ACT.

State, ex rel. Watson, v. Eskew..... 600
ASSESSORS. ADDITIONAL DUTIES. COMPENSATION. LABOR COMMISSIONER. TITE OF ACT. CONSTITUTIONAL LAW.

State, ex rel. Wright, v. Savage.....684, 702
JURISDICTION OF COURTS. POWERS OF EXECUTIVE OFFICERS. MANDAMUS. FIRE AND POLICE COMMISSIONERS. RES JUDICATA. STARE DECISIS.

Stevens v. Paulsen..... 488
TAX LIEN. STATUTE OF LIMITATIONS. NOTICE OF TAX SALE. CONTENTS.

Stewart v. Doering..... 298
FEES OF JUSTICE OF THE PEACE. CONTINUANCE OF CAUSE AS PART OF TRIAL.

Swaney v. Gage County..... 627
DEFECTIVE HIGHWAYS. PERSONAL INJURIES. LIMITATION OF ACTION.

Swanson, Close v..... 389

Sweet, Gibson v..... 550

Swobe, Goble v..... 838

T.

Tecumseh Nat. Bank, Bush v..... 451

Test, Van Etten v..... 407

Thom v. Dodge County..... 845
WITNESS. EVIDENCE OF INTEREST. PUBLIC ROAD. INCIDENTAL DRAINAGE.

Thomas v. Estate of Thomas..... 581
ERRORS AT TRIAL. WAIVER. ILLEGITIMATE CHILD AS HEIR. EVIDENCE OF PATERNITY. COMPETENCY OF WITNESSES.

Thomas, Frerking v..... 193

PAGE

Thornburg, Farmers & Merchants' State Bank of Beatrice v..... 76

Thurman v. City of Omaha..... 490

CONTRACT OF SALE. APPROVAL OF PURCHASER. LEGAL ADVISER. OPINION.

Tillotson, Dockerty v..... 432

Tootle-Weakley Millinery Co., McDonald v..... 577

Topping v. Jeanette..... 834

REFORMATION OF MORTGAGE. EVIDENCE OF MISTAKE.

Traver, Gullion v..... 51

U.

Union P. R. Co. v. Cheyenne County..... 777

RESTRAINING COLLECTION OF TAXES.

Union Trust Co. v. Davis..... 340

FORECLOSURE OF MORTGAGE. APPRAISEMENT. SALE BY DEPUTY SHERIFF.

United States Nat. Bank of Holdrege v. Forstedt..... 855

BANK. NOTICE TO OFFICERS. PERSONNEL OF WORKING FORCE.

University of Michigan v. McGuckin..... 300

MARRIAGE. VALIDITY. EXPRESSION OF CONSENT. CONTRACT. STATUS.

V.

Vach, Hubenka v..... 170

Van Etten v. Test..... 407

EJECTMENT. RES JUDICATA.

Vlazney, Somers v..... 383

W.

Walenz, Omaha Loan & Trust Co. v..... 89

Wallace, Royal Neighbors of America v..... 330

Watkins, Clary v..... 386

Watson v. Eskew..... 600

Webster v. Bates Machine Co..... 306

LEASE. DEFAULT IN PAYMENT OF RENT. REENTRY BY LANDLORD. TITLE TO CHATTELS. STATUTE OF LIMITATIONS.

Webster v. Keck..... 1

WAREHOUSEMAN'S LIEN. EVIDENCE.

Wells v. Frazier..... 370

FORECLOSURE SALE. OBJECTIONS TO APPRAISAL. DESIGNATION OF PARTIES AS "ET AL." DEPUTY SHERIFF.

Weston v. Herdman..... 24

SPECIFIC APPROPRIATIONS. SALARY OF REPORTER OF SUPREME COURT.

PAGE

Whelen v. Cassidy 503
ASSESSMENT OF TAXES. PRECINCTS.

William J. Lemp Brewing Co., Saussay v..... 429

Wilson v. Griess 792
BANK. RENEWAL OF NOTE. SECURITY. MORTGAGE. LEGALITY OF ACKNOWLEDGMENT.

Winterer, Hare v..... 551

Wirth v. Calhoun 316
ACTION FOR BREACH OF CONTRACT OF EMPLOYMENT. BURDEN OF PROVING DEFENSE. VALIDITY OF CONTRACT. OBSERVANCE OF SUNDAY.

Wright v. Savage..... 684

Y.

Youngson v. Bond 615
SUIT BY ADMINISTRATOR TO QUIET TITLE. CROSS-BILL. JURISDICTION.

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE CRITICISED IN THIS VOLUME.
CASES MARKED ‡ ARE DISTINGUISHED IN THIS VOLUME.
MODIFIED CASES IN THIS LIST ARE MARKED AS OVERRULED.

A.

PAGE

Ackerman v. Ackerman, ... Nebr., 54 482
Ackerman v. Ackerman, 61 Nebr., 72 81
Adams v. Thompson, 18 Nebr., 541 862
Allen v. Smith, 72 Miss., 689 289
Alpers v. City & County of San Francisco, 32 Fed. Rep., 503 720
Alter v. Bank of Stockham, 53 Nebr., 223 494
American Inv. Co. v. McGregor, 48 Nebr., 779 857
American Trust & Banking Co v. Boone, 102 Ga., 202 417
Ames v. Jackson, 115 Mass., 508 268
Anderson v. Kreidler, 56 Nebr., 171 8
Anderson v. Sloan, 1 Colo., 484 376
Anderson v. State, 22 Ohio St., 305 ..... 559, 560
Aniba v. Yeomans, 39 Mich., 171 206
Appleton v. Hopkins, 5 Gray (Mass.), 530 346
Arlington Mill & Elevator Co. v. Yates, 57 Nebr., 286 88
Arlington State Bank v. Paulsen, 57 Nebr., 717 563
Armstrong v. Mayer, 60 Nebr., 423 175
Armstrong v. Sanford, 7 Minn., 34 535
Arnold v. Weimer, 40 Nebr., 216 272
Asay v. Hoover, 45 Am. Dec. (Pa.), 713 158
Aspen Mining & Smelting Co. v. Billings, 150 U. S., 31 732
Atchison, T. & S. F. R. Co. v. Shean, 33 Pac. Rep. (Colo.), 108 642
Atkinson v. Williams, 51 N. E. Rep. (Ind.), 721 730
Attorney General v. Bank of Chenango, Hopk. Ch. (N. Y.), 671 535
Aultman, Miller & Co. v. Leahey, 24 Nebr., 286 ..... 52, 53
Ayres v. Duggan, 57 Nebr., 750 376

B.

Babbitt v. Finn, 101 U. S., 7 376
Babcock v. Eckler, 24 N. Y., 623 771
Bachelor v. Schmela, 49 Nebr., 37 212
Badger v. Jones, 66 N. Car., 305 410

PAGE

Bagley v. Castile, 42 Ark., 77 544
Baier v. Humpall, 16 Nebr., 127 759
Ball v. Ridge Copper Co., 118 Mich., 7, 76 N. W. Rep., 130 543
Ballard v. Hansen, 33 Nebr., 861 821
Bank of Orange v. Kidder, 20 Vt., 519 ..... 289, 291
Bank of Stockham v. Alter, 61 Nebr., 359 217
Bank of United States v. Davis, 4 Cranch. (U. S. C. C.), 533 274
Barger v. Cochran, 15 Ohio St., 460 410
Barker v. Knickerbocker Life Ins. Co., 24 Wis., 630 318
Barnes v. Allen, 25 Ind., 222 654
Barnes v. State, 19 Conn., 397 559
Battelle v. McIntosh, 62 Nebr., 647 33
Bazille v. Murray, 41 N. W. Rep. (Minn.), 238 509
Beach v. Botsford, 1 Doug. (Mich.), 199 587
Beal v. Blair, 33 Ia., 318 540
Beard v. Independent District, 31 C. C. A. (U. S.), 562, 88 Fed. Rep., 375 828
Bechtelheimer v. State, 54 Ind., 128 891
Bedford v. Van Cott, 42 Nebr., 229 168
Bell v. City of Burlington, 27 N. W. Rep. (Ia.), 245 394
Bell v. Lent, 24 Wend. (N. Y.), 230 183
Bellamy v. Chambers, 50 Nebr., 146 759
Bell County v. Alexander, 22 Tex., 350 568
Bentley v. Davidson, 74 Wis., 420, 43 N. W. Rep., 139 494
Bernheimer v. Hamer, 59 Nebr., 733 ..... 341, 857
Besson v. Eveland, 26 N. J. Eq., 468 461
Best v. Zutavern, 53 Nebr., 604 ..... 472, 474
Betts v. Union Bank, 1 Har. & Gill. (Md.), 175 744
Bexar Building & Loan Ass'n v. Heady, 50 S. W. Rep. (Tex.), 1079 .. 798
Bigelow v. Sickles, 75 Wis., 427 591
Billington v. Wagoner, 33 N. Y., 31 185
Bingham v. Mears, 27 L. R. A. (N. Dak.), 257 376
Bircher v. Walther, 63 S. W. Rep. (Mo.), 691 ..... 827, 828, 831
Bishop v. Stevens, 31 Nebr., 786 759
Blackshire v. Atchison, T. & S. F. R. Co., 13 Kan., 514 66
Blake v. Rourke, 38 N. W. Rep. (Ia.), 392 156
Blank v. Nohl, 112 Mo., 159 788
Blankenship v. Blankenship, 19 Kan., 159 474
Blanton v. King, 2 How. (Miss.), 856 290
Blivens v. City of Sioux City, 52 N. W. Rep. (Ia.), 246 632
Blizzard v. Hays, 46 Ind., 166 113
Blue Valley Bank v. Bane, 20 Nebr., 294 439
Blythe v. Ayres, 96 Cal., 532 ..... 586, 588, 589
Boales v. Ferguson, 55 Nebr., 565 290
Boehm v. City of Baltimore, 61 Md., 259 715
Boland v. O'Neil, 72 Conn., 217 790
Bonsell v. Bonsell, 41 Ind., 476 538
Boone County Nat. Bank v. Latimer, 67 Fed. Rep., 27 831

PAGE

Borgards v. Farmers' Mutual Ins. Co., 44 N. W. Rep. (Mich.), 856.. 811
Borgraefe v. Knights of Honor, 22 Mo. App., 127..... 230
Bower v. Cassels, 59 Nebr., 620..... 225
Bowes v. Heaps, 3 Ves. & B. (Eng.), 117..... 771
Boyden v. Burke, 14 How. (U. S.), 575..... 273
Brahm v. Adkins, 77 Ill., 263..... 287
Brandon v. Brandon, 14 Kan., 342..... 474
Brennan v. Clark, 29 Nebr., 385..... 442
Bridges v. Winters, 42 Miss., 135, 97 Am. Dec., 443..... 218
Briesenmeister v. Knights of Pythias, 81 Mich., 525.....46, 47
Brockett v. Brockett, 2 How. (U. S.), 238..... 732
Bronson v. Kimpton, 75 U. S., 444..... 219
Bronson v. McCormick Harvesting Machine Co., 52 Nebr., 342.... 93
Brooks v. City of Topeka, 8 Pac. Rep. (Kan.), 392..... 394
Brown v. Bell, 24 N. W. Rep. (Mich.), 824.....154, 156
Brown v. Brown, 101 Ind., 340..... 663
Brown v. Dewey, 1 Sandf. Ch. (N. Y.), 56..... 184
Brown v. Fitzpatrick, 56 Nebr., 61..... 342
Brown v. Foster, 113 Mass., 136..... 493
Brown v. Lunt, 37 Me., 423..... 746
Brown v. Rickets, 4 John. Ch. (N. Y.), 303..... 833
Brown v. Ritner, 41 Neb., 52..... 730
Brown v. Stein, 38 Nebr., 596..... 393
Brown v. Straw, 6 Nebr., 536..... 218
Brown v. Wuskoff, 21 N. E. Rep. (Ind.), 243..... 873
Brownell v. Stoddard, 42 Nebr., 177..... 461
Bryant v. Dakota County, 53 Nebr., 755.....631, 632
Buck v. Reed, 27 Nebr., 67..... 374
Buerstetta v. Tecumseh Nat. Bank, 57 Nebr., 504.....452, 453
Bull v. Mitchell, 47 Nebr., 647..... 207
Bullard v. Briggs, 7 Pick. (Mass.), 533..... 747
‡Bullock v. Pock, 57 Nebr., 781..... 9
Bundy v. Town of Monticello, 84 Ind., 119..... 417
Burhans v. Van Zandt, 7 Barb. (N. Y.), 91..... 133
Burlen v. Shannon, 96 Am. Dec. (Mass.), 733..... 508
Burlington & M. R. R. Co. v. York County, 7 Nebr., 487..... 780
Burnham v. Norton, 100 Wis., 8..... 247
Burnhisel v. Firman, 22 Wall. (U. S.), 170, 22 L. Ed., 766..... 184
Burrage v. Briggs, 120 Mass., 103..... 654
Burrage's Lessee v. Beardsley, 16 Ohio, 438..... 743
Bush v. Adams, 22 Fla., 177..... 268
Butler v. Davis, 5 Nebr., 521..... 540
Butler v. Hicks, 11 Smed. & M. (Miss.), 78..... 833
Button v. Hoffman, 61 Wis., 20, 20 N. W. Rep., 667..... 37
Byrne v. McGrath, 130 Cal., 316, 62 Pac. Rep., 559.....828, 832
Byrum v. Peterson, 34 Nebr., 237.....10, 17

C.

PAGE

Camp v. Stark, 81½ Pa. 235, 238..... 587
Campbell v. City of Anthony, 40 Kan., 652..... 346
Campbell v. Roe, 32 Nebr., 345..... 311
Campbell Printing-Press Co. v. Thorp, 36 Fed. Rep., 414..... 493
Capital Nat. Bank v. Coldwater Nat. Bank, 49 Nebr., 786..823, 825, 827
Carpenter v. Murphy, 15 N. W. Rep. (Wis.), 798..... 269
Carter v. Carter, 14 Pick. (Mass.), 424..... 573
Carter v. Gunnels, 67 Ill., 270..... 773
Case Mfg. Co. v. Garven, 45 Ohio St., 289..... 89
Cassilly v. Rhodes, 12 Ohio, 88..... 278
Cathcart v. Robinson, 5 Pet. (U. S.), 264.....892, 893, 894
Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 104 U. S., 54.....416, 418, 832
Cervena v. Thurston, 59 Nebr., 343..... 818
Chambers v. Cochran, 18 Ia., 159..... 99
Chambers v. People, 113 Ill., 509..... 544
Chandler v. Belden, 18 Johns. (N. Y.), 157..... 4
Chase v. Omaha Loan & Trust Co., 56 Nebr., 358..... 223
Chase v. Westmore, 5 M. & S. (Eng.), 180..... 4
Chauncey v. Wass, 35 Minn., 1, 30 N. W. Rep., 826..... 543
Chicago, B. & Q. R. Co. v. Cass County, 51 Nebr., 369.....174, 437, 780
Chicago, B. & Q. R. Co. v. Jones, 149 Ill., 361..... 370
Chicago, B. & Q. R. Co. v. Klein, 52 Nebr., 258..... 780
Chicago, B. & Q. R. Co. v. Landauer, 39 Nebr., 803..... 643
Chicago, B. & Q. R. Co. v. Nemaha County, 50 Nebr., 393..... 780
Chicago, B. & Q. R. Co. v. Schalkopf, 54 Nebr., 448..... 818
Chicago, R. I. & P. R. Co. v. Ringo, 52 Nebr., 163..... 453
Chmelir v. Sawyer, 42 Nebr., 362..... 609
Christopher v. Christopher, 64 Md., 583..... 745
Church v. Shanklin, 95 Cal., 626, 30 Pac. Rep., 789..... 494
City Missionary Society v. Reams, 51 Nebr., 225..... 207
City of Alton v. Meeuwenberg, 66 N. W. Rep. (Mich.), 571..... 394
City of Atchinson v. Bartholomew, 4 Kan., 124..... 535
City of Bozeman v. Cadwell, 36 Pac. Rep. (Mont.), 1042..... 346
City of Charleston v. Oliver, 16 S. Car., 47..... 360
City of Cincinnati v. Buckingham, 10 Ohio, 257..... 346
City of Grand Rapids v. De Vries, 82 N. W. Rep. (Mich.), 269..717, 724
City of Lincoln v. Smith, 28 Nebr., 762..... 283
City of Maquoketa v. Willey, 35 Ia., 323.....93, 99
City of Omaha v. Hawver, 49 Nebr., 1..... 393
City of Ouray v. Corson, 59 Pac. Rep. (Colo. App.), 876..... 715
City of St. Louis v. Sternberg, 69 Mo., 289..... 346
Claflin v. American Nat. Bank, 46 Nebr., 884..... 225
Claire v. Claire, 10 Nebr., 54..... 33
Clanton v. Barnes, 50 Ala., 260..... 472
Clark v. Turner, 50 Nebr., 290..... 156
Clarke v. Nebraska Nat. Bank, 57 Nebr., 314.....535, 536, 538

PAGE
Clarkson v. De Peyster, 3 Pai. Ch. (N. Y.), 319..... 753
Clarkson v. Hanway, 2 Cox Peere Williams (Eng.), 203..... 743
‡Cleghorn v. Obernalte, 53 Nebr., 687..... 461
Clemons v. Heelan, 52 Nebr., 287..... 837
Climer v. Wallace, 28 Mo., 556..... 89
Clussman v. Long Island R. Co., 9 Hun. (N. Y.), 618..... 640
Cobbey v. Buchanan, 48 Nebr., 391.....759, 760
Coburn v. Watson, 48 Nebr., 257..... 103
Coffey v. United States, 116 U. S., 436..... 700
Coffield v. State, 44 Nebr., 417..... 895
Cohen v. Trowbridge, 6 Kan., 385..... 540
Colchen v. Ninde, 120 Ind., 88, 22 N. E. Rep, 94.....730, 731
Cole v. Willard, 62 Nebr., 839..... 92
Coleman v. Lewis, 27 Pa., 291..... 87
Collamore v. Wilder, 19 Kan., 67..... 268
Collins v. Lewis, 60 N. J. Eq., 488, 46 Atl. Rep., 1098..... 828
Collins v. Steuart, 58 N. J. Eq., 392, 44 Atl. Rep., 467.....828, 830
Collins v. Trotter, 81 Mo., 275..... 381
Colton v. Rupert, 60 Mich., 318, 27 N. W. Rep., 520..... 538
Colvin v. Republican Valley Land Ass'n, 23 Nebr., 75..... 819
Combs' Appeal, 105 Pa. St., 155..... 587
Commonwealth v. Briant, 142 Mass., 463..... 559
Commonwealth v. Byrne, 20 Gratt. (Va.), 165..... 346
Commonwealth v. Dudley, 10 Mass., 402..... 247
Commonwealth v. Hayes, 145 Mass., 289.....559, 560
Commonwealth v. Nichols, 51 Mass., 259..... 559
Commercial Nat. Bank v. Gibson, 37 Nebr., 750..... 172
Commercial Nat. Bank v. Henninger, 105 Pa. St., 496..... 93
Connelly v. Edgerton, 22 Nebr., 82..... 775
Conner v. Goodman, 104 Ill., 365..... 311
Conway v. Nichols, 76 N. W. Rep. (Ia.), 681..... 252
Cook v. Barnes, 36 N. Y., 520..... 184
Cooley v. Foltz, 85 Mich., 47..... 46
Cooper v. Davis Mill Co., 48 Nebr., 420.....756, 757
Cooper v. Mayor, 4 Ga., 68..... 358
Cortelyou v. McCarthy, 53 Nebr., 479..... 376
Cottrell v. Smith, 63 Ia., 181..... 742
Courvoirsier v. Bouvier, 3 Nebr., 55..... 742
Cowell v. Simpson, 16 Ves. (Eng.), 275..... 4
Cowley v. Smyth, 50 Am. Rep. (N. J.), 432..... 121
Craig v. Stevenson, 15 Nebr., 362..... 857
‡Cram v. Cotrell, 48 Nebr., 646..... 8, 9
Cramer v. Benton, 64 Barb. (N. Y.), 522..... 134
Crane v. Hubbel, 7 Pai. Ch. (N. Y.), 413..... 185
Crane v. Reeder, 21 Mich., 24..... 589
Crawshay v. Homfray, 4 B. & Ald. (Eng.), 50..... 5
Crippen v. Morrison, 13 Mich., 23..... 87
Cromwell v. Sac County, 96 U. S., 51.....468, 507

PAGE
Cummings v. Harris, 3 Vt., 244 5
Currier v. Boston & M. R. Co., 31 N. H., 209 416
Curtin v. Atkinson, 36 Nebr., 110 442

D.

Daggett v. Everett, 19 Me., 373 346
Dailey v. Kinsler, 31 Nebr., 340 742
Dana v. City of San Francisco, 19 Cal., 486 423
Daniels v. Densmore, 32 Nebr., 40 199
Daniels v. Morris, 54 Ia., 369 475
Darner v. Daggett, 35 Nebr., 695 759
Davenport Plow Co. v. Lamp, 80 Ia., 722, 45 N. W. Rep., 1049 826
Davidson v. City of Muskegon, 69 N. W. Rep. (Mich.), 670 632
Davidson v. Cox, 11 Nebr., 250 87
Davis v. Patrick, 57 Fed. Rep., 909 376
Davis v. Scott, 22 Nebr., 154 775
Davis v. Snyder, 45 Nebr., 415 841
De Kay v. Chicago, M. & St. P. R. Co., 41 Minn., 178 639
Dell v. Oppenheimer, 9 Nebr., 454 186
Dennis v. Omaha Nat. Bank, 19 Nebr., 675 251
Denver City R. Co. v. City of Denver, 21 Colo., 350 346
Deroin v. Jennings, 4 Nebr., 97 137
Dickinson's Appeal, 42 Conn., 491 589
District Township of Eureka v. Farmers' Bank, 88 Ia., 194, 55 N. W. Rep., 342 ..... 826, 831
Doane v. Dunham, 64 Nebr., 135 ..... 733, 749, 836
Dodge v. Boston & Bangor Steamship Co., 148 Mass., 207 640
Dodge v. Freedman's Savings & Trust Co., 93 U. S., 379 246
Dodge v. Kiene, 28 Nebr., 216 765
Doe v. Turford, 3 Barn. & Adol. (Eng.), 890 274
Dogge v. State, 17 Nebr., 140 603
Doll v. Noble, 116 N. Y., 230, 22 N. E. Rep., 406 494
Dorris v. Erwin, 101 Pa. St., 239 508
Doty v. Brown, 4 Comstock (N. Y.), 71 509
Douglas v. Cameron, 47 Nebr., 358 ..... 386, 388
Drath v. Burlington & M. R. R. Co., 15 Nebr., 367 67
Drew v. Wakefield, 54 Me., 291 573
Duchess of Kingston's Case, 20 State Trials (Eng.), 355 700
Durant v. Titley, 7 Price (Eng.), 577 790
Durfee v. State, 53 Nebr., 214 ..... 875, 879
Durrell v. Johnson, 31 Nebr., 796 325
Dutton v. Warschauer, 21 Cal., 609 338

E.

Eagan v. Connelly, 107 Ill., 458 472
Earle v. Cureton, 13 S. Car., 19 867
Early v. Mahon, 19 Johns. (N. Y.), 147 186

PAGE

Early v. Wilson, 31 Nebr., 458 461
East Kingston v. Towle, 48 N. H., 57 370
Eastland v. Fogo, 27 N. W. Rep. (Wis.), 159 394
Eaton v. Cook, 25 N. J. Eq., 55 842
Eayrs v. Nason, 54 Nebr., 143 620
Ebert v. Mutual Reserve Fund Life Ass'n, 83 N. W. Rep. (Minn.), 506 810
Eddleman v. Carpenter, 7 Jones Law (N. Car.), 616 134
Edwards v. Reid, 39 Nebr., 645 251
Edwards County v. Jennings, 33 S. W. Rep. (Tex. Civ. App.), 585 .. 38
Ellicott v. Kuhl, 60 N. J. Eq., 333, 46 Atl. Rep., 945 .....828, 830
‡**Elliot v. Shuler**, 50 Fed. Rep., 454 410
Elliott v. Carter White-Lead Co., 53 Nebr., 458 776
Ellis v. Mortimer, 1 B. & P. ([N. R.] Eng.), 257 493
Ellsworth v. City of Fairbury, 41 Nebr., 881 128
Ellsworth v. McDowell, 44 Nebr., 707 87
Elshire v. Schuyler, 15 Nebr., 561 607
Elsworth v. Muldoon, 15 Abb. Pr. n. s. (N. Y.), 440 274
Embler v. Hartford Steam Boiler Ins. Co., 158 N. Y., 431, 44 L. R. A., 512 200
Emmert v. Thompson, 52 N. W. Rep. (Minn.), 31 563
Engle v. Hunt, 50 Nebr., 358 189
Ennis v. Fourth St. Building Ass'n, 71 N. W. Rep. (Ia.), 426 512
Erickson v. First Nat. Bank, 44 Nebr., 622 218
Ettinger v. Commonwealth, 98 Pa. St., 338 448
Evangelical Synod v. Schoeneich, 143 Mo., 652, 45 S. W. Rep., 647 ... 826
Everett v. Hobleman, 15 Nebr., 376 817
Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co., 66 Wis., 218, 28 N. W. Rep., 343 493
Ex parte Burgess, 57 L. T. Rep. (n. s.), 200 512
Ex parte Clark, 87 Cal., 638 664
Ex parte Cottrell, 13 Nebr., 193 346
Ex parte Donahoe, 24 Nebr., 66 .....346, 355
Ex parte Lane, 6 Fed. Rep., 34 535
Ex parte Morgan, 20 Fed. Rep., 298 535
Ex parte Rowland, 35 Tex. Cr. Rep., 108, 31 S. W. Rep., 651 535
Ex parte Spears, 88 Cal., 640, 26 Pac. Rep., 608 535
Ex parte Thornton, 12 Fed. Rep., 538 350
Eystra v. Capelle, 61 Mo., 578 747

F.

Fanning v. Krapfl, 68 Ia., 244, 26 N. W. Rep., 133 .....539, 540
Farmers & Mechanics' Bank v. Joslyn, 37 N. Y., 353 164
Farmers & Mechanics' Nat. Bank v. King, 57 Pa. St., 202 832
Farmers & Traders' Bank v. Kimball Milling Co., 1 S. Dak., 388, 36 Am. St. Rep., 739 833
Farmers' Loan & Trust Co. v. Funk, 49 Nebr., 353 598
Farrar v. Farrar, 4 N. H., 191 247

PAGE

Fee's Adm'r v. Fee, 10 Ohio, 469..... 310
*Ferguson v. Herr, 64 Nebr., 649..... 660
Fight v. State, 7 Ohio, 181..... 881
Finlay v. King's Lessee, 3 Pet. (U. S.), 345..... 568
First Nat. Bank v. Hummel, 14 Colo., 259, 23 Pac. Rep., 986..... 826
First Nat. Bank v. Yocum, 12 Nebr., 208..... 702
Fisherdick v. Hutton, 44 Nebr., 122..... 218
Fitzgerald v. Andrews, 15 Nebr., 52..... 322
Fitzgerald v. Brewster, 31 Nebr., 51..... 819
Flannagan v. Cleveland, 44 Nebr., 58.....376, 861
Florence Cotton & Iron Co. v. Field, 16 So. Rep. (Ala.), 538..... 731
Forrester v. Kearney Nat. Bank, 49 Nebr., 655..... 895
Foss v. Marr, 40 Nebr., 559..... 278
Fouts v. State, 8 Ohio St., 98.....893, 894
Fowler v. Waller, 25 Tex., 696..... 318
Foye v. Patch, 132 Mass., 105..... 508
Frank's Appeal, 59 Pa. St., 190..... 833
Freeman v. Lynch, 8 Nebr., 192.....84, 87, 88
Freeman v. Pope, 5 Ch. App. Cas. (Eng.), 536..... 770
Frelinghuysen v. Nugent, 36 Fed. Rep., 229..... 832
Frink v. Le Roy, 49 Cal., 314..... 338
Frith v. Cartland, 2 H. & M. (Eng.), 417..... 828
Frost v. Parker, 21 N. W. Rep. (Ia.), 507..... 859
Fuller v. Schroeder, 20 Nebr., 631..... 759
Fulton v. Ryan, 60 Nebr., 9.....453, 859
Fulton v. Stevens, 74 N. W. Rep. (Wis.), 803..... 57
Furgeson v. Jones, 17 Ore., 204..... 589

G.

Gaines v. Hennen, 24 How. (U. S.), 553..... 587
Galbreath v. Cook, 30 Ark., 417..... 744
Galligher v. Wolf, 47 Nebr., 589..... 223
Gatling v. Lane, 17 Nebr., 77.....819, 820
Gaughram v. Crosby, 33 Nebr., 33..... 730
Gelston v. Hoyt, 3 Wheat. (U. S.), 246.....699, 700
George v. Cleveland, 53 Nebr., 716..... 38
George v. Edney, 36 Nebr., 604..... 859
German Nat. Bank of Hastings v. Leonard, 40 Nebr., 676..... 416
Gettinger v. State, 13 Nebr., 308..... 450
Gibson v. Cranage, 39 Mich., 49..... 493
Gilbert v. Odum, 69 Tex., 670, 7 S. W. Rep., 510..... 246
Gilbert v. Stockman, 76 Wis., 62..... 765
Gill v. Lydick, 40 Nebr., 508..... 399
Glade v. White, 42 Nebr., 336..... 290
Glaze v. Parcel, 40 Nebr., 732..... 399
Godfrey v. City of Beatrice, 51 Nebr., 272..... 442
Goldsmith v. Fuller, 30 Nebr., 563..... 461

PAGE

Goodell **v. Brandon Nat. Bank**, 63 Vt., 303, 21 Atl. Rep., 956..... 287
Goodnow **v. Litchfield**, 9 N. W. Rep. (Ia.), 107..... 509
Goodwin **v. Cunningham**, 54 Nebr., 11..... 8
Goodwin **v. Provident Savings Life Assurance Society**, 66 N. W. Rep. (Ia.), 157..... 472
Grabill **v. Barr**, 47 Am. Dec. (Pa.), 418..... 158
Graham **v. Hartnett**, 10 Nebr., 517..... 188
Grand Island **Banking Co. v. Wright**, 53 Nebr., 574..... 146
Granger **v. George**, 5 B. & C. (Eng.), 149..... 311
Granholm **v. Sweigle**, 3 N. Dak., 476..... 358
Gray **v. Central R. Co.**, 11 Hun. (N. Y.), 70..... 493
Green **v. Fagan**, 15 Ala., 335..... 289
Green **v. Hellman**, 61 Nebr., 875..... 32
Greenough **v. Greenough**, 11 Pa. St., 489..... 158
Greenwood **v. Routt**, 31 Am. St. Rep. (Colo.), 284..... 699
Gridley **v. Watson**, 53 Ill., 186..... 620
Griffith **v. Salleng**, 54 Nebr., 362..... 9
Grimes **v. Eddy**, 126 Mo., 168..... 370
Gudtner **v. Kilpatrick**, 14 Nebr., 347..... 862
Gulf C. & S. F. R. Co. **v. Morgan**, 64 S. W. Rep. (Tex. Civ. App.), 688..... 647

H.

Hagan **v. State**, 10 Ohio St., 459..... 894
Halbert **v. Rosenbalm**, 49 Nebr., 498..... 759
Hall **v. Supreme Lodge Knights of Honor**, 24 Fed. Rep., 450..... 230
Hallenbeck **v. Hahn**, 2 Nebr., 377..... 780
Ham **v. St. Louis Public Schools**, 34 Mo., 181..... 729
Hamilton **v. Love**, 54 N. E. Rep. (Ind.), 437..... 318
Hamilton **v. Russell**, 1 Cranch. (U. S.), 309..... 770
Hamilton **v. Thrall**, 7 Nebr., 210..... 765
Hanna **v. Read**, 40 Am. Rep. (Ill.), 608..... 508
Hansen **v. Berthelsen**, 19 Nebr., 433..... 742
Harden **v. Atchison & N. R. Co.**, 4 Nebr., 521..... 816
Hare **v. Hooper**, 56 Nebr., 480..... 554
Hargreaves **v. Korcek**, 44 Nebr., 660..... 255
Harlow **v. Thomas**, 15 Pick. (Mass.), 66..... 765
Havemeyer **v. Dahn**, 48 Nebr., 536.....795, 798
Havemeyer **v. Paul**, 45 Nebr., 373..... 622
Hayes **v. Douglas County**, 65 N. W. Rep. (Wis.), 482..... 237
Hedman **v. Anderson**, 6 Nebr., 392..... 775
Hedrick **v. Strauss**, 42 Nebr., 485..... 768
Heffley **v. Hunger**, 54 Nebr., 776..... 3
Henderson **v. Dodd**, 1 Bailey Eq. (S. Car.), 138..... 744
Henderson **v. Nott**, 36 Nebr., 154..... 320
Henderson's Distilled Spirits, 14 Wall. (U. S.), 44..... 544
Herdman **v. Marshall**, 17 Nebr., 252..... 381

PAGE

Hesselgrave v. State, 63 Nebr., 807 850
*Hewit v. Bank of Indian Territory, 64 Nebr., 463 469
Hews v. Kenney, 43 Nebr., 815 461
Hildreth v. Sands, 2 John. Ch. (N. Y.), 35 743
Hilton v. Ross, 9 Nebr., 406 756
Hinde's Lessee v. Longworth, 11 Wheat. (U. S.), 199, 213..743, 744, 747
Hines v. Robinson, 57 Me., 324 134
Hittson v. Davenport, 4 Colo., 169 219
Hoagland v. Lowe, 39 Nebr., 397 87
Hobbs v. Iowa Mutual Benefit Ass'n, 47 N. W. Rep. (Ia.), 983 811
Hodgkins v. State, 36 Nebr., 160 878
Hoffine v. Ewings, 60 Nebr., 729 818
Hoffman v. Gallaher, 6 Daly (N. Y.), 42 493
Hoisington v. Ostrom, 27 Kan., 110 742
Holland v. Supreme Council, 25 Atl. Rep. (N. J.), 367 810
Hollenbeck v. Tarkington, 14 Nebr., 430 729
Holley v. Young, 68 Me., 215 613
Holsworth v. O'Chander, 49 Nebr., 42 700
Home Fire Ins. Co. v. Wood, 50 Nebr., 381 836
Hoover v. Engles, 63 Nebr., 688 354
Horacek v. Keebler, 5 Nebr., 355 322
Horbach v. Tyrrell, 48 Nebr., 514 ..... 254, 795, 798
Horkey v. Kendall, 53 Nebr., 522 ..... 2, 479
Horton v. Kelly, 40 Minn., 193 295
Houston v. Blackman, 66 Ala., 559 745
Houts v. Showalter, 10 Ohio St., 124 ..... 278, 279
How v. Codman, 4 Me., 79 865
Howk v. Minnick, 19 Ohio St., 462 310
Hudson v. Buck, 7 Ch. Div. (Eng.), 683 494
Huff v. Babbott, 14 Nebr., 150 33
Huffman v. Hall, 102 Cal., 26 190
Huffman v. Koppelkom, 8 Nebr., 344 222
Hughes v. Wisconsin Oddfellows' Mutual Life Ins. Co., 73 N. W. Rep. (Wis.), 1015 ..... 810, 811
Hull v. Chicago, B. & Q. R. Co., 21 Nebr., 371 818
Humphrey v. Hurd, 29 Mich., 44 133
Humphreys v. McKissock, 140 U. S., 304 37
Humphries v. Davis, 100 Ind., 274 654
Hunger v. Barlow, 39 Ia., 539 542
Hunt v. Hunt, 37 Me., 333 589
Hurlbut v. Hall, 39 Nebr., 889 218
Hutton v. Hutton's Adm'r, 3 Pa. (3 Barr), 100 790

I.

Importers & Traders' Nat. Bank v. Peters, 123 N. Y., 272 832
Independent District v. King, 80 Ia., 497, 45 N. W. Rep., 908. 826, 827, 829

PAGE

In re Chambers, 22 Pac. Rep. (Cal.), 138..... 657
In re Dassler, 35 Kan., 678.....346, 359
In re Dunham's Will, 24 N. E. Rep. (N. Y.), 932..... 156
In re Eysaman's Will, 20 N. E. Rep. (N. Y.), 613.....155, 156
In re Goerke's Will, 50 N. W. Rep. (Wis.), 345..... 156
In re Goldthrop's Estate, 62 N. W. Rep. (Ia.), 845..... 156
In re Hackett, 53 Vt., 354..... 544
In re Ho King, 14 Fed. Rep., 724..... 320
In re Jessup, 81 Cal., 408..... 589
In re Keller, 36 Fed. Rep., 681..... 536
In re Lowe, 54 Kan., 757..... 725
In re Valentine's Will, 67 N. W. Rep. (Wis.), 12..... 156
In re Vandine, 6 Pick. (Mass.), 187.....715, 722
In re Wheeler, 34 Kan., 96..... 359
In re Wight, 134 U. S., 136, 10 Sup. Ct. Rep., 487, 33 L. Ed., 865.... 82
Iowa Loan & Trust Co. v. Estate of Devall, 63 Nebr., 826..... 73
Isom v. McGehee's Heirs, 45 Miss., 712.....290, 291
Israel v. Brooks, 23 Ill., 575..... 113

J.

Jack v. Dougherty, 3 Watts (Pa.), 151..... 746
Jacks v. Adamson, 56 Ohio St., 397, 47 N. E. Rep., 48..... 82
Jackson v. Johnson, 5 Cow. (N. Y.), 74..... 659
Jackson v. Northwestern Mutual Relief Ass'n, 47 N. W. Rep. (Wis.), 733..... 44
Jacobs v. Morrow, 21 Nebr., 233..... 223
James v. Higginbotham, 60 Nebr., 203.....312, 315, 437, 728
Jeffres v. Cashman, 42 Nebr., 594..... 817
Jenne v. Marble, 37 Mich., 319..... 791
Jensen v. Halstead, 61 Nebr., 249..... 817
Jewett v. Klein, 27 N. J. Eq., 550..... 641
*John v. Connell, 61 Nebr., 267.....233, 238
Johnson v. Beazley, 65 Mo., 250..... 290
Johnson v. Butt, 46 Nebr., 220..... 247
Johnson v. Chilson, 29 Nebr., 301..... 71
Johnson v. City of Burlington, 95 Ia., 197, 63 N. W. Rep., 694..... 394
Johnson v. Warren, 74 Mich., 491..... 573
Johnston v. Phelps County Farmers' Mutual Ins. Co., 63 Nebr., 21.. 813
Jonasen v. Kennedy, 39 Nebr., 313..... 116
Jones v. Bates, 26 Nebr., 693.....607, 609
Jones v. Green, 1 Wall. (U. S.), 330..... 214
Jones v. Hayes, 36 Nebr., 526..... 730
Jones v. State, 51 Ohio St., 331..... 894

K.

Kain v. State, 8 Ohio St., 306..... 894
Karcher v. Supreme Lodge Knights of Honor, 137 Mass., 368.... 230
Karll v. Kuhn, 38 Nebr., 539..... 768

PAGE

Kearney Land & Investment Co. v. Aspinwall, 45 Nebr., 601..... 77
Keegan v. Geraghty, 101 Ill., 26..... 656
Keeler v. Clifford, 165 Ill., 544, 46 N. E. Rep., 248..... 494
Kellogg v. Adams, 39 N. Y., 28..... 183
Kendall v. Lucas County, 26 Ia., 395..... 731
Kettenbach v. Omaha Life Ass'n, 49 Nebr., 842..... 333
King v. Baldwin, 2 Am. Lead. Cas., 260..... 99
King v. State, 18 Nebr., 375..... 866
Kingman & Co. v. Weiser Bros., 48 Nebr., 834..... 767
Klamp v. Klamp, 51 Nebr., 17..... 137
Klemer v. Sheffield, 80 N. W. Rep. (Minn.), 1055..... 200
Knapp v. Chicago, K. & N. R. Co., 57 Nebr., 195..... 817
Knatchbull v. Hallett, 13 Ch. Div. (Eng.), 696.....826, 832
Knowlton v. Johnson, 37 Mich., 47..... 88
Kobarg v. Greeder, 51 Nebr., 365..... 137
Koehler v. Summers, 42 Nebr., 330..... 730
Kofka v. Rosicky, 41 Nebr., 328.....191, 192, 657, 658
Korn v. Mutual Assurance Society, 6 Cranch. (U. S.), 192..... 811
Kothe v. Krag-Reynolds Co., 50 N. E. Rep. (Ind.), 594..... 798
Kroh v. Heins, 48 Nebr., 691..... 153
Kuhland v. Sedgwick, 17 Cal., 123..... 816

L.

La Farge v. Herter, 9 Seld. (N. Y.), 241..... 185
Lander v. Abrahamson, 34 Nebr., 553..... 513
Landon v. Platt, 34 Conn., 517..... 89
Larwell v. Stevens, 12 Fed. Rep., 559..... 190
La Selle v. Nicholls, 56 Nebr., 458.....341, 857
Lathrope v. State, 51 Ind., 192..... 559
Leach v. Shelby, 58 Miss., 681.....745, 748
Leigh v. Green, 62 Nebr., 344..... 537
Le Moyne v. Quimby, 70 Ill., 399..... 620
Levi v. Fred, 38 Nebr., 564..... 759
Levy v. Yerga, 25 Nebr., 764..... 819
Lewis v. Brewster, 57 Pa. St., 410..... 746
Lewis v. City of Lincoln, 55 Nebr., 1.....187, 189
Lewon v. Heath, 53 Nebr., 707.....818, 820
Liebermann v. City of Milwaukee, 89 Wis., 336..... 237
Linch v. State, 30 Nebr., 740.....10, 17
Lind v. Burke, 56 Nebr., 785..... 590
Lindgren v. Gates, 26 Kan., 135..... 873
Lininger v. Raymond, 9 Nebr., 40..... 867
Long v. Moler, 5 Ohio St., 271..... 765
Long v. Wagoner, 47 Mo., 178..... 540
Lord Walpole v. Lord Orford, 3 Ves. (Eng.), 402..... 752
Losure v. Miller, 45 Nebr., 465..... 730
Lowrie v. France, 7 Nebr., 191..... 437

PAGE

Luce v. Foster, 42 Nebr., 818 36
Lydecker v. Palisade Land Co., 33 N. J. Eq., 415 544
‡Lydick v. State, 61 Nebr., 309 ..... 389, 391, 392
Lynch v. Commonwealth, 88 Pa. St., 189 881

M.

McCaskell v. State, 53 Ala., 510 346
McClay v. Foxworthy, 18 Nebr., 295 410
McClesky v. State, 4 Tex. Civ. App., 322 701
McClure v. Campbell, 25 Nebr., 57 764
McConnell v. First Nat. Bank, 38 Nebr., 252 498
McCormick v. Herndon, 86 Wis., 449, 56 N. W. Rep., 1097 133
McDonald v. Beer, 42 Nebr., 437 ..... 182, 186
McDonald v. Shepard, 25 Kan., 112 87
McEvoy v. Nebraska & Iowa Ins. Co., 46 Nebr., 782 143
McGee v. Atkinson, 33 N. W. Rep. (Mich.), 737 ..... 267, 269
M'Gee v. Barber, 14 Pick. (Mass.), 212 865
McGee v. McDonald's Estate, 66 Mich., 628 271
McGoon v. Shirk, 54 Ill., 408 219
McGovern v. Knox, 21 Ohio St., 547 461
McGowan v. Supreme Court of Foresters, 83 N. W. Rep. (Wis.), 775 334
McHugh v. Smiley, 17 Nebr., 626 225
McIntire v. Levering, 148 Mass., 546 113
McIntyre v. Whitfield, 13 Smedes & M. (Miss.), 88 338
McLaughlin v. McLaughlin, 4 Ohio St., 508 ..... 290, 291
McLeod v. Evans, 66 Wis., 401, 28 N. W. Rep., 173 ..... 826, 827, 828
MacLeod v. Skiles, 81 Mo., 595 765
McLeod v. Swain, 27 Am. St. Rep., 229 246
McNaughton v. Burke, 63 Nebr., 704 199
McPherson v. Blacker, 92 Mich., 377 370
Madsen v. State, 44 Nebr., 631 399
*Magneau v. City of Fremont, 30 Nebr., 843 ..... 343, 347
Magraw v. McGlynn, 32 Cal., 257 731
Mahoney v. Mahoney, 59 Minn., 347, 61 N. W. Rep., 334 475
Mallard v. First Nat. Bank, 40 Nebr., 784 251
Marbury v. Madison, 1 Cranch. (U. S.), 137 696
March v. Metropolitan Life Ins. Co., 65 Am. St. Rep. (Pa.), 887 334
Marsh v. Falker, 40 N. Y., 562 121
Marsh v. Mitchell, 26 N. J. Eq., 497 613
Martin v. Avery, 8 Ala., 430 864
Martin v. Long, 53 Nebr., 694 ..... 655, 668
Martin v. Mayor, 11 Abb. Pr. (N. Y.), 295 873
Martin v. State, 30 Nebr., 507 559
Mathews v. Jones, 47 Nebr., 616 199
Matter of Cavin v Gleason, 105 N. Y., 256 830
Matthews v. Hoff, 113 Ill., 90 289

PAGE

May v. Brownell, 3 Vt., 463 273
Maynard v. Hill, 125 U. S., 190 303
Mayor v. Radecke, 49 Md., 217 723
Mead v. Weaver, 42 Nebr., 149 94
Medland v. Linton, 60 Nebr., 249 ..... 233, 237, 837
Mee v. Bankers' Life Ass'n, 69 Minn., 210 58
Memphis v. Brown, 94 U. S., 715 732
Merck v. American Freehold Land Mortgage Co., 7 S. E. Rep. (Ga.), 265 557
Merrill v. Ijams, 58 Nebr., 706 34
Merrill v. Walker, 24 Me., 237 865
Merrill v. Wedgwood, 25 Nebr., 283 2
Merrill v. Wisconsin Female College, 74 Wis., 415 ..... 568, 573
Messenger v. Lockwood, 9 West. Law J. (Ohio), 521 356
Metropolitan Nat. Bank v. Campbell Commission Co., 77 Fed. Rep., 705 831
Metz v. State Bank of Brownville, 7 Nebr., 165 ..... 610, 612
Meyer v. Amidon, 45 N. Y., 169 121
Michigan Mutual Life Ins. Co. v. Richter, 58 Nebr., 463 342
Miles v. Kelley, 40 S. W. Rep. (Tex.), 599 799
Miles v. United States, 103 U. S., 304 590
Miller v. Antelope County, 35 Nebr., 237 730
Miller v. Brown, 3 Mo., 127 113
Miller v. Brumbaugh, 7 Kan., 343 381
Miller v. Hurford, 11 Nebr., 377 603
Miller v. Washburn, 11 Mass., 411 865
Miner v. Aylesworth, 18 Fed. Rep., 199 268
Missouri P. R. Co. v. Foreman, 73 Tex., 311 639
Missouri P. R. Co. v. Fox, 56 Nebr., 746 817
Mitchell v. State, 12 Nebr., 538 681
Modern Woodmen of America v. Lane, 62 Nebr., 89 164
Modern Woodmen of America v. Tevis, 111 Fed. Rep., 113 164
Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co., 49 Nebr., 869 ..... 1, 5
Monastes v. Catlin, 6 Ore., 119 290
Moncure v. Dermott, 13 Pet. (U. S.), 345 183
Monday v. O'Neil, 44 Nebr., 724 278
Monroe v. Reid, 46 Nebr., 316 174
Monteith v. Bax, 4 Nebr., 166 ..... 774, 775
Moon v. Cline, 39 N. E. Rep. (Ind. App.), 432 731
Moore v. Kepner, 7 Nebr., 291 867
Moore v. Waterman, 40 Nebr., 498 453
Moores v. Peycke, 44 Nebr., 405 ..... 870, 872
Mooring v. McBride, 62 Tex., 309 246
Morgan v. City of Des Moines, 60 Fed. Rep., 208 ..... 630, 632
Morgan v. State, 51 Nebr., 672 ..... 890, 892, 893, 894
Morrill v. Skinner, 57 Nebr., 164 200
Morrill v. State, 38 Wis., 428 366

PAGE

Morrill v. Titcomb, 90 Mass., 100 246
Morris v. Railway Co., 148 N. Y., 88 47
Morrison v. Lincoln Savings Bank & Safe Deposit Co., 57 Nebr., 225 ..... 823, 824, 825, 828, 829, 830, 832
Mosher v. Cole, 50 Nebr., 636 259
Mosher v. Neff, 33 Nebr., 770 461
Mowry v. Sanborn, 65 N. Y., 581 ..... 536, 538, 539
Moynihan v. State, 70 Ind., 126 891
Mullen v. Morris, 43 Nebr., 596 104
Munson v. Carter, 19 Nebr., 293 255
Murdock v. Brooks, 38 Cal., 596 376
Murray v. Hoboken Land & Improvement Co., 18 How. (U. S.), 272 544
Murray v. Klinzing, 64 Conn., 78 218
Murray v. Romine, 60 Nebr., 94 819
Murray v. School District, 11 Nebr., 436 437
Murry v. Hennessey, 48 Nebr., 608 157
Musser v. Stewart, 21 Ohio St., 353 356
Mussey v. Holt, 24 N. H., 248 247
Mussina v. Alling, 12 La. Ann., 799 867
Myers v. Board of Education, 51 Kan., 87, 32 Pac. Rep., 658 ..... 826, 827

N.

Names v. Names, 48 Nebr., 701 137
Nash v. Church, 10 Wis., *303 542
National Life Ins. Co. v. Martin, 57 Nebr., 350 412
National Masonic Accident Ass'n v. Burr, 44 Nebr., 256 ..... 810, 812, 813
Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co., 52 Nebr., 410 73
Nebraska Loan & Building Ass'n v. Marshall, 51 Nebr., 534 379
Nebraska Loan & Building Ass'n v. Perkins, 61 Nebr., 254 347
Nebraska Moline Plow Co. v. Fuehring, 60 Nebr., 316 837
Nebraska Wesleyan University v. Parker, 52 Nebr., 453 318
Nelson v. Alling, 58 Nebr., 606 576
Nelson v. Farmland Security Co., 58 Nebr., 604 82
New England Mortgage Security Co. v. Hendrickson, 13 Nebr., 157 555
Newman v. Franklin, 28 N. W. Rep. (Ia.), 579 252
New Orleans v. Citizens' Bank, 167 U. S., 371 700
Nissen v. Turner, 50 Nebr., 272 259
Noble v. Citizens' Bank of Geneva, 63 Nebr., 847 ..... 378, 379
Nonotuck Silk Co. v. Flanders, 87 Wis., 237, 58 Wis., 383 827
Northwestern Mutual Life Ins. Co. v. Barbour, 96 Ky., 128 731
Nugent v. Powell, 4 Wyo., 173 665

O.

PAGE

Obernalte v. Edgar, 28 Nebr., 70 819
O'Boyle v. McHugh, 69 N. W. Rep. (Minn.), 37 247
O'Brien v. Gaslin, 20 Nebr., 347 742
O'Connell v. Chicago T. R. Co., 184 Ill., 308 700
O'Keefe v. Foster, 5 Wyo., 343, 40 Pac. Rep., 527 268
O'Leary v. Iskey, 12 Nebr., 136 759
Oliver v. Eaton, 7 Mich., 108 775
Oliver v. Hawley, 5 Nebr., 439 218
Olmsted v. New England Mortgage Security Co., 11 Nebr., 487 555
Omaha & Florence Loan & Trust Co. v. Hansen, 32 Nebr., 449 819
Omaha Street R. Co. v. Martin, 48 Nebr., 65 325
Orr v. Hodgson, 4 Wheat. (U. S.), 453 589
Orthwein v. Thomas, 127 Ill., 554 659
Osgood v. Coates, 1 Allen (Mass.), 77 246
Overstreet v. Davis, 24 Miss., 393 ..... 864, 867

P.

Pain v. Packard, 2 Am. Lead. Cas., 260 99
Parker v. Kuhn, 21 Nebr., 413 311
Parsons v. New York C. & H. R. R. Co., 113 N. Y., 355 ..... 640, 647
Parsons v. Parsons, 101 Wis., 76 ..... 665, 668
Patrick Land Co. v. Leavenworth, 42 Nebr., 715 622
Patterson v. Lamson, 45 Ohio St., 77 744
Peak v. Ellicott, 30 Kan., 156, 1 Pac. Rep., 499 ..... 826, 827
Pease v. Smith 61 N. Y., 477 ..... 843, 844
Pelletier v. Saunders, 67 N. Car., 261 410
People v. Doe, 31 Cal., 220 873
People v. Gordon, 45 N. W. Rep. (Mich.), 658 715
People v. Smith, 93 Cal., 490 700
Perkins v. Mobley, 4 Ohio St., 669 548
Perry v. Butt, 14 Ga., 699 416
†Peterborough Savings Bank v. Pierce, 54 Nebr., 712 563
Peters v. Bain, 133 U. S., 670 832
Peters v. Killian, 63 Nebr., 57 ..... 547, 548
Petro v. Cassiday, 13 Ind., 289 568
Phenix Ins. Co. v. Bachelder, 32 Nebr., 490 ..... 142, 812
Phenix Ins. Co. v. Rollins, 44 Nebr., 745 143
Phillips v. Dugan, 21 Ohio St., 466 219
Philo v. Butterfield, 3 Nebr., 256 555
Piggott v. Ramey, 1 Scam. (Ill.), 145 289
Pina v. Peck, 31 Cal., 359 ..... 587, 589
Pinkham v. Pinkham, 61 Nebr., 533 622
Pjarrou v. State, 47 Nebr., 294 450
Pleuler v. State, 11 Nebr., 547 363
Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429 352
Pomfrey v. Village of Saratoga Springs, 104 N. Y., 459 283

PAGE

‡Porter v. Ourada, 51 Nebr., 510 9
Potter v. Potter, 27 Ohio St., 84 836
Potter v. Waite, 55 Conn., 236, 10 Atl. Rep., 563 246
Powder River Live Stock Co. v. Lamb, 38 Nebr., 339 674
Pratt v. Stevens, 94 N. Y., 387 536
Priest v. Lackey, 39 N. E. Rep. (Ind.), 54 619
Pritchard v. Madren 24 Kan., 486 ..... 542, 543

Q.

Quigley v. McEvony, 41 Nebr., 73 251

R.

Randall v. Randall, 37 Mich., 563 790
Reade v. Livingston, 3 John. Ch. (N. Y.), 481 ..... 770, 771
Rector v. Canfield, 40 Nebr., 595 ..... 440, 441, 443
Redell v. Moores, 63 Nebr., 219 ..... 695, 703, 706
Reed v. Noxon, 48 Ill., 323 773
Reid v. Blaney, 2 Me., 128 865
Reid v. Smoulter, 128 Pa. St., 324, 5 L. R. A., 517 28
Remy v. Municipality No. 2, 11 La. Ann., 148 ..... 587, 588
Reynolds v. Taylor, 43 Ala., 420 29
Rice v. Welling, 5 Wend. (N. Y.), 595 ..... 184, 186
Richards v. Kountze, 4 Nebr., 200 185
Richards v. Waller, 49 Nebr., 639 ..... 8, 207
Richardson v. Hahn, 63 Nebr., 294 371
Ridgeway Stove Co. v. Way, 141 Mass., 557 89
River Rendering Co. v. Behr, 7 Mo. App., 345 719
Robbins v. State, 8 Ohio St., 131 893
Roberts v. Woven Wire Mattress Co., 46 Md., 374 273
Robertson v. Buffalo County Nat. Bank, 40 Nebr., 235 ..... 265, 759
Robinson v. Woodward, 48 S. W. Rep. (Ky.), 1082 828
Robson v. State, 83 Ga., 166 881
Rochester & Charlotte Turnpike Co. v. Paviour, 52 L. R. A. (N. Y.), 790 417
Rockport v. Walden, 54 N. H., 167, 20 Am. Rep., 131 268
Rogers v. Rathbun, 1 Johns. Ch. (N. Y.), 367 186
Rood v. Railway, etc., Ass'n, 31 Fed. Rep., 62 230
Rook v. Wilson, 41 N. E. Rep. (Ind.), 311 619
Rosenbaum v. Russell, 35 Nebr., 513 120
Rosenbloom v. State, 64 Nebr., 342 368
Ross v. McManigal, 61 Nebr., 90 133
Ross v. Ross, 129 Mass., 243 654
Ross v. Tremain, 2 Met. (Mass.), 495 573
Rountree v. Brinson, 3 S. E. Rep. (N. Car.), 747 184
Rowand v. Anderson, 33 Kan., 264 89
Roy v. McPherson, 11 Nebr., 197 460
Royal Trust Co. v. Exchange Bank, 55 Nebr., 663 453

PAGE
Rube v. Cedar County, 35 Nebr., 896..... 223
Rube v. Sullivan, 23 Nebr., 779..... 188
Russel v. People's Savings Bank, 39 Mich., 671..... 147
Russell v. Lewis, 3 Ore., 380..... 290
Russell v. Nelson, 99 N. Y., 119, 1 N. E. Rep., 314..... 184

S.

Sahlinger v. People, 102 Ill., 241..... 881
St. James Orphan Asylum v. Shelby, 60 Nebr., 796..... 568
St. John v. St. John, 11 Ves. Ch. (Eng.), 526..... 790
Sawyer v. Dooley, 21 Nev., 390, 32 Pac. Rep., 437..... 544
Schade v. Bessinger, 3 Nebr., 140.....136, 247
Schields v. Horbach, 49 Nebr., 262..... 133
School District v. Bishop, 46 Nebr., 850..... 81
Schrimper v. Chicago, M. & St. P. R. Co., 82 N. W. Rep. (Ia.), 916.. 836
Schwallback v. Chicago, M. & St. P. R. Co., 69 Wis., 292, 34 N. W. Rep., 128 133
Scoggin v. Schloath, 15 Ore., 380..... 745
Scott v. Chope, 33 Nebr., 41..... 399
Scott v. Flowers, 61 Nebr., 620..... 370
Seabolt v. Northumberland County, 187 Pa. St., 318..... 348
Security Investment Co. v. Sizer, 58 Nebr., 669..... 77
Security Nat. Bank of Grand Island v. Latimer, 51 Nebr., 498.... 453
Selby v. McQuillan, 45 Nebr., 512..... 867
Seward v. Clark, 67 Ind., 289..... 409
Shaffer v. Stull, 32 Nebr., 94..... 188
Sharp v. Brown, 34 Nebr., 406.....728, 729, 730
Sherman v. Kane, 86 N. Y., 57.....133, 134
Sherwood v. Central Michigan Savings Bank, 103 Mich., 109, 61 N. W. Rep., 352..... 829
Sherwood v. Judd, 3 Bradf. (N. Y.), 419..... 291
Shoff v. Wells, 1 Nebr., 168..... 128
Shoemate v. Lockridge, 53 Ill., 503..... 620
Shute v. Hinman, 34 Ore., 578, 58 Pac. Rep., 832..... 828
Silsby Mfg. Co. v. Town of Chico, 24 Fed. Rep., 893..... 493
Silvers v. Potter, 48 N. J. Eq., 539..... 742
Simeral v. Dubuque Mutual Fire Ins. Co., 18 Ia., 319..... 811
Sinclair v. McBryde, 88 N. Car., 438..... 410
Singerly v. Thayer, 108 Pa. St., 291, 2 Atl. Rep., 230..... 493
Slaughter-House Cases, 16 Wall. (U. S.), 36..... 545
Sleeper v. Estate of Gould, 53 Vt., 111.....267, 269, 271
Slobodisky v. Phenix Ins. Co., 52 Nebr., 395..... 836
Small v. Sandall, 48 Nebr., 318..... 859
‡Smiley v. McDonald, 42 Nebr., 5.....711, 716, 721
Smith v. City of Omaha, 49 Nebr., 883..... 237
Smith v. Clark, 69 N. W. Rep. (Ia.), 1011..... 799
Smith v. Combs, 49 N. J. Eq., 420, 24 Atl. Rep., 9..... 832

PAGE

Smith v. Foxworthy, 39 Nebr., 214 857
Smith v. Groves, 24 Nebr., 545 614
Smith v. Hitchcock, 38 Nebr., 104 ..... 133, 820
Smith v. James, 34 N. W. Rep. (Ia.), 309 156
Smith v. Johnson, 37 Nebr., 675 727
Smith v. Lane, 3 Pick. (Mass), 205 747
Smith v. Ramsay, 6 Serg. & R. (Pa.), 573 376
Smith v. Silver, 58 Nebr., 429 729
Smith v. Spaulding, 34 Nebr., 128 730
Smyth v. Ames, 169 U. S., 466 ..... 601, 602
Snell v. Meservy, 91 Ia., 322, 59 N. W. Rep., 32 538
Snow v. Rich, 61 Pac. Rep. (Utah), 336 730
Snowden v. Tyler, 21 Nebr., 199 841
Snyder v. Bull, 17 Pa. St., 54 158
Somers v. McLaughlin, 57 Wis., 358 673
Southard v. Curley, 134 N. Y., 148 136
South Branch Lumber Co. v. Littlejohn, 31 Nebr., 606 9
South Milwaukee Co. v. Murphy, 88 N. W. Rep. (Wis.), 583 599
South Platte Land Co. v. City of Crete, 11 Nebr., 344 780
Spokane County v. First Nat. Bank, 29 U. S. App., 707, 68 Fed. Rep., 979 831
Spooner v. Manchester, 133 Mass., 270 844
Springer v. City of Detroit, 60 N. W. Rep. (Mich.), 688 632
Springer v. United States, 102 U. S., 586 544
Stall v. Jones, 47 Nebr., 706 ..... 133, 136, 836
State v. Abbey, 29 Vt., 60 472
State v. Allen, 2 McCord (S. Car.), *55 544
State v. Ashbrook, 48 L. R. A. (Mo.), 265 363
State v. Bank of Commerce, 54 Nebr., 725, 823, 824, 825, 827, 828, 829, 830
State v. Bennett, 19 Nebr., 191 361
State v. Berka, 20 Nebr., 375 603
State v. Boyd, 36 Nebr., 60 698
State v. Boyd, 36 Nebr., 181 698
†State v. Boyd, 63 Nebr., 829 362
State v. Burlington & M. R. R. Co., 60 Nebr., 741 ..... 601, 602
State v. City of Hudson, 29 N. J. Law, 104 237
State v. Cook, 43 Nebr., 318 423
State v. County Commissioners, 49 Nebr., 51 535
State v. Dodge County, 20 Nebr., 595 519
State v. Duluth Gas & Water Co., 76 Minn., 96, 78 N. W. Rep., 1032 ... 521
State v. Elder, 31 Nebr., 169 697
State v. Farmers & Merchants' Irrigation Co., 59 Nebr., 1 348
State v. Fawcett, 63 Nebr., 523 497
State v. Fremont, E. & M. V. R. Co., 60 Nebr., 749 ..... 601, 602
State v. Gandy, 12 Nebr., 232 423
State v. Grand Trunk R. Co., 58 Me., 176 639
*State v. Green, 27 Nebr., 64 ..... 343, 347, 352

PAGE
State v. Heckler, 81 Mo., 417..... 559
State v. Hickman, 9 Mont., 370..... 29
State v. Higgs, 35 S. E. Rep. (N. Car.), 473..... 723
State v. Hill, 47 Nebr., 456..... 705
State v. Hill, 36 S. W. Rep. (Mo.), 223..... 448
State v. Hill, 4 Municipal Corporation Cases (N. Car.), 111..... 722
State v. Holcomb, 46 Nebr., 88..... 698
State v. Horgan, 55 Minn., 183..... 683
State v. Kelly, 97 N. Car., 404..... 881
State v. Kennedy, 60 Nebr., 300.....695, 699, 705
State v. Klitzke, 46 Minn., 343..... 75
State v. Lincoln County, 18 Nebr., 283..... 779
State v. McArthur, 5 Kan., 280..... 873
State v. Mace, 5 Md., 337..... 357
State v. Mahoney, 23 Minn., 181..... 559
State v. Marshall, 64 N. H., 549..... 683
State v. Mayor, 4 Nebr., 260..... 536
State v. Meagher, 49 Mo., 571..... 559
State v. Meserve, 58 Nebr., 451..... 601
State v. Midland State Bank, 52 Nebr., 1.....823, 825
State v. Montgomery, 43 Atl. Rep. (Me.), 13..... 350
State v. Moores, 55 Nebr., 480.....694, 695, 701, 703, 705
State v. Mueller, 38 Minn. 497..... 559
State v. Murdock, 59 Nebr., 521..... 850
State v. Osborn, 60 Nebr., 415..... 523
State v. Poynter, 59 Nebr., 417..... 601
State v. Reiley, 75 Mo., 521..... 560
*State v. Savage, 64 Nebr., 684..... 703
State v. Scott, 59 Nebr., 499..... 498
State v. Sinnott, 15 Nebr., 473..... 682
State v. State Bank of Wahoo, 42 Nebr., 896..... 825
State v. Stevenson, 109 N. Car., 730..... 349
State v. Stone, 120 Mo., 428..... 698
State v. Stuht, 52 Nebr., 209..... 370
State v. Temperance Benevolent Ass'n, 42 Mo. App., 485..... 230
State v. Thayer, 31 Nebr., 82..... 697
State v. Thiele, 19 Nebr., 220..... 174
State v. Thorne, 9 Nebr., 458..... 421
State v. Wagener, 69 Minn., 206..... 350
State v. Wallichs, 12 Nebr., 407..... 31
State v. Wentworth, 65 Me., 234..... 560
State v. Weston, 4 Nebr., 216.....26, 28, 29
State v. Weston, 6 Nebr., 16.....26, 29
State Savings Bank v. Shaffer, 9 Nebr., 1..... 218
Stearns v. Hendersass, 9 Cush. (Mass.), 497..... 134
Stegeman v. Faulkner, 42 Nebr., 53..... 490
Stemple v. Herminghouser, 3 G. Greene (Ia.), 408..... 589

PAGE

Stewart v. Petree, 55 N. Y., 623 186
Stewart v. Stewart, 65 N. W. Rep. (Ia.), 976 619
Stichter v. Cox, 52 Nebr., 532 ..... 264, 598
Stoddard Woolen Manufactory v. Huntley, 8 N. H., 441 5
Stohr v. San Francisco Musical Fund Society, 82 Cal., 557, 22 Pac. Rep., 1125 811
Stoltz v. Vanatta, 32 Week, L. Bul. (Ohio), 100 744
Stover's Appeal, 77 Pa. St., 282 573
Strauss v. Meertief, 38 Am. Rep. (Ala.), 8 318
Stubendorf & Co. v. Hoffman, 23 Nebr., 360 ..... 292, 295
Sturgeon v. Gray, 96 Ind., 166 881
Sturtevant v. Ballard, 9 John. (N. Y.), 336 771
Succession of Fletcher, 11 La. Ann., 59 587
Succession of Gilmore, 12 La. Ann., 562 731
Supreme Commandery v. Ainsworth, 71 Ala., 436 811
Sutton v. Casselleggi, 5 Mo. App., 111 246
Swansen v. Swansen, 12 Nebr., 210 730
Swanson v. Swanson, 32 Tenn., 446 589
Swartwout v. Payne, 19 Johns. (N. Y.), 294 184
Swartz v. McClelland, 31 Nebr., 646 461
Sword v. Low, 122 Ill., 487 87

T.

Taylor v. Mason, 9 Wheat. (U. S.), 325 568
Teal v. Walker, 111 U. S., 242 468
Temple v. Smith, 13 Nebr., 513 768
*Templeton v. City of Tekamah, 32 Nebr., 542 ..... 343, 347
Templeton v. Stratton, 128 Mass., 137 666
Tex v. Pflug, 24 Nebr., 666 819
Texas & P. R. Co. v. Murphy, 111 U. S., 488 732
Third Nat. Bank v. Stillwater Gas Co., 36 Minn., 75, 30 N. W. Rep., 440 832
Thomas v. Hinkley, 19 Nebr., 324 223
Thomas v. Owens, 4 Md., 189 29
Thompson v. Higginbotham, 18 Kan., 42 535
Thompson & Sons Mfg. Co. v. Nicholls, 52 Nebr., 312 453
Thomson v. Bank of British North America, 82 N. Y., 1 287
Tierman's Ex'r v. Security Building & Loan Ass'n, 152 Mo., 135, 53 S. W. Rep., 1072 826
Tilden v. Tilden, 13 Gray (Mass.), 103 573
Tissot v. Darling, 9 Cal., 278 376
Todd v. Cremer, 36 Nebr., 430 199
Tolerton & Stetson Co. v. First Nat. Bank of Wayne, 63 Nebr., 674 483
Toscan v. Devries, 57 Nebr., 276 372
Toulmin v. Austin, 5 Stew. & P. (Ala.), 410 746
‡Treadwell v. Brown, 44 N. H., 551 753

PAGE

Tredway v. Allen, 20 Wis., 500.....268, 269, 272
Trew v. Gaskill, 10 Ind., 265..... 538
Triplett v. Parmlee, 16 Nebr., 649..... 87
Troup v. Horbach, 57 Nebr., 644..... 412
Troxell v. Johnson, 52 Nebr., 46..... 132
Tryon v. Whitmarsh, 1 Met. (Mass.), 1..... 121
Tucker v. Harris, 13 Ga., 1..... 290
Tuska v. O'Brien, 68 N. Y., 446..... 508
Twohy Mercantile Co. v. Melbye, 78 Minn., 357, 81 N. W. Rep., 20.. 828

U.

Uldrich v. Gilmore, 35 Nebr., 288..... 608
Union P. R. Co. v. Buzicka, 65 Nebr., —..... 472
Union P. R. Co. v. Dawson County, 12 Nebr., 254..... 779
Union Stock Yards Co. v. Conoyer, 41 Nebr., 617..... 325
Union Stock Yards Nat. Bank v. Smout, 62 Nebr., 227..... 295
United States v. Buchanan County, 5 Dill. (U. S. C. C.), 285..... 422
University of Michigan v. McGuckin, 62 Nebr., 489..... 302
Unland v. Crane, 63 Nebr., 451..... 576
Upson v. Noble, 35 Ohio St., 655..... 657

V.

Van Buren v. State, 63 Nebr., 453.....445, 449
Vance v. Vance, 108 U. S., 514..... 632
Vanderpool v. Notly, 42 N. W. Rep. (Mich.), 680..... 867
Van Pelt v. Gardner, 54 Nebr., 701..... 598
Van Wagner v. Van Nostrand, 19 Ia., 422..... 765
Veeder v. McKinley-Lanning Loan & Trust Co., 61 Nebr., 892..137, 204
Velten v. Carmack, 23 Ore., 282..... 747
Voorman v. Li Po Tai, 45 Pac. Rep. (Cal.), 470..... 268
Vought v. Foxworthy, 38 Nebr., 790..... 77
Vrooman v. Turner, 69 N. Y., 280..... 200

W.

Wachter's Case, 1 Walk. (Pa.), 267..... 291
Wagner v. Varner, 50 Ia., 532..... 654
Waite v. Frisbie, 45 Minn., 361..... 158
Walcott v. O'Connor, 163 Mass., 21..... 841
Walker v. Birch, 6 Term. Rep. (Eng.), 258..... 4
Walker v. Hale, 16 Ala., 26..... 731
Walker v. Turner, 27 Nebr., 103..... 805
Walkup v. Houston, 65 N. Car., 501..... 219
Wallace v. Matthews, 39 Ga., 617, 99 Am. Dec., 473..... 613
Wallace v. Rappleye, 103 Ill., 229..... 656

PAGE
Walsh v. Ætna Life Ins. Co., 30 Ia., 144, 6 Am. Rep., 664..... 811
Walton Plow Co. v. Campbell, 35 Nebr., 173..... 219
Ward v. Cochran, 150 U. S., 597..... 190
Ward v. Patterson, 46 Pa. St., 372..... 573
Wardell v. McConnell, 23 Nebr., 152.....608, 609
Warrick v. Rounds, 17 Nebr., 411..... 608
Watson v. Roode, 30 Nebr., 264..... 765
Watts v. Gantt, 42 Nebr., 869..... 412
Weaver v. Cressman, 21 Nebr., 675..... 214
Webb v. Bishop, 7 S. E. Rep. (N. Car.), 698..... 182
Webb v. Hoselton, 4 Nebr., 308..... 199
Webster v. Cooper, 14 How. (U. S.), 487..... 568
Webster v. Daniel, 47 Ark., 131, 14 S. W. Rep., 550..... 536
Weimer v. Bunbury, 30 Mich., 201..... 544
Welch v. Adams, 63 N. H., 344..... 587
Welsh v. Barrett, 15 Mass., 380..... 274
Wendt v. Vogel, 87 Wis., 462, 58 N. W. Rep., 764..... 494
Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co., 54 Nebr., 241..... 172
Westmeath v. Westmeath, Jac. (Eng.), 126..... 790
Wheelock v. Freeman, 13 Pick. (Mass.), 165..... 218
‡Whipple v. Fowler, 41 Nebr., 675.....9, 199
White v. Wabash, St. L. & P. R. Co., 64 Ia., 281, 20 N. W. Rep., 436... 66
Whitman v. State, 17 Nebr., 224..... 878
Wier v. Batdorf, 24 Nebr., 83..... 588
Wiggins Ferry Co. v City of East St. Louis, 107 U. S., 365, 27 L. Ed., 419..... 363
Wilde v. Wilde, 37 Nebr., 891..... 791
Wilgus v. Gettings, 21 Ia., 177..... 87
Williams v. Evans, 6 Nebr., 216..... 775
Williams v. Hubbard, Walker's Ch. (Mich.), 28..... 753
Williams v. McConaughey, 58 Nebr., 656..... 817
Williams v. Taylor, 63 Nebr., 717..... 92
Will of Smith, 52 Wis., 543..... 587
Wilson v. Coburn, 35 Nebr., 530..... 290
Wilson v. Shepherd, 15 Nebr., 15..... 757
Wolf River Lumber Co. v. Brown, 60 N. W. Rep. (Wis.), 996..... 509
Wood v. Carpenter, 101 U. S., 135..... 311
Wood v. Clark, 58 Nebr., 115..... 342
Woodmen Accident Ass'n v. Pratt, 62 Nebr., 673..... 631
Wood Reaping & Mowing Machine Co. v. Smith, 50 Mich., 565, 15 N. W. Rep., 906.....493, 494
Woodworth v. Mills, 61 Wis., 44..... 113
Workmen's Mutual Aid Ass'n v. Monroe, 53 S. W. Rep. (Tex.), 1029..... 798
Wright v. Sweet, 10 Nebr., 190..... 873
Wulbern v. Timmons, 55 S. Car., 456, 33 S. E. Rep., 568..... 828

PAGE
Wyler v. Rothschild, 53 Nebr., 566..... 673
Wylie v. Charlton, 43 Nebr., 840.....136, 154

Y.

Yorgensen v. Yorgensen, 6 Nebr., 383..... 820
Young v. Bank of Alexandria, 4 Cranch. (U. S.), *384..... 472

Z.

Zaleski v. Clark, 44 Conn., 218..... 493
Zehr v. Miller, 40 Nebr., 791..... 730
Zimmerman v. Zimmerman, 59 Nebr., 80..... 412
Zink v. Westervelt, 52 Nebr., 90..... 431
Zirkle v. Leonard, 60 Pac. Rep. (Kan.), 318..... 619

Digest of Nebraska Cases Overruled, Modified, Distinguished, Negatived and To Be Compared.

NOTE.—The insertion in the following list of a case from another state would necessitate a change in the foregoing title; hence this note. An act of the legislature of Ohio, adopted in 1835, provided "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration,* or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; every such person shall be deemed guilty of murder, in the first degree," etc. In 1857 the supreme court of the state construed that statute, holding the adverb "purposely," as a modifier of the verb "kill," to apply to every intervening clause; opinion by Bartley, C. J., *Robbins v. State*, 8 Ohio St., 131, 175. The effect was to make intent a necessary ingredient of murder in both degrees.† In 1873 the Ohio law became ours by adoption. Criminal Code, sec. 3; amended in 1893. In 1897 our supreme court held that our legislature, in adopting the Ohio law, did not adopt the construction of her court, but that such decision stood—on a par with any decision of our own court—subject to revision; and they then and there overruled it; opinion by POST, C. J., *Morgan v. State*, 51 Nebr., 672,‡ overruling *Franklin v. Kelly*, 2 Nebr., 79, 104, par.

*A gross syntactical error; it has been corrected in Ohio and Indiana.—W. F. B.

†It might be a question as to how many *dicta* are in Judge Bartley's opinion. Most of his reasoning appears to be logically essential to the conclusion reached. The question involved was the same as in *Bechtelheimer v. State*, cited in a following note.

In the statute as quoted by Chief Justice Bartley in *Robbins v. State, supra*, 8 Ohio State, p. 131, a comma follows the word "purposely." The learned chief justice, in commenting on the section quoted, probably alludes to this comma when he speaks—on page 175—of the "authoritative punctuation of the statute." The original act, approved March 7, 1835, had no such comma. The aforesaid comma was inserted by Joseph Rockwell Swan in his compilation of 1841.—W. F. B.

‡The enactment of a law in terms similar to the provisions of the statute of a foreign country, does not involve the adoption of the construction which the courts of that country may have given the statute. Hemphill, C. J., *Snoddy v. Cage*, 5 Tex., 106; but see vigorous dissent by Wheeler, J.—W. F. B.

3 syllabus in *Hallenbeck v. Hahn*, 2 Nebr., 377, *O'Dea v. Washington County*, 3 Nebr., 118, *Bohanan v. State*, 18 Nebr., 57, 73, 74, *Parks v. State*, 20 Nebr., 515, 518, *Coffield v. State*, 44 Nebr., 417, 423, and *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663,* and it is a mistake to say, as has been said, that these decisions are modified by *Nebraska Building & Loan Ass'n v. Marshall*, 51 Nebr., 534, 538. *Morgan v. State* is upheld in *Rhea v. State*, 63 Nebr., 461, 467, opinion by HOLCOMB, J. On a motion for rehearing, SEDGWICK, J., filed a memorandum dissenting from the opinion of the majority of the court. This will be found in Appendix A to volume 64. "It is a settled rule that in the adoption of the statute of a sister state the state adopting it adopts the construction which the former has placed upon it." ALBERT, C., *State v. McBride*, 64 Nebr., 547, 549. In *Goble v. Simeral*, filed January 21, 1903, POUND, C., states the rule as follows: "If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature." The Ohio decision† is mentioned with disapproval in a dictum by the Oregon supreme court; opinion by Kelly, C. J., *State v. Brown*, 7 Ore., 186, 197. Hon. John A. Ehrhardt, of Stanton, has made a valuable suggestion as to this list, which will be followed in the 65th volume.—W. F. B.

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*The principle of these cases is recognized, tacitly, by NORVAL, C. J., in *State v. Poynter*, 59 Nebr., 417, 430.—W. F. B.

†A statute substantially identical with the Ohio statute cited above, was enacted in Indiana, 1843. The compiler of that year says, in a note, that the section was "taken substantially from the Ohio statute." Revised Statutes, 1843, p. 960. This was fourteen years before the statute was construed by the Ohio court. The construction in Indiana, taken in the aggregate, differs widely from Ohio. "A purpose to kill is an essential ingredient in the crime of murder in the first degree, where the killing is effected by administering poison." *Bechtelheimer v. State*, 54 Ind., 128, citing the Ohio decision with approval, at page 136. "Where, in the perpetration of a robbery, the robber takes the life of his victim, he is guilty of murder in the first degree, though there may have been no intent to kill." *Moynihan v. State*, 70 Ind., 126. The former decision was in 1876; the latter four years thereafter. Worden, C. J. in the former, J. in the latter, delivered the respective opinions. Judge SEDGWICK points out the inconsistency of these two decisions—Appendix A. It may not be out of place to state succinctly the two rules of construction.

Ohio rule.—A purpose to kill the person named in the indictment as deceased, is an essential element of murder in any degree.

Indiana rule.—A purpose to kill is an essential element of murder, except where the slayer was engaged in the perpetration or attempt to perpetrate a rape, a robbery, an arson or a burglary, in which case the enormity of the cardinal felony takes the place of the purpose to kill.—W. F. B.

EXPRESSLY PARTIALLY OVERRULED.

Adams v. Nebraska City Nat. Bank, 4 Nebr., 370.

Chattel mortgage. Title to property passes to mortgagee.

Musser v. King, 40 Nebr., 892.

Latter case upheld in Randall v. Persons, 42 Nebr., 607; Sharp v. Johnson, 44 Nebr., 165; Camp v. Pollock, 45 Nebr., 771.

Murray v. Loushman, 47 Nebr., 256.

Strahle v. First Nat. Bank of Stanton, 47 Nebr., 319.

Title to property remains in mortgagor.

Alter v. Bank of Stockham, 51 Nebr., 797.

Alter v. Bank of Stockham, 53 Nebr., 223.

Fraud. Conversion.

Aultman v. Obermeyer, 6 Nebr., 260.

Lipscomb v. Lyon, 19 Nebr., 511.

Woodruff v. White, 25 Nebr., 745.

Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

Bankers' Life Ins. Co. v. Robbins, 53 Nebr., 44.

Section 8, chapter 16, Compiled Statutes, does not apply to domestic insurance companies.

Bankers' Life Ins. Co. v. Robbins, 55 Nebr., 117.

Section 8, chapter 16, does apply to domestic insurance companies.

Bollman v. Lucas, 22 Nebr., 796.

Sunday Creek Coal Co. v. Burnham, 52 Nebr., 364.

Fraudulent conveyance. Guilty knowledge of purchaser.

Brooks v. Dutcher, 22 Nebr., 644.

City of Omaha v. Richards, 49 Nebr., 244.

A general and a specific exception to instructions.

Carkins v. Anderson, 21 Nebr., 364.

Anderson v. Carkins, 135 U. S., 483.

Robinson v. Jones, 31 Nebr., 20.

Homestead. Prior contract to convey after having acquired title. Estoppel.

Cheney v. Harding, 21 Nebr., 68.

Rowe v. Griffiths, 57 Nebr., 488.

Failure to file affidavit before service by publication.

Courcamp v. Weber, 39 Nebr., 533.

Dorsey v. Conrad, 49 Nebr., 443.

Alteration of instruments. Presumption.

Crook v. Vandevoort, 13 Nebr., 505.
Mattis v. Boggs, 19 Nebr., 698, 703.
Latter case reaffirmed in Kirk v. Bowling, 20 Nebr., 260.
Johnson v. Hardy, 43 Nebr., 368.
Ejectment by tenant in common.

Curten* v. Atkinson, 29 Nebr., 612.
Curtin* v. Atkinson, 36 Nebr., 110.
Parties to error proceeding in supreme court.

Darst v. Levy, 40 Nebr., 593.
McCord v. Bowen, 51 Nebr., 247, 251.
Attachment. Chattel mortgage. Rights of mortgagor.

Drexel v. Richards, 48 Nebr., 732.
Drexel v. Richards, 50 Nebr., 509.
Mechanic's lien. Description of real estate.

Farmers' Mutual Ins. Co. v. Phoenix Ins. Co., June 4, 1902.
Farmers' Mutual Ins. Co. v. Phoenix Ins. Co., May 20, 1903.
Judgment on insurance policy.

First Nat. Bank of Chadron v. Engelbercht, 57 Nebr., 270.
First Nat. Bank of Chadron v. Engelbercht, 58 Nebr., 639, 640.
Mortgage foreclosure.

First Nat. Bank of Omaha v. Goodman, 55 Nebr., 409.
First Nat. Bank of Omaha v. Goodman, 55 Nebr., 418.
Liability of wife as surety for husband.

Gee Wo v. State, 36 Nebr., 241.
O'Connor v. State, 46 Nebr., 157, 158.
Negative averment in criminal information.

Geisler v. Brown, 6 Nebr., 254.
World Publishing Co. v. Mullen, 43 Nebr., 126.
Language libelous per se.

Grant v. Bartholomew, 57 Nebr., 673,
County of Logan v. Carnahan, December 17, 1902.
The former holding was that a county could maintain a foreclosure of a tax lien without the prior issuance of a certificate; this was overruled in effect in the latter opinion, and formally overruled on rehearing June 3, 1903.

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*This is the same case, but the names are spelled differently in the two reports.—W. F. B.

Henry v. Vliet, 33 Nebr., 130.
Henry v. Vliet, 36 Nebr., 138.
Precedent debt as consideration for chattel mortgage.

Hoadley v. Stephens, 4 Nebr., 431.
Omaha Real Estate & Trust Co. v. Kragscow, 47 Nebr., 592.
Acknowledgment of a deed in another state before a commissioner for this state.

Hollenbeck v. Tarkington, 14 Nebr., 430.
(Phenix Ins. Co. v. Swantkowski, 31 Nebr., 245.)
Sharp v. Brown, 34 Nebr., 406.
Limitation of proceeding in error.

Johnson v. First Nat. Bank of Plum Creek, 28 Nebr., 792.
Dorsey v. Conrad, 49 Nebr., 443, 444.
Alteration of negotiable instrument.

Kittle v. De Lamater, 3 Nebr., 325.
Smith v. Columbus State Bank, 9 Nebr., 31.
Promissory note. Illegal consideration. Innocent purchaser.

La Flume v. Jones, 5 Nebr., 256.
Burkett v. Clark, 46 Nebr., 466, 468, 475.
Judicial sale. Redemption. Deposit.

Lancaster County Bank v. Horn, 34 Nebr., 742.
Sager v. Summers, 49 Nebr., 459.
Voluntary assignment.

Lee v. Hastings, 13 Nebr., 508.
Sureties on replevin bond are not liable in a case in which a return of the property can be had.
Ulrich v. McConaughey, 63 Nebr., 10, 13.
"We think, in the light of the opinion in that case [*Shelby v. McQuillan*, 59 Nebr., 158], *Lee v. Hastings* should not be followed."

Lewis v. Mills, 47 Nebr., 910.
Barker v. Wheeler, 60 Nebr., 470, 471.
Res judicata. Judgment upon officer's bond.

McCord v. Krause, 36 Nebr., 764.
McCord v. Bowen, 51 Nebr., 247, 251.
Attachment. Chattel mortgage.

McCord v. Weil, 29 Nebr., 682.
McCord v. Weil, 33 Nebr., 868, 869.
Latter case reaffirmed in Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Nebr., 214, 217.
Review of order appointing receiver in advance of main case.

Magneau v. City of Fremont, 30 Nebr., 843.
State v. Boyd, 63 Nebr., 829.
Rosenbloom v. State, 64 Nebr., 342.
See Templeton v. City of Tekamah, *infra.*

Manly v. Downing, 15 Nebr., 637.
Green v. Sanford, 34 Nebr., 363.
Limitation of foreclosure of mechanic's lien.

Marvin v. Weider, 31 Nebr., 774.
Perry v. Baker, 61 Nebr., 841, 845.
Law of the case as a rule in district court.*

Moore v. Kepner, 7 Nebr., 291.
Lininger v. Raymond, 9 Nebr., 40.
Judgment against surety on replevin bond.

O'Dea v. Washington County, 3 Nebr., 118.
See note at the head of this digest of cases.

Omaha & R. V. R. Co. v. Wright, 47 Nebr., 886.
Omaha & R. V. R. Co. v. Wright, 49 Nebr., 456, 457.
Pleading negligence.

Omaha Consolidated Vinegar Co. v. Burns, 44 Nebr., 21.
Omaha Consolidated Vinegar Co. v. Burns, 49 Nebr., 229.
Mechanic's lien for sinking well.

Osborne v. Canfield, 33 Nebr., 330.
Moline v. Curtis, 38 Nebr., 520, 534.
Bill of exceptions on review of attachment proceeding in county court.

Pacific Express Co. v. Cornell, 59 Nebr., 364.
Nebraska Telephone Co. v. Cornell, 59 Nebr., 737.
Maximum rate law.

Richards v. State, 22 Nebr., 145.
Horbach v. City of Omaha, 49 Nebr., 851.
Latter case reaffirmed in Mathews v. Mulford, 53 Nebr., 252, 253.
Extension of time for filing bill of exceptions.

Richardson v. Campbell, 34 Nebr., 181.
Havemeyer v. Paul, 45 Nebr., 373, 374.
Latter decision reaffirmed in Omaha Loan & Trust Co. v. Hanson, 46 Nebr., 870, and in Connecticut Mutual Life Ins. Co. v. Westerhoff, 58 Nebr., 379, 383.
Contract rate of interest after maturity.

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*The case of *Perry v. Baker* established a rule for the district court, which differs from the rule established by a long line of decisions for the supreme court.—W. F. B.

Russel v. Rosenbaum, 24 Nebr., 769.

Aultman v. Martin, 49 Nebr., 103.

Separate assignments of error in the giving of instructions.

Schields v. Horbach, 40 Nebr., 103.

State v. Scott, 53 Nebr., 571, 572.

Amendment of bill of exceptions. Time to present for allowance. Notice.

Scott v. Flowers, 60 Nebr., 675.

Scott v. Flowers, 61 Nebr., 620.

State industrial school. Constitutionality of statute. Constitutional portion stands notwithstanding the defect.

Search v. Miller, 9 Nebr., 26.

In the trial of an action in replevin, the jury should be instructed as to which party has possession of the property at the time of the trial. If a verdict is silent as to the right of property and the right of possession, and as to the value thereof, according to the finding, no judgment can be rendered for any amount whatever.

Ulrich v. McConaughey, 63 Nebr., 10.

If the nature of a defendant's interest is not in issue and his right of possession is equal in value to the ownership, the silence of the verdict as to these questions is not prejudicial error.

State v. Green, 27 Nebr., 64.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

See Templeton v. City of Tekamah, *infra*.

State v. Sioux City & P. R. Co., 7 Nebr., 357.

Foree v. Stubbs, 41 Nebr., 271.

Latter case reaffirmed in Hall v. Hooper, 47 Nebr., 111, 118.

Right to maintain action to quiet title defined.

Strader v. White, 2 Nebr., 348.

Gibson v. Smith, 31 Nebr., 354.

Waggoner v. First Nat. Bank of Creighton, 43 Nebr., 84, 94, 95.

Liability for partnership debts.

Stutzner v. Printz, 43 Nebr., 306.

Herman v. Hayes, 58 Nebr., 54.

Discharge of attachment after judgment.

Templeton v. City of Tekamah, 32 Nebr., 542.

A provision of a municipal ordinance, which imposes a license-tax as a condition precedent to entering upon a certain occupation, and which punishes an offender against the provision with fine and imprisonment is unconstitutional and void.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

The provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license tax is constitutional and valid.

Thomas v. Markmann, 43 Nebr., 823.

Barker v. Wheeler, 60 Nebr., 470, 471.

Judgment of court having jurisdiction against an officer does not conclude his bondsmen, but is only prima-facie evidence.

Walker v. Turner, 27 Nebr., 103.

City of Omaha v. Richards, 49 Nebr., 244, 245

Specific exceptions to instructions.

Weaver v. Cressman, 21 Nebr., 675.

Anheuser-Busch Brewing Ass'n v. Hier, 52 Nebr., 424.

Funds in hands of clerk of district court not subject to garnishment. Action in equity.

Westcott v. Archer, 12 Nebr., 345.

Grebe v. Jones, 15 Nebr., 312, 317.

Latter case reaffirmed in Darnell v. Mack, 46 Nebr., 740.

Attachment. Levy. Jurisdiction.

White v. State, 28 Nebr., 341.

Coffield v. State, 44 Nebr., 417.

Filing information without preliminary hearing.

Whitman v. State, 42 Nebr., 841.

Metz v. State, 46 Nebr., 547, 556.

Burglary. Presumption. Possession of stolen property.

Wilson v. Macklin, 7 Nebr., 50.

Muller v. Plue, 45 Nebr., 701, 702.

Writ of replevin against officer holding goods under execution issued on void judgment.

Winslow v. State, 26 Nebr., 308, 312.

Leisenberg v. State, 60 Nebr., 628, 629.

Allegation of the particular hour of the night in an indictment for burglary.

Woodruff v. White, 25 Nebr., 745.

Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

PARTIALLY (NOT EXPRESSLY) OVERRULED.

Bohanan v. State, 18 Nebr., 57.

See note at the head of this digest of cases.

Chicago, B. & Q. R. Co. v. Cass County, 51 Nebr., 369.

James v. Higginbotham, 60 Nebr., 203.

Latter case reaffirmed in Gandy v. Cummins, 64 Nebr., 312, and Achenbach v. Pollock, 64 Nebr., 436.

Assignment in petition in error that court erred in overruling motion for new trial.

Coffield v. State, 44 Nebr., 417, 419.

See note at the head of this digest of cases.

Crowell v. Johnson, 2 Nebr., 146.

Wescott v. Archer, 12 Nebr., 345.

Attachment. Jurisdiction.

Eiseman v. Gallagher, 24 Nebr., 79.

Brewster v. Bank of Ainsworth, 43 Nebr., 79.

[Eiseman v. Gallagher approved in a dictum in Frenzer v. Richards, 60 Nebr., 131, 134.]

Usury. Defense. Affirmative relief. Rule of equity.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.

Franklin v. Kelley, 2 Nebr., 79.

See note at the head of this digest of cases.

Hallenbeck v. Hahn, 2 Nebr., 377.

Johnson v. Hahn, 4 Nebr., 139.

Enjoining the collection of taxes.

Hurley v. Estes, 6 Nebr., 386.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Kane v. Union P. R. Co., 5 Nebr., 105.

Hurlburt v. Palmer, 39 Nebr., 158.

Anheuser-Busch Brewing Ass'n v. Peterson, 41 Nebr., 897.

Herbert v. Wortendyke, 49 Nebr., 182, 185.

Defective service. General appearance. Waiver of objection. Setting up want of personal jurisdiction in answer.

Kountze v. Scott, 49 Nebr., 258.

McCord v. Bowen, 51 Nebr., 247, 251.

Motion to dissolve attachment. Right of defendant who does not own property.

Kyger v. Ryley, 2 Nebr., 20.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Mercer v. James, 6 Nebr., 406.

A verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is error without prejudice.

Hooker v. Hammill, 7 Nebr., 231.

Verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is prejudicial error.

Also

Hershiser v. Delone, 24 Nebr., 380.

Richardson Drug Co. v. Teasdall, 59 Nebr., 150.

Morehead v. Adams, 18 Nebr., 569.

Scott v. Overall, 50 Nebr., 144.

Construction of statute relative to settling bill of exceptions.

Morgan v. State, 51 Nebr., 672.

See note at the head of this digest of cases.

Morrissey v. Schindler, 18 Nebr., 672.

Herron v. Cole Bros., 25 Nebr., 692.

The discrepancy in the two preceding cases pointed out and the latter held to overrule the former in Hanna v. Emerson, 45 Nebr., 708, 709.

Right to bring action in county where one of the defendants resides.

Parks v. State, 20 Nebr., 515, 518.

See note at the head of this digest of cases.

Peters v. Dunnells, 5 Nebr., 460.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

OVERRULED ON A POINT NOT DISCUSSED IN FORMER OPINION.

Shiverick v. Gunning, 58 Nebr., 29.

Shiverick v. Gunning, 59 Nebr., 73.

Instructions as to matters not in evidence.

MODIFIED.

Ayres v. Wolcott, 62 Nebr., 805.

Ayres v. Wolcott, December 17, 1902.

Fraudulent conveyance.

Boyer v. Clark, 3 Nebr., 161.

Raymond Bros. v. Green, 12 Nebr., 215, 220.

Set-off. Unliquidated damages.

City of Seward v. Klenk, 27 Nebr., 615, 621.
Same case modified. See page 621 of same volume.
Retaining bill of exceptions.

Fremont, E. & M. V. R. Co. v. Whalen, 11 Nebr., 585.
Republican V. R. Co. v. Arnold, 13 Nebr., 485, 486.
Testimony of witness as to value of land.

Hiatt v. Brooks, 17 Nebr., 33.
City of Hastings v. Foxworthy, 45 Nebr., 676, 682.
Law of the case.

Jefferson County v. Saxon, 10 Nebr., 14.
On appeal to this court transcript must be filed within statutory six months, and *must* contain testimony.
Schuyler v. Hanna, 28 Nebr., 601.
On appeal transcript must be filed within statutory six months, but *need not* contain testimony.

John v. Connell, 61 Nebr., 267.
John v. Connell, 64 Nebr., 233.
Levy of sewer tax. Levy notice.

Mathews v. Toogood, 23 Nebr., 536.
Mathews v. Toogood, 25 Nebr., 99.
Interest-bearing coupons. Aggregate interest of principal debt and coupons must not exceed ten per cent.

Miller v. Waite, 59 Nebr., 319.
Miller v. Waite, 60 Nebr., 431.
Voluntary assignment. Partnership property.

People v. Hamilton County, 3 Nebr., 244.
Long v. State, 17 Nebr., 60.
Pleading in mandamus.

Pierce v. Atwood, 64 Nebr., 92.
Judgment modified July 10, 1902, without additional opinion, so it will not direct the dismissal as to Alice E. Atwood. See clerk's record No. 11,017.

Plummer v. Rohman, 61 Nebr., 61.
Plummer v. Rohman, 62 Nebr., 145.
Plea of estoppel.

Real v. Hollister, 17 Nebr., 661.
Real v. Hollister, 20 Nebr., 112.
Eviction before action on covenant.

Romberg v. Hughes, 18 Nebr., 579.
Schrandt v. Young, 62 Nebr., 254, 263.
Ulrich v. McConaughey, 63 Nebr., 10, 15.
Damages in replevin.

Royal Neighbors of America v. Wallace, 64 Nebr., 330.
Royal Neighbors of America v. Wallace, December 3, 1902.
Representations in an application for life insurance; their materiality matter of common knowledge.

Scott v. Flowers, 60 Nebr., 675.
Scott v. Flowers, 61 Nebr., 620.
State Industrial School.

Solt v. Anderson, 62 Nebr., 153.
An allegation of fact in a reply is taken as denied by the force of the Code.
Solt v. Anderson, 63 Nebr., 734.
Allegations of a reply are to be construed with the petition.

DISTINGUISHED.

Ackerman v. Thummel, 40 Nebr., 95.
Taylor v. Davey, 55 Nebr., 153.
Injunction. Remedy at law.

Ahlman v. Meyer, 19 Nebr., 63.
Reid v. Panska, 56 Nebr., 195, 196, 200.
Houck v. Linn, 56 Nebr., 743, 744.
Replevin. Quashing writ. Right to dismiss writ.

Allen v. Saunders, 6 Nebr., 436.
Merrill v. Willis, 51 Nebr., 162.
Landlord and tenant.

Allyn v. State, 21 Nebr., 593.
Browning v. State, 54 Nebr., 203, 205.
The former case holds that the fact that the defendant in a prosecution for a misdemeanor was not arraigned is not prejudicial error.
In the latter case, NORVAL, J., says: "Whether that decision [*Allyn v. State, supra*] is right or wrong we are not called upon to decide, since the scope of the opinion is limited to trials for misdemeanors." The learned judge then proceeds to lay down a different rule for a felony case.

Anderson v. Chicago, B. & Q. R. Co., 35 Nebr., 95.
Orgall v. Chicago, B. & Q. R. Co., 46 Nebr., 4, 8.
Death by wrongful act. Nominal damages. Pleading

Arnold v Badger Lumber Co., 36 Nebr., 841.
Patten v. Lane, 45 Nebr., 333.
Cross-bill. Jurisdiction.

Barnes v. State, 40 Nebr., 545.
Davis v. State, 54 Nebr., 177, 180.
Simple larceny. Larceny from bailee. Felonious taking. Instruction.

Bays v. State, 6 Nebr., 167.
Wallace v. School District, 50 Nebr., 171, 174, 175.
Power of school board to dismiss teacher.

Bazzo v. Wallace, 16 Nebr., 290.
Omaha Loan & Trust Co. v. Ayer, 38 Nebr., 891
Error after appeal.

Brewer v. Otoe County, 1 Nebr., 373.
May v. School District, 22 Nebr., 205.
Arapahoe Village v. Albee, 24 Nebr., 242.
The doctrine that lapse of time does not bar the sovereign, does not apply to municipal corporations whose powers are derived from the state; there is an exception by statute as to county warrants.

Bullock v. Pock. See Whipple v. Fowler, *infra*.

Burr v. Boyer, 2 Nebr., 265.
Eichoff v. Eikenbary, 52 Nebr., 332, 335.
Surety. Collateral security. Negligence of creditor. Release *pro tanto*.

Bush v. Tecumseh Nat. Bank, 64 Nebr., 451.
Stewart v. Rosengren, November 19, 1902.
Sufficient transcript. Affirmative error.

Calvert v. State, 34 Nebr., 616.
Chicago, B. & Q. R. Co. v. Steel, 47 Nebr., 741.
Street railway. Railroad. Right of way. Easement. Condemnation. Damages.

Chadron Banking Co. v. Mahoney, 43 Nebr., 214.
Philadelphia Mortgage & Trust Co. v. Goos, 47 Nebr., 804, 812.
Appointment of receiver. Pending appeal. Pending action.

City of Beatrice v. Leary, 45 Nebr., 149.
City of Omaha v. Bowman, 52 Nebr., 293, 296.
Diversion of water from a watercourse by a city.

City of Hastings v. Foxworthy, 45 Nebr., 676.
Dovey v. City of Plattsmouth, 52 Nebr., 642, 644, 645.
Municipal corporation. Damage to person or property.

City of Lincoln v. Finkle, 41 Nebr., 575.
Dovey v. City of Plattsmouth, 52 Nebr., 642, 644.
See City of Hastings v. Foxworthy, *supra*.

City of Lincoln v. Grant, 38 Nebr., 369.
Dovey v. City of Plattsmouth, 52 Nebr., 642, 644.
See City of Hastings v. Foxworthy, *supra*.

City of Omaha v. Richards, 49 Nebr., 244; 50 Nebr., 804.
City of Omaha v. Bowman, 52 Nebr., 293, 297.
Instruction. Overflow. Negligence.

City of Wahoo v. Dickinson, 23 Nebr., 426.
Sage v. City of Plattsmouth, 48 Nebr., 558, 561.
Municipal corporations. Extension of boundaries.

City of Wahoo v. Tharp, 45 Nebr., 563.
Sage v. City of Plattsmouth, 48 Nebr., 558, 561.
See City of Wahoo v. Dickinson, *supra*.

Cleveland Paper Co. v. Banks, 15 Nebr., 20.
Bullis v. Drake, 20 Nebr., 167.
Misconduct of prevailing party's counsel.

Coffman v. Brandhoeffer, 33 Nebr., 279.
Davis v. Ballard, 38 Nebr., 830.
Alias summons.

Courtnay v. Parker, 16 Nebr., 311; 21 Nebr., 582.
Corey v. Plummer, 48 Nebr., 481, 484.
Judgment lien. Homestead.

Cram v. Cotrell. See Whipple v. Fowler, *infra*.

Curran v. Percival, 21 Nebr., 434.
Dolan v. McLaughlin, 48 Nebr., 842, 846, 847, 849.
Action on saloon-keeper's bond.

Dayton v. Lincoln, 39 Nebr., 74.
Violet v. Rose, 39 Nebr., 660.
Submission to the jury of issues admitted in pleadings, is prejudicial or non-prejudicial accordingly as the jury may or may not have been *sidetracked* by the instruction.

Dern v. Kellogg, 54 Nebr., 650.
United States Nat. Bank of Omaha v. Westervelt, 55 Nebr., 424.
Right of collector to prefer his own creditor.

De Clerq v. Hager, 12 Nebr., 185.
State v. Keith County, 16 Nebr., 508.
The former of these cases holds that bridges upon the line of a highway within the county are not works of *internal improvement* according to the constitutional meaning. Opinion by LAKE, J. The latter case says the former ruling was a dictum, and holds that such bridges are works of internal improvement. MAXWELL, J.

Farmers & Merchants' Bank v. Anthony, 39 Nebr., 343.
Forrester v. Kearney Nat. Bank, 49 Nebr., 655.
Chattel mortgage. Registration. Attachment.

Frey v. Curtis, 52 Nebr., 406.
Holt v. Schneider, 57 Nebr., 523, 524, 531, 532.
Ostensible authority to act as an agent.

Garber v. Palmer, 47 Nebr., 699.
Reid v. Panska, 56 Nebr., 195, 196, 200.
See Ahlman v. Meyer, *supra*.

German Ins. Co. v. Heiduk, 30 Nebr., 288.
Eagle Fire Ins. Co. v. Globe Loan & Trust Co., 44 Nebr., 380.
Insurance. Company charged with knowledge of agent.

Goodwin v. Cunningham, 54 Nebr., 11.
Gillilan v. McDowall, December 12, 1902.
Foreclosure of tax lien. Redemption. Independent title. Assignment of mortgage. Record. Foreclosure of prior lien. Bar.

Green v. Barker, 47 Nebr., 934.
Stenberg v. State, 50 Nebr., 127.
Conveyance of public land. Collateral attack.

Greene v. Greene, 42 Nebr., 634.
Buckingham v. Roar, 45 Nebr., 244.
Admission of incompetent testimony in equity trial.

Gregory v. Cameron, 7 Nebr., 414.
Morrison v. Boggs, 44 Nebr., 248.
Evidence in collateral actions.

Hale v. Sanborn, 16 Nebr., 1. See Livesey v. Omaha Hotel Co., *infra*.

Hards v. Platte Valley Improvement Co. See Livesey v. Omaha Hotel Co., *infra*.

Haynes v. Aultman, 36 Nebr., 257.
Wood v. Roeder, 45 Nebr., 311.
Change of domicile. Service of summons.

Heidiman-Benoist Saddlery Co. v. Schott, 59 Nebr., 20.
Engel v. Dado, November 19, 1902.
Possession of chattels by defendant in replevin.

Higginbottom v. Benson, 24 Nebr., 461.
White v. Atlas Lumber Co., 49 Nebr., 82, 86.
Foreclosure of mortgage. Improvements by mortgagee. Rent.

Holt County v. Scott, 53 Nebr., 176.
Fire Ass'n v. Ruby, 58 Nebr., 730, 732.
Official bond. Non-approval. Estoppel.

Horn v. Queen, 5 Nebr., 472.
Einspahr v. Smith, 46 Nebr., 138.
Injunction. Final order. Appeal.

Jameson v. State, 25 Nebr., 185.
Bartell v. State, 40 Nebr., 232.
Reporter's notes as evidence in a prosecution for felony. The effect of these two cases is that a portion of the evidence can not be read to the jury from the reporter's notes, except by agreement and in presence of counsel.

Johnson v. Powers, 21 Nebr., 292.
Edee v. Strunk, 35 Nebr., 307.
Order appointing a receiver without notice; void or voidable?

Kiene v Shoeffing, 33 Nebr., 21.
Kansas & W. N. R. Co. v. Conlee, 43 Nebr., 121.
Statute of frauds.

Livesey v. Omaha Hotel Co., 5 Nebr., 50.
Lincoln Shoe Mfg. Co. v. Sheldon, 44 Nebr., 279.
Suit against subscriber of stock to a corporation.

Lydick v. State, 61 Nebr., 309.
Close v. Swanson, 64 Nebr., 389.
Highway. Order of county board. Easement. Dedication. User.

McLaughlin v. Sandusky, 17 Nebr., 110.
Tukey v. City of Omaha, 54 Nebr., 370, 378.
Municipal corporation. Incurring debt. Taxpayer. Landowner. Opening street.

Mathews v. Jones, 47 Nebr., 616.

Peterborough Savings Bank v. **Pierce**, 54 Nebr. 712, 718, 720, 722.

Assumption of mortgage.

Mead v. State, 25 Nebr., 444.

Davis v. State, **54 Nebr., 177**, 180.

See Barnes v. **State**, *supra*.

Meehan v. **First Nat. Bank**, 44 Nebr., 213.

Maxwell v. Home **Fire Ins. Co. of Omaha**, 57 Nebr., 207, 210.

Foreclosure.

Metz v. State Bank, 7 Nebr., 165.

Hamilton v. Whitney, 19 Nebr., 303.

Judgment lien. Index. Notice.

Metz v. State, 46 Nebr., 547.

Davis v. State, 51 Nebr., 301, 303, **325**.

Use of the expression "incriminating circumstances" in an instruction.

Metz v. State, 46 Nebr., 547.

Ferguson v. State, 52 Nebr., 432, 434, **436**.

Instructions. Burglary.

Miller v. Meeker, 54 Nebr., 452.

Seiver v. Union P. R. Co., **March 4, 1903**.

Service on sham defendant for the purpose of bringing non-resident defendant within jurisdiction of court.

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46.

Moise v. Powell, 40 Nebr., 671.

Appeal. Personal jurisdiction. Privilege. Waiver.

Morrissey v. Chicago, B. & Q. R. Co., 38 Nebr., 406.

Fremont, E. & M. V. R. Co. v. Harlin, 50 Nebr., 698, 713.

Railroad embankment. Negligence.

Morrissey v. Chicago, B. & Q. R. Co., 38 Nebr., 406.

Town v. Chicago, B. & Q. R. Co., 50 Nebr., 768, 774.

Surface water.

Myers v. McGavock, 39 Nebr., 843.

Bachelor v. Korb, 58 Nebr., 122.

Approval of a guardian's bond for the sale of the real estate of his ward.

National Cordage Co. v. Sims, 44 Nebr., 148.
Yoder v. Haworth, 57 Nebr., 150, 153.
Contract of agency. Contract of sale.

National Masonic Accident Ass'n v. Burr, 44 Nebr., 856.
Johnston v. Phelps County Farmers' Mutual Ins. Co., 63 Nebr., 21.
Insurance. Waiver of forfeiture.
Distinguished in Farmers' Mutual Ins. Co. v. Kinney, 64 Nebr., 808.

Niland v Kalish, 37 Nebr., 47. See Greene v. Greene, *supra.*

Olander v. Tighe, 43 Nebr., 344.
Corey v. Plummer, 48 Nebr., 481, 484.
See Courtnay v. Parker, *supra.*

Osborne v. Plano Mfg. Co., 51 Nebr., 502.
Yoder v. Haworth, 57 Nebr., 150.
See National Cordage Co. v. Sims, *supra.*

Parmer v. Keith, 16 Nebr., 91.
Dreyfus v. Aul, 29 Nebr., 191.
Malicious attachment.

Payne v. Jones, 33 Nebr., 260.
Hanscom v. Lantry, 48 Nebr., 665, 666.
Bill of exceptions. Allowance. Continuing duty.

Porter v. Ourada, 51 Nebr., 510.
Holt v. Schneider, 57 Nebr., 523, 531, 532.
See Whipple v. Fowler, *infra.*

Pottinger v. Garrison, 3 Nebr., 221.
Farrar v. Triplett, 7 Nebr., 237.
Demurrer to answer. Pleading over. Waiver.

Potvin v. Meyers, 27 Nebr., 749.
Drexel v. Pusey, 57 Nebr., 30.
Principal and surety. Payment of judgment by surety and subsequent assignment.

Ragoss v. Cuming County, 36 Nebr., 375.
Bush v. Johnson County, 48 Nebr., 1, 2, 15.
Final order before board of county commissioners. Collateral attack.

Reed v. Reed,* 4 Nev., 396.
Walton v. Walton, 57 Nebr., 102.
Divorce on the ground of cruelty.

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*This is the only foreign case in the list.—W. F. B.

Sexson v. Kelley, 3 Nebr., 104.
Thomas v. Hinkley, 19 Nebr., 324.
Liquor dealer's bond. Obligee. Condition. Liability.

Skinner v. Skinner, 38 Nebr., 756. See Greene v. Greene, *supra*.

Spaulding v. Johnson, 48 Nebr., 830.
Forrester v. Kearney Nat. Bank, 49 Nebr., 655.
Chattel mortgage. Registration. Attachment.

Spencer v. Thistle, 13 Nebr., 227.
Cockle Separator Mfg. Co. v. Clark, 23 Nebr., 702.
Vacating decree. Final order.

Springfield Fire & Marine Ins. Co. v. Winn, 27 Nebr., 649.
Home Ins. Co. v. Winn., 42 Nebr., 331.
Insurance. Fraud. Perjury.

State v. Burlington & M. R. R. Co., 60 Nebr., 741.
State v. Eskew, 64 Nebr., 600, 601, 602.
Constitutional law, section 26, article 5, state officers.

State v. Cochran, 28 Nebr., 798. See Gregory v. Cameron, *supra*.

State v. Dimond, 44 Nebr., 154.
Sage v. City of Plattsmouth, 48 Nebr., 558, 561.
Municipal corporation. Quo warranto. Injunction. Extension of boundaries. Collection of taxes.

State v. Fremont, E. & M. V. R. Co., 60 Nebr., 749.
State v. Eskew, 64 Nebr., 600, 601, 602.
Constitutional law, section 26, article 5.

State v. Graham, 21 Nebr., 329.
State v. Clark, 39 Nebr., 899.
School land. Contract of purchase. Default in payment of interest.

State v. Hill, 38 Nebr., 698.
State v. Hill, 47 Nebr., 456, 460, 480, 509, 526.
Liability of treasurers. Certificate of deposit.

State v. Poynter, 59 Nebr., 417.
State v. Eskew, 64 Nebr., 600, 601, 602.
Constitutional law, section 26, article 5, state officers.

State v. Robinson, 20 Nebr., 96.
In re Groff, 21 Nebr., 647.
Constitution. Statute.

State v. Uridil, 37 Nebr., 371.
City of Wahoo v. Dickinson, 23 Nebr., 426.
Village of Hartington v. Luge, 33 Nebr., 623.
City of Wahoo v. Tharp, 45 Nebr., 563.
The distinction between these cases is drawn in Sage v. City of Plattsmouth, 48 Nebr., 558, at page 561.
Proceedings in nature of quo warranto to test the legality of an incorporation.

Stewart v. Carter, 4 Nebr., 564.
Arnold v. Baker, 6 Nebr., 134.
An appeal lies from the district to the supreme court from an order sustaining a demurrer to a petition in equity, but not where the demurrer is for misjoinder of causes of action.

Stewart v. Rosengren, November 19, 1902.
Seiver v. Union P. R. Co., March 4, 1903.
See Miller v. Meeker, *supra*.

Stump v. Richardson County Bank, 24 Nebr., 522.
Chapman v. Garber, 46 Neb., 16, 20.
Negotiable instrument. Surety. Payment. Contribution.

Tootle v. First Nat. Bank of Chadron, 34 Nebr., 863.
State Bank of Lushton v. Kelley, 49 Nebr., 242.
Chattel mortgage. Prior equities. Constructive notice.

Treat v. Price, 47 Nebr., 875.
Beckman v. Birchard, 48 Nebr., 805.
Accord and satisfaction. Acceptance. Estoppel.

Village of Hartington v. Luge, 33 Nebr., 623.
State v. Dimond, 44 Nebr., 154.
See State v. Uridil, *supra*.

Western Union Telegraph Co. v. Fremont, 39 Nebr., 692.
Western Union Telegraph Co. v. Village of Wakefield, June 3, 1903.
Occupation tax on telegraph company.

West v. Van Pelt, 34 Nebr., 63.
Mayer v. Ver Bryck, 46 Nebr., 221.
Special contract. Recovery. Quantum meruit.

Whipple v. Fowler 41 Nebr., 675.
Snell v. Margritz, 64 Nebr., 613.
Payment of mortgage.

White v. Blum, 4 Nebr., 555.
Pickering v. Hastings, 56 Nebr., 201.
Liability of stockholders.

Wilson v. City of Auburn, 27 Nebr., 435.
Ives v. Irey, 51 Nebr., 136, 141, 142.
Taxes. Special assessments.

Yeazel v. White, 40 Nebr., 432.
Philadelphia Mortgage & Trust Co. v. Goos, 47 Nebr., 804, 811.
See Chadron Banking Co. v. Mahoney, *supra*.

Young v. Cooper, 12 Nebr., 610.
Geneva Nat. Bank v. Bailor, 48 Nebr., 866, 869.
Attachment. False representation of a material fact.

OVERRULED IN TOTO.

Allis v. Newman, 29 Nebr., 207.
Stull v. Cass County, 51 Nebr., 760.
Bill of exceptions. Mistake. Loss. Failure to file in time.

Anselme v. American Savings & Loan Ass'n, 63 Nebr., 525.
Anselme v. American Savings & Loan Ass'n, December 17, 1902.
Building and loan associations. Usury.

Arlington State Bank v. Paulsen, 57 Nebr., 717.
Arlington State Bank v. Paulsen, 59 Nebr., 94.
Review of questions not litigated below.

Banghart v. Lamb, 34 Nebr., 535.
Selby v. McQuillan, 45 Nebr., 512.
Judgment against sureties on appeal bond.

Barker v. Wheeler, 60 Nebr., 470.
Barker v. Wheeler, 62 Nebr., 150.
General denial. Proof of payment.

Bartlett v. Bartlett, 13 Nebr., 456.
Bartlett v. Bartlett, 15 Nebr., 593.
Husband and wife. Equitable title to real property.

Bellinger v. White, 5 Nebr., 399.
Graff v. Ackerman, 38 Nebr., 720.
See Edgington v. Cook, *infra*.

Bennet v. Fooks, 1 Nebr., 465.

Galway v. Malchow, 7 Nebr., 285.
Mansfield v. Gregory, 8 Nebr., 432.
Harral v. Gray, 10 Nebr., 186.
Mansfield v. Gregory, 11 Nebr., 297.
Hubbart v. Walker, 19 Nebr., 94.

Galway v. Malchow reaffirmed in Sheasley v. Keens, 48 Nebr., 57, 59.

Purchaser at sheriff's sale. Prior lien.

Bonns v. Carter, 20 Nebr., 566, 22 Nebr., 495.

Jones v. Loree, 37 Nebr., 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863, 866.

Last two cases reaffirmed in Grand Island Banking Co. v. Costello, 45 Nebr., 119, 140, and Goldsmith v. Erickson, 48 Nebr., 48.

No presumption of fraud because the property transferred was all the vendor owned.

Bressler v. Wayne County, 25 Nebr., 468.

Wayne County v. Bressler, 32 Nebr., 818.

Taxation of ...tional bank stock. Deduction of debts.

Burlington & M. R. R. Co. v. Shoemaker, 18 Nebr., 369.

Chicago, B. & Q. R. Co. v. Cox, 51 Nebr., 479.

Railroad company's liability for damages where line is not fenced.

Cass County v. Chicago, B. & Q. R. Co., 25 Nebr., 348.

Chicago, B. & Q. R. Co. v. Richardson County, 61 Nebr., 519.

Railroad bridge across navigable river assessable by state board.

Cedar County v. Jenal, 14 Nebr., 254.

State v. Hill, 47 Nebr., 456.
Bush v. Johnson County, 48 Nebr., 1.
In re State Treasurer's Settlement, 51 Nebr., 116.
Bartley v. State, 53 Nebr., 310, 337.

But see dictum in Thomssen v. Hall County, 63 Nebr., 777, 783.

Payment by county treasurer to his successor without manual delivery of legal tender, viz., with deposits in a bank.

City of Seward v. Klenk, 27 Nebr., 615. See Scott v. Waldeck, *infra*.

Coy v. Jones, 30 Nebr., 798.

Globe Publishing Co. v. State Bank of Nebraska, 41 Nebr., 175, 176.

Deere v. Losey, 48 Nebr., 622.

Sager v. Summers, 49 Nebr., 459.

Voluntary assignment.

Edgington v. Cook, 32 Nebr., 551.

Graff v. Ackerman, 38 Nebr., 720.

Taxation of land purchased from the government before issuance of patent.

First Nat. Bank of Hastings v. McAllister, 33 Nebr., 646.

Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago, 51 Nebr., 707.

Negotiable paper. Legal holiday. Presentment and protest. Common law not abrogated by statute.

First Nat. Bank of South Bend v. Gandy, 11 Nebr., 431, 433.

McIntosh v. Johnson, 51 Nebr., 33, 34.

Public funds. Garnishment.

Fisher, Ex parte, 6 Nebr., 309.

This court will not inquire into the constitutionality of the law, under which the defendant was committed, in a habeas-corpus proceeding.

Sovereign v. State, 7 Nebr., 409.

Ex parte Thomason, 16 Nebr., 238.

The court *did* inquire into the constitutionality of the law under which the defendant was committed in a proceeding in habeas corpus.

Strange and unaccountable as it may seem, there is no allusion to the *Fisher Case* in either *Sovereign v. State* or *Ex parte Thomason*.

Godman v. Converse, 38 Nebr., 657.

Godman v. Converse, 43 Nebr., 463.

Administration of estates. Allowance to widow. Acceptance of conditional will.

Horn v. Miller, 20 Nebr., 98.

Bickel v. Dutcher, 35 Nebr., 761.

Latter case reaffirmed in Continental Building & Loan Ass'n v. Mills, 44 Nebr., 136, 142.

Taking appeal. Limitation of time.

Howell v. Roberts, 29 Nebr., 483.

Globe Publishing Co. v. State Bank of Nebr., 41 Nebr., 175, 176.

Liability of stockholder in corporation.

Landauer v. Mack, 39 Nebr., 8.

Landauer v. Mack, 43 Nebr., 430.

Attachment. Levy on mortgaged chattels. Burden of proof.

McDonald v. Bowman, 35 Nebr., 93.

McDonald v. Bowman, 40 Nebr., 269.

Chattel mortgage. Attachment. Replevin by mortgagee.

Mathis v. Pitman, 32 Nebr., 191.
Wallace v. Sheldon, 56 Nebr., 55, 59.
Taxing of costs and attorneys' fees against the estate, in a will contest.

Merrill v. Wright, 41 Nebr., 351.
Neither a levy nor assessment of taxes, will be presumed from the mere introduction in evidence of a treasurer's tax receipt or certificate of sale.
Darr v. Wisner, 63 Nebr., 305.
In the foreclosure of a tax lien, the certificate of sale is evidence, *prima facie*.

Morgan v. State, 48 Nebr., 798.
State v. Cornell, 50 Nebr., 526.
Compensation of stenographer.

Nebraska Telephone Co. v. Cornell, 58 Nebr., 823.
Pacific Express Co. v. Cornell, 59 Nebr., 364.
Construction of petition in injunction.

Nebraska Telephone Co. v. Jones, 59 Nebr., 510.
Nebraska Telephone Co. v. Jones, 60 Nebr., 396.
Contributory negligence. Directing verdict.

Nickolls v. Barnes, 32 Nebr., 195.
Nickolls v. Barnes, 39 Nebr., 103.
Landlord and tenant. Possession by tenant under written lease unilaterally executed, tantamount to occupying under oral lease.

Omaha & R. V. R. Co. v. Clark, 35 Nebr., 867.
Omaha & R. V. R. Co. v. Clarke, 39 Nebr., 65.
Question of fact.

Phillips v. Bishop, 31 Nebr., 853.
Phillips v. Bishop, 35 Nebr., 487.
The latter case overruled the former, on a question of fact and not of law.

Pickens v. Plattsmouth Land Co., 31 Nebr., 585.
Pickens v. Plattsmouth Investment Co., 37 Nebr., 272.
Mechanic's lien. Question of fact.

Rice v. Gibbs, 33 Nebr., 460.
Rice v. Gibbs, 40 Nebr., 264, 265.
Assignability of a contract of option for a sale of real estate.

Rittenhouse v. Bigelow, 38 Nebr., 543.
Rittenhouse v. Bigelow, 38 Nebr., 547.
Cities of the first class. Equalization of taxes by township.

St. Joseph & D. R. Co. v. Baldwin, 7 Nebr., 247.
Railroad Co. v. Baldwin, 103 U. S., 426.
Government grant of land to railroad company.
The latter case overruled the former on a question of fact and not of law.

Sandwich Mfg. Co. v. Feary, 34 Nebr., 411.
Sandwich Mfg. Co. v. Feary, 40 Nebr., 226.
Harvesting machine. Sale. Contract. Warranty.

Scott v. Overall, 50 Nebr., 144.
Williams v. Miles, 62 Nebr., 566.
Construction of statute relative to settling bill of exceptions.
The latter case reaffirms Morehead v. Adams.*

Scott v. Waldeck, 11 Nebr., 525.
Jones v. Wolfe, 42 Nebr., 272.
City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861.
State v. Ambrose, 47 Nebr., 235, 241.
Use of quashed bill of exceptions.

Shawang v. Love, 15 Nebr., 142.
Hurlburt v. Palmer, 39 Nebr., 158, 159.
Latter case reaffirmed in Mayer v. Nelson, 54 Nebr., 434.
Waiver of defects in process by appeal or error.

Shellenberger v. Ransom, 31 Nebr., 61.
Shellenberger v. Ransom, 41 Nebr., 631.
Descent in case of murder of ancestor by heir.

Shellenberger v. Ransom, 41 Nebr., 631.
Veeder v. McKinley-Lanning Loan Co., 61 Nebr., 892, 912.
Descent of real estate.

Smith v. Boyer, 29 Nebr., 76.
Smith v. Boyer, 35 Nebr., 46.
The latter case overruled the former by the established rule that where evidence is fairly conflicting the finding or verdict of the nisi-prius court will not be disturbed, the court applying this rule to an order discharging an attachment.

Sonnenschein v. Bartels, 37 Nebr., 592.
Sonnenschein v. Bartels, 41 Nebr., 703.
Fraudulent conveyance.

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*Morehead v. Adams, 18 Nebr., 569, will be found in the list of cases partially (not expressly) overruled.—W. F. B.

Stanwood v. City of Omaha, 38 Nebr., 552.
Stanwood v. City of Omaha, 42 Nebr., 303.
Rule as to conflicting evidence applied.

State v. Keim, 8 Nebr., 63.
Farmers & Merchants' Banking Co. v. City of Red Cloud, 62 Nebr., 442.
Garnisheeing public money.

State v. Missouri P. R. Co., 29 Nebr., 550.
Missouri P. R. Co. v. Nebraska, 164 U. S., 403, 17 Sup. Ct. Rep., 130, 41 L. Ed., 489.
Latter case reaffirmed in Chicago, B. & Q. R. Co. v. State, 50 Nebr., 399.
Grain elevator case. The taking by a state of the private property of a person or a corporation without the owner's consent for the use of another.

State v. Roper, 46 Nebr., 724.
State v. Roper, 47 Nebr., 417.
Relocation of county seat.

State v. Seavey, 22 Nebr., 454.
State v. Moores, 55 Nebr., 480.
Municipal corporation. Local self-government.

Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Nebr., 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Nebr., 29.
Railroad. Mechanic's lien. Material-man.

Svanson v. City of Omaha, 38 Nebr., 550.
Svanson v. City of Omaha, 42 Nebr., 303.
Sufficiency of evidence.

Thomas v. Edgerton, 36 Nebr., 254.
Thomas v. Edgerton, 40 Nebr., 25, 26.
Liability of officer for sufficiency of sureties on replevin bond.

United States Nat. Bank of Omaha v. Geer, 53 Nebr., 67.
United States Nat. Bank of Omaha v. Geer, 55 Nebr., 462.
Commercial paper. Restrictive indorsement.

TO BE COMPARED.

Atchison & N. R. Co. v. Baty, 6 Nebr., 37.
Graham v. Kibble, 9 Nebr., 182.
Clearwater Bank v. Kurkonski, 45 Nebr., 1.
Hier v. Hutchings, 58 Nebr., 334.
Everson v. State, October 22, 1902.

The first case held a part of a statute which gave double value in damages for the accidental destruction of live stock on a railroad track void.

The second case held the fifty-dollar penalty for illegal fees constitutional.

The third case held the statutory penalty of $50, for failing to enter satisfaction of chattel mortgage, was not in conflict with the constitution, citing the second case.

The fourth case held the five-hundred-dollar penalty for recommitment after a release by a writ of habeas corpus could be recovered, citing the third case. The constitutionality of the statute was assumed.

The fifth holds the statutory fine—in double the amount of the thing—for the use of the injured party in a prosecution for embezzlement is not in conflict with the constitution, citing with approval the second, third and fourth cases.

The first of these cases has been made the basis for the doctrine that punitive damages are not recoverable in this state. *Boldt v. Budwig*, 19 Nebr., 739; *Rosewater v. Hoffman*, 24 Nebr., 222, and other cases too numerous for citation. But is this construction warrantable in view of the language of the opinion, 6 Nebr., p. 45?

Becker v. Anderson, 11 Nebr., 493, 496.
Marsh v. Burley, 13 Nebr., 261, 264.
Housel v. Cremer, 13 Nebr., 298.
Lancaster County Bank v. Gillilan, 49 Nebr., 165, 180.

In the first of the foregoing cases, it was stated—dictum—that the filing and recording of a chattel mortgage was equivalent to a change of possession of the property. In the second case, the writer of the former opinion retracts the statement. In the first case, it was held that, where a chattel mortgage was void as to creditors, the mortgaged property was assets in the hands of the executor of the mortgagor. The third and fourth cases appear to be in almost direct conflict with this doctrine, and in the fourth case the opinion in the first, as to this point, is analytically criticised.

Berkley v. Lamb, 8 Nebr., 392.
Schribar v. Platt, 19 Nebr., 625.
Best v. Zutavern, 53 Nebr., 619.

Execution. Homestead. Confirmation of sale.

The last decision says that the second overruled the first.

Bradshaw v. City of Omaha, 1 Nebr., 16.
Turner v. Althaus, 6 Nebr., 54, 77.

Taxation of vacant and farm lands within city limits.

Bryant v. Estabrook, 16 Nebr., 217.
Schoenheit v. Nelson, 16 Nebr., 235, 238.
Holmes v. Andrews, 16 Nebr., 296.
Otoe County v. Brown, 16 Nebr., 394, 397.
McClure v. Warner, 16 Nebr., 447.
D'Gette v. Sheldon, 27 Nebr., 829.
Alexander v. Wilcox, 30 Nebr., 793.
Warren v. Demary, 33 Nebr., 327.
Fuller v. Colfax County, 33 Nebr., 716.
Black v. Leonard, 33 Nebr., 745.
Alexander v. Thacker, 43 Nebr., 494, 497.

Foreclosure of tax lien. When does the five-year limit begin to run?

In the opinion in the last case cited NORVAL, C. J., makes an exhaustive review of the decisions on this point.

Commercial Nat. Bank v. Nebraska State Bank, 33 Nebr., 292.
Lancaster County Bank v. Gillilan, 49 Nebr., 165, 178.

Assignment for benefit of creditors. Title of assignee.

The opinion in the latter case, by IRVINE, C., contains an exhaustive summary. The decisions which he cites are cited elsewhere in this table.

Dawson v. Merrille, 2 Nebr., 119.
Simmons v. Yurann, 11 Nebr., 516.
Carkins v. Anderson, 21 Nebr., 364, 368.
Carkins v. Anderson, 135 U. S., 483.

Public lands. Improvements.

Entry of land under United States laws. Agreement by entryman to convey after he shall have acquired title. Public policy.

The third case in the foregoing series states that the second overrules the first. But the fourth case in such series reverses the third.

Filley v. Duncan, 1 Nebr., 134.
Colt v. Du Bois, 7 Nebr., 391, 394.

In the opinion in the former case CROUNSE, J., says that the lien of a judgment does not attach to lands acquired after its rendition, so as to affect bona-fide purchasers, until levy of execution. In the latter opinion, GANTT, C. J., says that question was not before the court in the former case, and then proceeds to lay down the opposite rule.

German Nat. Bank v. First Nat. Bank, 55 Nebr., 86.

An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors.
National Wall Paper Co. v. Columbia Nat. Bank, 63 Nebr., 234.

An insolvent corporation can not make a preference of a debt due from it on which the officers and directors are bound as sureties.

Grimes v. Farrington, 19 Nebr., 44.

Bonns v. Carter, 20 Nebr., 566.

Hershiser v. Higman, 31 Nebr., 531.

Hamilton v. Isaacs, 34 Nebr., 709, 713, 714, 716.

Jones v. Loree, 37 Nebr., 816.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Assignment for the benefit of creditors.

The sixth opinion in the foregoing series contains a learned discussion by IRVINE, C.

Hagenbuck v. Reed, 3 Nebr., 17.

Washington County v. Fletcher, 12 Nebr., 356, 359.

Graff v. Ackerman, 38 Nebr., 720, 724.

Taxation of school lands where the state has not parted with the title.

Handy v. Brong, 4 Nebr., 60, 64.

Buckmaster v. McElroy, 20 Nebr., 557, 564.

In the former opinion GANTT, J., appears to lay down the rule that statutes in derogation of the common law are to be strictly construed. In the latter, COBB, J., lays down the opposite rule. The first section of the Code of Civil Procedure would appear to settle the question as to that Code.

Harmon v. City of Omaha, 53 Nebr., 164, 170.

Language seems to imply that laches may bar a proceeding by injunction to prevent the collection of a void tax.

Casey v. Burt County, 59 Nebr., 624.

Mere delay of party in proceeding against a void tax, will not constitute laches.

Hill v. Palmer, 32 Nebr., 632.

Reynolds v. Fisher, 43 Nebr., 172, 173.

Farmers' Loan & Trust Co. v. Memminger, 48 Nebr., 17.

Lien upon personal property for taxes.

Hoover v. Engles, 63 Nebr., 688.

Personal taxes can be collected in an action for debt.

Rosenbloom v. State, 64 Nebr., 342.

A tax is not a debt as the word is used in the constitution, and, consequently, the provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license-tax does not trench upon the constitution.

Howell v. Hathaway, 28 Nebr., 807.

Rust-Owen Lumber Co. v. Holt, 60 Nebr., 80.

Mechanic's lien for material furnished to husband for improvements upon wife's property with her knowledge.

Insurance Co. of North America v. Bachler, 44 Nebr., 549.

Hartford Fire Ins. Co. v. Corey, 53 Nebr., 209, 213, following German Ins. Co. v. Eddy, 37 Nebr., 461.

Lancashire Ins. Co. v. Bush, 60 Nebr., 116.

Farmers & Merchants' Ins. Co. v. Dobney, 62 Nebr., 213, 23 Sup. Ct. Rep., 565.

From the latter decision Harlan, Brewer and Brown, JJ., dissented.

Recovery of attorney fees in action on insurance policy.

Johnson v. Jones, 2 Nebr., 126.

Holliday v. Brown, 33 Nebr., 657, 34 Nebr., 232.

Wilson v. Shipman, 34 Nebr., 573.

Campbell Printing Press & Mfg. Co. v. Marder, 50 Nebr., 283, 287.

Impeachment of officer's return.

Lander v. Abrahamson, 34 Nebr., 553.

Anthony v. Korbach, 64 Nebr., 509, 513.

In the latter case, ALBERT, C., uses the following language in regard to the verification of a petition to vacate a judgment: "We have not overlooked *Lander v. Abrahamson*, 34 Nebr., 553, where, in the body of the opinion, it is held that the petition in an action of this kind must be verified positively. No good reason is given for the rule announced, nor was the point directly involved in the case. It is entirely omitted from the syllabus. In our opinion, it does not state the correct rule of practice and should not be followed."

McCord v. Krause, 36 Nebr., 764.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Attachment. Chattel mortgage.

Merriam v. Goodlett, 36 Nebr., 384.

Brown v. Ulrich, 48 Nebr., 409, 413.

Specific performance. Default in payment. Essence of contract. Waiver.

The writer of the opinion in the latter case says that the point in question was not necessary to a decision of the former; yet he makes a conditional overruling *in hæc verba*.

Merriam v. Rauen, 23 Nebr., 217.

Alexander v. Thacker, 43 Nebr., 494.

Interest on tax-sale certificate.

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46, 48.

O'Leary v. Iskey, 12 Nebr., 136, 137.

Creighton v. Keith, 50 Nebr., 810, 814.

Jenkins v. State, 60 Nebr., 205.

Effect of appeal as to vacating judgment.

Moore v. Kepner, 7 Nebr., 291.
General Statutes, 1873, p. 257.
Selby v. McQuillan, 45 Nebr., 512, 513, 514.
Appeal bond. Judgment against sureties.

Morgan v. State.
State v. McBride.
Goble v. Simeral.
See note at head of this digest of cases.

Morse v. Engle, 28 Nebr., 534.
Holliday v. Brown, 34 Nebr., 232, 234.
Radzuweit v. Watkins, 53 Nebr., 412, 416.
Service of summons in the alternative manner.

Morse v. Steinrod, 29 Nebr., 108.
Brown v. Work, 30 Nebr., 800.
Thompson v. Richardson Drug Co., 33 Nebr., 714.
Lininger v. Raymond, 12 Nebr., 19.
Nelson v. Garey, 15 Nebr., 531.
Bierbower v. Polk, 17 Nebr., 268.
Grimes v. Farrington, 19 Nebr., 44, 48.
Costello v. Chamberlain, 36 Nebr., 45.
Kavanaugh v. Oberfelder, 37 Nebr., 647.
Farwell v. Wright, 38 Nebr., 445.
Sherwin v. Gaghagen, 39 Nebr., 238.
Hewitt v. Commercial Banking Co., 40 Nebr., 820.
Preferring a creditor. Fraudulent conveyance.

Niland v. Kalish, 37 Nebr., 47.
Lihs v. Lihs, 44 Nebr., 143.
These two cases are not inconsistent, as a careful reading will disclose.
Husband and wife. Testimony.

Parrish v. State, 18 Nebr., 45.
Horton v. State, 63 Nebr., 34.
The former case was reopened two years after affirmance. In the latter case the supreme court held that its jurisdiction closed with the term at which the judgment of affirmance was pronounced.

Patrick v. Leach, 8 Nebr., 530, 538.
Search v. Miller, 9 Nebr., 26, 27, 30.
Kopplekom v. Huffman, 12 Nebr., 95.
Altschuler v. Algaza, 16 Nebr., 631.
Dunbar v. Briggs, 18 Nebr., 94, 97.
Stevens v. Carson, 30 Nebr., 544, 550.
Wylie v. Charlton, 43 Nebr., 840.
Veeder v. McKinley-Lanning Loan & Trust Co., 61 Nebr., 892.
Doane v. Dunham, 64 Nebr., 135.
Preponderance of evidence.
In *Search v. Miller* MAXWELL, J., says: "The court also erred

in instructing the jury that a 'clear prepónderance of the evidence was required to impeach the consideration.' In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action."

In *Doane v. Dunham* POUND, C., says: "Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing."

Pearson v. Kansas Mfg. Co., 14 Nebr., 211.

Barry v. Wachosky, 57 Nebr., 534, 537.

The former decision held in effect that where an action was commenced in one county against several defendants, and summons was issued to another bailiwick, the court retained its jurisdiction notwithstanding it developed that the defendant, whose presence gave the court jurisdiction, was improperly joined. The writer of the latter opinion says that the former opinion "is no longer regarded as sound, but has in effect long been overruled."

Peckinbaugh v. Quillin, 12 Nebr., 586.

Burnham v. Doolittle, 14 Nebr., 214, 216.

Attachment. Garnishment. Equity of redemption.

Ray v. Mason, 6 Nebr., 101.

Credit Foncier v. Rogers, 8 Nebr., 34.

Aultman v. Howe, 10 Nebr., 8.

Oliver v. Sheeley, 11 Nebr., 521.

Walker v. Lutz, 14 Nebr., 274.

Sides v. Brendlinger, 14 Nebr., 491.

Kyle v. Chase, 14 Nebr., 528.

Republican V. R. Co. v. Boyse, 14 Nebr., 130, 132.

Donavan v. Sherwin, 16 Nebr., 129, 130.

Tessier v. Crowley, 16 Nebr., 369, 372.

Preserving affidavits in bill of exceptions. The last case repudiates what it claims was a dictum in the eighth opinion of this series.

Searles v. Auerhoff, 28 Nebr., 668.

Nothing appearing to the contrary, it will be presumed that judicial proceedings are conducted with reference to sun time.

Iowa Loan & Trust Co. v. Estate of Devall, 63 Nebr., 826, 827.

"That decision [*Searles v. Auerhoff*] was rendered in 1890, before standard time was generally adopted in this state, and may, therefore, be said to have had as its basis the experienced course of human conduct. Since then, however, the former method of measuring time has fallen into disuse to such an extent that the reason for the presumption has almost, if not entirely, ceased to exist."

Scott v. Waldeck, 11 Nebr., 525.

Donovan v. Sherwin, 16 Nebr., 129, 130.

City of Seward v. Klenk, 27 Nebr., 615, 30 Nebr., 775.

Jones v. Wolfe, 42 Nebr., 272.

City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861, 863.

Use of bill of exceptions after the same has been quashed.

Seymour v. Street, 5 Nebr., 85. See White v. Blum, *infra*.

Shelley v. Towle. See Haller v. Blaco, *infra*.

State v. Moore, 37 Nebr., 13.

Weis v. Ashley, 59 Nebr., 494.

The governor as part of the law-making power.

State v. Priebnow, 16 Nebr., 131.

Arnold v. State, 38 Nebr., 752.

An obiter-dictum in the first opinion disapproved in the second. Plea in bar. Jury trial.

State v. Sanford, 12 Nebr., 425.

State v. Krumpus, 13 Nebr., 321.

Mann v. Welton, 21 Nebr., 541.

Hamilton v. Fleming, 26 Nebr., 240.

State v. Wilson, 31 Nebr., 462, 464.

Johnson v. Bartek, 56 Nebr., 422, 424.

Attachment. Exempt property.

The doctrine in Nebraska now is that the judgment of a court sustaining an attachment does not settle the status of the property attached as to its exemption.

Walker v. Morse, 33 Nebr., 650.

Moline v. Curtis, 38 Nebr., 520, 528.

Motion to quash bill of exceptions.

Wescott v. Archer, 12 Nebr., 345.

Grebe v. Jones, 15 Nebr., 312, 317.

The opinion in each of these cases was written by MAXWELL, J. The latter opinion, at the most, hardly more than modifies the former. In the latter case there is a vigorous dissenting opinion by LAKE, C. J.

White v. Blum, 4 Nebr., 555, 558.

Miller v. Hyers, 11 Nebr., 474.

Stay. Waiver of error proceeding.

Wilson v. Griess, May 21, 1903.

Gilbert v. Garber, June 18, 1903.

The acknowledgment of a mortgage incumbering a family homestead by an officer interested in sustaining the conveyance. See *Havemeyer v. Dahn*, 48 Nebr., 536, and *Horbach v. Tyrrell*, 48 Nebr., 514.

Woods v. Shields, 1 Nebr., 453, 454.

Kyger v. Ryley, 2 Nebr., 20, 27.

Strict foreclosure. Effect of statute

Wright v. People, 4 Nebr., 407.

The first sentence of the third paragraph of the syllabus lays down the doctrine of moral insanity *sine cera*. The latter sentence of the same paragraph lays down the right-and-wrong rule. These two sentences seem to be in direct and irreconcilable conflict. It appears, from an examination of the original opinion on file, that the syllabus was *not* prepared by the court.

NEGATIVED BY CONSTITUTION OF 1875.

Burlington & M. R. R. Co. v. Lancaster County, 4 Nebr., 293.

Land road tax valid under constitution of 1867.

McCann v. Merriam, 11 Nebr., 241.

Land road tax invalid under constitution of 1875.

City of Tecumseh v. Phillips, 5 Nebr., 305.

License money collected by towns and villages belongs to county.

City of Hastings v. Thorne, 8 Nebr., 160.

License money collected by a city or village belongs to such municipality.

Jones v. Nebraska City, 1 Nebr., 176.

A special act of the legislature, approved February 12, 1866, being "An Act to authorize the Town Council of Nebraska City to raise money to erect a Central or High School Building." Revised Statutes of 1866, page 692. Clause 4, section 14, of such act gives the board of education power "to contract with and employ all the teachers in the several schools therein, and at their pleasure to remove them," page 695. In *Jones v. Nebraska City, supra*, the court held the statute to be a part of the contract, and that the court had no power to inquire into the cause of removal. This law was repealed by section 15, article III. of the Constitution of 1875. *Wallace v. School District*, 50 Nebr., 171, 174.

NEGATIVED BY STATUTE.

Armstrong v. Mayer, 60 Nebr., 423.

Chapter 82, Laws of 1883, which attempted to amend section 1030 of the Code by grafting into the original section the right of appeal, is inimical to section 11, article 3, of the Constitution.

House Roll No. 8, introduced by Loomis, of Dodge (Session Laws 1901, p. 484, ch. 85), provided for an appeal in forcible entry and detainer. Code of Civil Procedure, ch. 10, sec. 1032*a*.

Aultman, Miller & Co. v. Mallory, 5 Nebr., 178.

A sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee until the condition is performed.

The legislature of 1877 enacted (Session Laws, p. 170) "that no sale, contract or lease, wherein the transfer of title or owner-

ship of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides," etc.

Campbell Printing Press & Mfg. Co. v. Dyer, 46 Nebr., 830, 833, 835.

The statute of 1877 was in effect a legislative command that the decision in the *Aultman Case* should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned.

Brome v. Cuming County, 31 Nebr., 362.

Section 8, chapter 7, Compiled Statutes, amended 1895. Session Laws, chapter 7, section 18.

Employment of counsel by county commissioners.

Brotherton v. Brotherton, 14 Nebr., 186.

Session Laws, 1883, p. 224, ch. 40.

Nygren v. Nygren, 42 Nebr., 408, 411.

Judgment for alimony as a lien on real estate.

Brunswick v. McClay, 7 Nebr., 137.

Session Laws, 1881, ch. 26, p. 201.

Larabee v. Klosterman, 33 Nebr., 150, 156.

Assignment of error in motion for new trial.

Dundy v. Richardson County, 8 Nebr., 508. See South Platte Land Co. v. Buffalo County, *infra*.

Haller v. Blaco, 10 Nebr., 36.

Howard v. Lamaster, 11 Nebr., 582.

Thompson v. Merriam, 15 Nebr., 498.

Shelley v. Towle, 16 Nebr., 194.

General Statutes, 1873, p. 923, sec. 68.

Larson v. Dickey, 39 Nebr., 463.

Session Laws, 1879, p. 327, sec. 127.

Form of tax deed.

Hand v. Phillips, 18 Nebr., 593.

This was an action to foreclose a mortgage containing a stipulation for an attorney's fee. The mortgage was dated February 18, 1879. On February 24, 1879, the governor approved the act repealing the act of February 18, 1873, providing for stipulated attorney's fee. General Laws, 1873, p. 98. This repealing act took effect June 1, 1879.

Dow v. Updike, 11 Nebr., 95.

This was a suit on a note, providing for an attorney fee, dated

July 20, 1879, fifty days after the repealing act went into effect. The opinion is to the effect that in the absence of a statute no recovery of a stipulated attorney's fee can be had.

Under the old law it was held that attorney fees must be taxed as costs and kept separate from the judgment. *Rich v. Stretch*, 4 Nebr., 186; *Hendrix v. Rieman*, 6 Nebr., 516; *Heard v. Bank*, 8 Nebr., 10.*

Hardy v. Miller, 11 Nebr., 395. See Hand v. Phillips, *supra*.

Heard v. Dubuque County Bank, 8 Nebr., 10, 15.

Session Laws, 1881, p. 212.

Larabee v. Klosterman, 33 Nebr., 150, 157.

Assignment of error in motion for new trial.

Howard v. Lamaster, 11 Nebr., 582. See Haller v. Blaco, *supra*.

Hewerkle v. Gage County, 14 Nebr., 18.

Session Laws, 1885, p. 395, ch. 106.

Liability of county for defendant's witness's fees where he is indicted for a felony.

Interstate Savings & Loan Ass'n v. Strine, 59 Nebr., 27.

On appeal from district court to the supreme court, a finding of the trial court on substantially conflicting evidence will not be disturbed.

The foregoing is simply the doctrine laid down in numerous cases.

The legislature of 1903 enacted the following with an emergency clause: "That in all appeals from the district court to the supreme court in suits in equity, whether now pending or hereafter to be brought to said court, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Senate File 108. Approved April 10, 1903. Session Laws, 1903, p. 631. *Quære:* Is this a legislative mandamus?

Johnson v. Hahn, 4 Nebr., 139.

Session Laws, 1877, p. 43.

Kittle v. Shervin, 11 Nebr., 65.

County treasurer's authority to sell real estate of taxpayer before exhausting personalty.

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*A stipulation for an attorney fee in excess of the legal rate of interest is usurious. *Toole v. Stephen*, 4 Leigh [Va.], 581, cited in *Dow v. Updike*, *supra*. Under the old practice an attorney fee could only be recovered by action of the court. *Rosa v. Doggett*, 8 Nebr., 48. —W. F. B.

Kemerer v. State, 7 Nebr., 130.

Session Laws, 1879, p. 366, sec. 40.

State v. Baushausen, 49 Nebr., 558.

Power of county board to reconsider a claim.

McCormick v. Keith, 8 Nebr., 140, 143. See Heard v. Dubuque County, *supra.*

Midland P. R. Co. v. McCartney, 1 Nebr., 398. See Brunswick v. McClay, *supra.*

South Platte Land Co. v. Buffalo County, 7 Nebr., 253.

Section 70, chapter 77, Compiled Statutes, amended 1883. Session Laws, chapter 67.

Suydam v. Merrick County, 19 Nebr., 155, 159.

State v. Edwards, 26 Nebr., 701, 702.

Equalization of assessment.

State v. Brodboll, 28 Nebr., 254.

Where portions of different school districts go to make up the territory included in a municipal corporation, license moneys collected for the school fund in such municipal corporation, is to be distributed equally among such school districts.

Session Laws, 1895, ch. 63.

In cities and villages where corporate limits form, in whole or in part, more than one school district all money derived from fines, penalties and licenses shall be apportioned to these several districts in proportion to the number of persons of school age residing in each district.

State v. White, 29 Nebr., 288. See State v. Brodboll, *supra.*

Thompson v. Merriam. See Haller v. Blaco, *supra.*

Woods v. Commissioners of Colfax County, 10 Nebr., 552.

County not liable for negligence in not repairing bridge.

Session Laws, 1889, ch. 7.

County made liable by legislative enactment.

Hollingsworth v. Saunders County, 36 Nebr., 141.

County held liable except in case of contributory negligence on the part of the person injured.

Ordinances, Statutes and Constitutional Provisions Cited and Construed.

NEBRASKA.

ORDINANCES.

City of Omaha.

PAGE

No. 4462. Garbage 712
sec. 1. Removal of garbage without contract with city. 712, 713, 714
sec. 11. Definition of "garbage"..... 714

SESSION LAWS.

1855.

P. 75, sec. 180. Acknowledgment of illegitimate child; right of inheritance 589

1856.

P. 125, sec. 6. Acknowledgment of illegitimate child; right of inheritance 589

1860.

P. 64, sec. 2. Acknowledgment of illegitimate child; right of inheritance 589

1887.

P. 470, ch. 47. Bureau of labor.....600, 601, 602, 604
sec. 4. Labor commissioner; collection of statistics.. 604
P. 540, ch. 60. Board of transportation 602

1891.

P. 272, ch. 33. Mutual insurance companies..... 810

1893.

P. 164, ch. 24, sec. 9. Penalties for violation of "Maximum Freight Rate Law".....680, 681

1897.

P. 208, ch. 28. Election of clerk of district court..... 500
P. 247, ch. 39. Industrial statistics; collection by assessor....600, 601
P. 377, ch. 94, sec. 9. Adoption of children; right of inheritance... 656

1899.

P. 207, ch. 47. Bureau of insurance; taxation..... 601

1901.

P. 412, ch. 53. Taxation of peddlers 365

REVISED STATUTES.

1866.

PAGE
P. 496, sec. 580. Review of proceedings of inferior tribunals...660, 663
P. 536, secs. 796-801. Adoption of children; decree of court....659, 660
P. 536, sec. 797. Terms of adoption; right of inheritance..... 661
P. 537, sec. 800. Decree of adoption; effect 667

GENERAL STATUTES.

1873.

P. 241, ch. 13, sec. 53. Disbursement of funds by county treasurer.. 422
P. 448, ch. 35. Internal improvements; bonds; payment..... 421
P. 649, ch. 57, sec. 797. Adoption of children; right of inheritance, 649, 651

COMPILED STATUTES.

1893.

Ch. 12*a*, sec. 78. Cities, special taxes; sewer tax.....233, 235, 236, 237
sec. 85. Special taxes; equalization 235, 236
Ch. 39*b*, sec. 4. Industrial statistics; collection by labor commissioner 604
sec. 5. (Cobbey's Consolidated Statutes, sec. 2066.) Industrial statistics; collection by labor commissioner 600, 603, 604
sec. 7. (Cobbey's Consolidated Statutes, sec. 2068.) Posting of labor laws 600, 603

1897.

Ch. 43. Insurance companies 810
sec. 56. Powers and by-laws of insurance companies..... 811
sec. 62. Insurance companies; assessments made at stated intervals 812

1901.

Ch. 12*a*, sec. 54. Metropolitan cities; protection of public health.. 714
sec. 63. Equalization of assessments 514, 519
sec. 167. Appointment of fire and police commission..694, 695
Ch. 14, art. 1, sec. 46. Village trustees; general powers..... 369
sec. 69, subdiv. 8. Business licenses 369
subdiv. 12. Enforcement of ordinances 369
sec. 79. Passage of ordinances; titles..... 369
Ch. 16, sec. 97. Deposit of compensation money for railroad right of way 65
Ch. 18, art. 1, sec. 28. Submission of proposition to issue bonds.. 37
sec. 37. Claim against county; appeal..... 74
sec. 39. Transcript on appeal from county board... 74
sec. 91. Disbursement of funds by county treasurer.. 420
Ch. 19, sec. 17. Salary of supreme court reporter.....27, 29, 31
Ch. 20, sec. 18. Transcript of judgment of probate court; issuance of execution 291
sec. 19. Probate court; judgment; execution..... 291
sec. 42. Probate jurisdiction; appeal 220, 224

PAGE

Ch. 23, sec. 30. Realty; order of descent..... 388
sec. 30, subdiv. 3. Order of descent; brothers and sisters, 387, 388
subdiv. 5. Order of descent; next of kin..... 388
sec. 31. Acknowledgment of illegitimate child; right of inheritance 581, 582
sec. 127. Wills; signature 157
sec. 164. Executor's bond 211
sec. 179. Administrator's bond 211
sec. 214. Decedent's estate; examination of claims against estate 266, 270, 275
sec. 217. Time allowed for the presentation of claims, 261, 265, 270
sec. 218. Extension of time for presentation of claims, 265, 266, 269, 270, 271, 272, 275
sec. 219. Renewal of commission...265, 266, 269, 270, 271, 272, 275
sec. 220. Failure to present claim; examination by judge.. 270
sec. 221. Claims; set-off 264, 266
sec. 226. Claims barred 266, 597
sec. 255. Distribution of assets of insolvent estate; liability of executor 289
sec. 260. Allowance of contingent claim which has become absolute 598
sec. 261. Contingent claim; payment..... 598
sec. 262. Payment of contingent claim becoming absolute after time for presentation of claims..... 598
sec. 263. Recovery of contingent claim from heirs..... 598
sec. 266. Liability of heirs for contingent claim..... 598
sec. 289. Assignment of estate..... 290
sec. 290. Decree distributing estate 290
sec. 291. Decree distributing estate 290
sec. 311. Probate bond 220, 222
sec. 312. Suit on executor's or administrator's bond..... 291
Ch. 28, sec. 11. Justice's fees; attendance upon trial of cause..298, 299
Ch. 32, sec. 14. Chattel mortgage 169, 170
sec. 15. Failure to discharge mortgage of record; penalty, 166, 167, 170
sec. 20. Fraudulent intent question of fact....766, 769, 770, 771
sec. 26. Instruments required to be in writing....166, 169, 170
Ch. 36, sec. 4. Conveyance of homestead 254
sec. 15. "Head of family"..... .....296, 297
sec. 17. Homestead succession; homestead exemption, 292, 296, 297
Ch. 37. Bastardy proceedings; settlement 548
Ch. 43, sec. 42. Canceling insurance policies 140
sec. 91. Fraternal beneficiary association; definition...800, 804
Ch. 45, sec. 14. Submission of proposition to issue bonds.....35, 36

PAGE

Ch. 50. Intoxicating liquors 383, 877
sec. 3. Intoxicating liquors; license; remonstrance.....383, 384
sec. 11. Disposing of liquors without license; penalty.... 877
sec. 14. Selling of intoxicating liquors on Sunday.....557, 558
sec. 20. Unlawful sale of liquors; complaint.....875, 877, 880
sec. 25. Liquor-license; petition; signatures of freeholders, 383, 384
Ch. 52, sec. 1. Marriage; civil contract; consent of parties..... 303
Ch. 53, sec. 1. Separate property of married woman; necessaries furnished family 858
sec. 2. Contracts of married women..... 146
Ch. 72, sec. 3. Damages to passengers on railroad, 636, 637, 638, 643, 644, 645, 646, 648
Ch. 73, sec. 55. Legal title to real estate in mortgagor..... 337
sec. 57. Quieting title 619
sec. 74. Contract with agent or broker..... 258
Ch. 77, art. 1, sec. 4. Taxes; valuation of personalty..... 518
sec. 5. Realty; valuation for taxation..... 518
sec. 32. Capital stock of corporation; listing for assessment 514, 517, 519
sec. 103. Payment of taxes; entry made by collector 34
sec. 104. Tax receipt; contents 34
sec. 106. Payment of taxes; entry on treasurer's cash book 34
sec. 107. Numbering of tax receipts..... 34
sec. 108. Indorsement of payment on tax list..... 34
sec. 109. Notice of sale of real estate; statement of amount due 488, 489
sec. 111. Payment at tax sale; resale of property..31, 32
sec. 144. Restraining collection of taxes..... 780
sec. 152. Taxing peddlers 342, 344, 348, 366
sec. 153. Peddlers' license 342, 344
sec. 154. Peddling without license; penalty, 342, 343, 344, 347, 348
art. 4. Foreclosure of tax liens by county commissioners.. 427
art. 5, sec. 4. Foreclosure of tax lien; service of process, 533, 534, 535, 541, 543
sec. 6. Foreclosure of tax lien; title of purchaser, 534, 535, 541, 542, 543
art. 6. Payment of judgments against municipal corporations 419
sec. 2. Payment of judgment against county; tax.. 421
Ch. 78, sec. 117. Defective bridge; recovery of damages; limitation 627, 628
Ch. 89. Drainage of lands 846
art. 1, sec. 16. Drainage; prosecution of improvements during pendency of appeal; bond..... 846
Ch. 93*a*, art. 2, sec. 39. Eminent domain; irrigation..... 546

CODE OF CIVIL PROCEDURE. PAGE

Sec. 1. Construction of Code..... 664
Sec. 17. Time to commence actions; legal disabilities; insanity.. 629
Secs. 68 86*b*. Service of summons; corporations.....800, 805
Sec. 92. Petition; prayer for relief..... 753
Sec. 106. Cross-demands deemed compensated 98
Sec. 113. Verification of pleading 513
Sec. 128. Pleading; conditions precedent.....107, 108
Sec. 192. Return of property in replevin action; damages..... 439
Sec. 193. Replevin; property not returned..... 15
Sec. 195. Order of replevin; power of sheriff..... 13
Sec. 314. New trial; definition 702
Sec. 315. "Smallness of damages"; new trial.....127, 128
Sec. 316. Time of making application for new trial..... 52
Sec. 318. New trial; newly-discovered evidence..... 611
Sec. 328. Competency of witnesses; communications between husband and wife 591
Sec. 329. Competency of witnesses; interest of parties; testimony of transactions with decedent 94, 151, 153
Sec. 331. Husband and wife as witnesses..... 591
Sec. 332. Competency of witnesses; husband and wife; communications 591
Sec. 333. Professional communications; physicians.....39, 46
Sec. 334. Professional communications; waiver of rights..... 46
Sec. 339. Evidence; whole matter given..... 748
Sec. 419. Foreign statutes; authenticity; admission as evidence, 469, 471
Sec. 420. Foreign statutes; evidence of authenticity..... 469
Sec. 428. Definition of judgment 700
Sec. 432. Default; judgment 106, 110
Sec. 482. When judgment becomes dormant.....871, 873
Sec. 491*b*. Appraisement of lands; how made.....472, 475
Sec. 491*d*. Copy of appraisement; filing..... 76
Sec. 497. Execution sale; notice.....73, 476
Sec. 503. Execution sale; where held 341, 342
Sec. 535. Execution; order to disclose property; arrest of debtor, 111, 112
Sec. 561. Justice of the peace; appeal; filing of transcript..... 871
Sec. 562. Justice judgment; transcript; lien..... 871
Sec. 580. Review of proceedings of inferior tribunal.....660, 663
Sec. 582. District court; error; review..... 411
Sec. 586. Transcript for review 431
Sec. 588. Supersedeas 174, 373
Sec. 592. Error proceedings; when commenced..... 726
Sec. 594. Reversal of judgment in supreme court..... 427
Sec. 602, subdiv. 3. Vacation of judgment after term.....89, 90
subdiv. 7. Vacation of judgment after term; "casualty or misfortune" 509, 512

PAGE

Sec. 603. Petition to vacate judgment; verification.....509, 512, 513
Sec. 607. Suspension of proceedings; injunction 91
Secs. 612-616. Judgment against sureties for cost.....862, 863
Sec. 616. Judgment against sureties for cost..... 864
Sec. 646. Mandamus; remedy in ordinary course of law.....497, 498
Sec. 647. Form of writs of mandamus..... 522
Sec. 653. Mandamus; pleadings; trial 522
Sec. 675. Actions in equity; appeal.....409, 411
Sec. 676. Trial to court; testimony reduced to writing..... 498
Sec. 677. Appeal undertaking 173
Sec. 710. Rival claimants to office; information..... 501
Secs. 796-801 (1866). Adoption of children; decree of court....659, 660
Sec. 797 (1866). Terms of adoption; right of inheritance..... 661
Sec. 800 (1866). Decree of adoption; effect..... 667
Sec. 959. Adjournment of trial on motion of justice..... 299
Sec. 1007. Appeal undertaking; surety 860
Sec. 1014. Liability of surety on appeal undertaking..... 861
Sec. 1047. Execution; when issued 871

CRIMINAL CODE.

Sec. 241. Sabbath breaking 316, 320
Sec. 254. Construction of words not defined 320
Secs. 267-282. Procedure for the prevention of crime.....77, 79
Sec. 274. Appearance of parties in district court; examination... 78
Sec. 275. Failure to give security; commitment..... 78
Sec. 276. Judgment for costs 78, 79
Sec 500. Costs; payment; commitment.....77, 79
Sec. 501. Conviction; costs 77, 79

CONSTITUTION.

Art. 1, sec. 7. Search and seizure 878
sec. 21. Property rights 65
Art. 2, sec. 1. Distribution of powers 684, 696
Art. 3, sec. 11. Subject and title of bill.....439, 600, 603
sec. 22. How money is drawn from the treasury.....24, 25, 26
Art. 5, sec. 26. Executive state offices 600, 601, 602
Art. 6, sec. 2. Jurisdiction of supreme court..... 680
sec. 8. Supreme court reporter; salary.....27, 31
sec. 20. Compensation of officers 26
Art. 8, sec. 5. License moneys; school fund.....361, 362
Art. 9, sec. 1. Taxation 343, 348, 514, 520
Art. 16, sec. 25. Payment of salaries.....24, 27, 28

OTHER STATES.

CALIFORNIA.

Civil Code, sec. 1387. Acknowledgment of illegitimate child, right of inheritance 586, 588

IOWA. PAGE

Code (1882), sec. 3639. Competency of witnesses; interest of parties 156
Code, sec. 1244. Condemnation of land for railroad right of way; deposit of compensation with sheriff..... 66

KANSAS.

Bill of Rights, sec. 16. Imprisonment for debt..... 359

MAINE.

Laws 1838, ch. 338. Acknowledgment of illegitimate child; right of inheritance 588
Laws 1889, ch. 298. Peddlers; peddling without a license..... 350

MARYLAND.

Constitution, 1851, art. 3, sec. 44 (1867, art. 3, sec. 38.). Imprisonment for debt 357
Laws 1854, ch. 138. Lotteries; fine for violation of act..... 357

MICHIGAN.

2 Howell's Statutes, sec. 7516. Admissibility of evidence; communications to physicians 47
2 Howell's Statutes, sec. 7545. Witnesses; interest of parties; testimony as to transactions with decedent.....154, 155

NEW YORK.

Revised Statutes 1875 (part 2), ch. 7, title 3, sec. 4. Fraudulent intent; question of fact.....770, 771
Code of Civil Procedure, 829. Witnesses; interest of parties; testimony of transactions with decedent..... 155

NORTH DAKOTA.

Constitution, sec. 15. Imprisonment for debt..... 358

OHIO.

Constitution, art. 1, sec. 15. Imprisonment for debt..... 356
2 Bates' Annotated Statutes, sec. 5617. Settlement of proceedings in bastardy 548

OKLAHOMA.

Statutes, 1893, ch. 16, art. 6, sec. 7. Legal rate of interest.....463-472

PENNSYLVANIA.

Constitution, art. 3, sec. 13. Increase of salary during term of office 29
art. 5, sec. 22. Orphans' courts 29
Laws 1874, p. 207, act No. 134, sec. 5. Orphans' courts; salary of clerk 29
Laws 1887, p. 22, act No. 19. Orphans' courts; repeal of provision for salary of clerk 29

WISCONSIN. PAGE

Revised Statutes, 1849, ch. 70, sec. 6. Decedents; extension of time for presentation of claims against estate.....268, 272
———, sec. 7. Renewal of commission.....268, 272

FEDERAL.

STATUTES AT LARGE.

Vol. 1, p. 84, ch. 20, sec. 22. Time to commence error proceedings.. 731
Vol. 30, p. 455, ch. 448, sec. 17. Exemption from stamp tax....378, 580

REVISED STATUTES.

Sec. 905. Proof of statutes of foreign state.....469, 471
Sec. 5198. Penalty for taking usurious interest 855

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1902.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.

HON. SILAS A. HOLCOMB, HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT NO. 1.
HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT NO. 2.
HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT NO. 3.
HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

ANNA M. WEBSTER v. JOSIAH L. KECK.

FILED FEBRUARY 19, 1902. No. 11,055.

Commissioner's opinion, Department No. 1.

1. Bailee: LIEN: AGREEMENT. "A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which his possession was obtained." *Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.*, 49 Nebr., 869.

2. ———: ———: ———: TENANT. Agreement to permit tenant under an expiring lease to leave his goods *in statu quo* for an agreed

sum of $10, payable monthly, with no right to retain goods to end of month, and no right to demand payment on removal reserved by the contract, creates no lien on the goods for unpaid storage.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

William Gaslin, for plaintiff in error.

E. C. and *H. V. Calkins, contra.*

HASTINGS, C.

In this action of replevin, at the close of the testimony, the court orally instructed for a verdict in favor of defendant: "That we find that at the commencement of this action the defendant had the right of possession of the goods described in the petition and special interest therein and that the value of his special interest is the sum of $85 and assess his damages for the detention at one cent." Plaintiff in error filed a motion for a new trial, with ten assignments of error; the first six being to the point that the state of the evidence did not warrant the action of the court; the seventh being for errors of law occurring at the trial; the eighth, that there was no finding as to the value of the property; the ninth, that there was no finding as to ownership; and tenth, that the verdict is not supported by the pleadings, as defendant merely denied generally. These assignments are renewed in the petition in error, with the additional one that the court instructed orally for the verdict. It is not necessary to consider this, as no objection on that ground was taken in the lower court either at the time or in the motion for a new trial. It seems equally unnecessary to examine the complaints as to the form of the verdict. It has been repeatedly held that a defendant under a general denial may prove and recover for attachment liens upon the property replevied. *Horkey v. Kendall,* 53 Nebr., 522, 527; *Merrill v. Wedgwood,* 25 Nebr., 283. It is hard to see why a warehouseman's lien, if it exists, should not be equally privileged to

be shown without pleading. It has also been expressly held that a finding for defendant that only fixes his right of possession and the value of his interest is sufficient, if within the value of the property as shown by the evidence. *Heffley v. Hunger,* 54 Nebr., 776. In this case we find no evidence of any value in the property, but it is alleged by plaintiff as being something over $100 at the commencement of the action, and plaintiff can hardly be heard to claim its value would not support a finding of an $85 interest in defendant.

The question mainly argued by counsel is whether or not any warehouseman's lien was in fact shown. Plaintiff claims that no actual keeping of a public warehouse was shown, and that defendant's evidence, so far as it went, tended merely to show a special contract for storage by the month, and no lien arose. Counsel for defendant seems to concede that, if there was any agreement inconsistent with a retention of possession on the part of defendant until payment, there can be no lien. The contention of plaintiff is that the agreement for payment by the month is inconsistent with such retention; that under it there could be no claim for payment until the expiration of a month, and no agreement that the property should remain for that length of time was shown. It seems that plaintiff's husband had been tenant of the building, and, at the close of his tenancy, asked leave to permit this property to remain until such time as it should be required to be moved. The property consisted of bricks, lumber, and a boiler and a large sheet-iron smokehouse, and was scattered all over the house, and occupied a large share of the floor. The "house" was known as "The Cold Storage Building." Under this arrangement, plaintiff's husband paid $10 monthly for two months, up to March 1, 1897, and some eight or nine months later she demanded the goods, and was refused them until storage should be paid "according to agreement." She then commenced this action. The action was commenced November 18, and the property removed a few days later. If the fact that plain-

tiff's husband, in arranging that these goods, which apparently had been in use in the building, might remain, agreed that $10 per month should be paid for such storage, created a lien for storage at that rate, the $85 was due, and a charge on the goods. The agreement does not seem to have been understood merely as one fixing the rate of payment. It was carried out for two months by the payment of $10 each month; tending to show that this was not a contract where goods were left in store, to be paid for on delivery. Plaintiff cites *Chase v. Westmore,* 5 M. & S. [Eng.], 180. In this case Lord Ellenborough held that, where grain had been delivered to be ground at 15 shillings a load, the fact that a price had been stipulated did not waive a lien, and that, as no time for payment had been fixed, payment to be made on delivery was presumed, and therefore a right to retain the property for payment remained. He indicates that a fixed time of payment would defeat the lien. *Cowell v. Simpson,* 16 Ves. [Eng.], 275, is also cited. In this case, Lord Eldon held that an attorney, in making a settlement with a client, and taking security for the amount due, waives his lien, and after the security has become due, and he has done other business, he has no lien on the papers in his hands for more than has accrued since the settlement. The implied contract to pay when the business was closed or taken away, having been once done away with, could not be renewed by mere action of law. *Walker v. Birch,* 6 Term Rep., 258, is simply a holding by Lord Kenyon that where cotton factors had received cotton on an express agreement to sell it and pay over the proceeds to the order of the depositor, and they sold it, no balance due from the depositor on other accounts could be charged against it inconsistently with the receipt. In *Chandler v. Belden,* 18 Johns. [N. Y.] 157*, a ship owner, who had agreed to carry salt from Turk's Island to New York for a certain price—$500 in advance, and the rest in equal payments at 30, 60 and 90 days after arrival in quarantine in New York—was held to have converted the

salt, in selling it for unpaid freight, though consignees had become insolvent. He was held to have no lien, because of having stipulated a time and manner of payment, especially as the time was subsequent to that of the agreed delivery of the salt. *Stoddard Woolen Manufactory v. Huntley,* 8 N. H., 441, is a case where a clothier, who was to receive his pay quarterly, was held to have no lien upon flannels dressed by him. His agreement to get pay quarterly was held to waive his right to demand his pay before surrendering the goods, which were presumably to be returned as finished and called for. The fact that payment had not been made as agreed could not be held to revive his lien. *Cummings v. Harris,* 3 Vt., 244, is trover for sheep which were to be kept and cared for till a certain time at 67 cents a head. Defendant, after caring for them and delivering their wool under his contract, refused to give them up until he should get his pay. The trial court was asked to instruct that he had no right to hold them, and refused to do so. This is held error. He had contracted for a definite sum, and reserved no lien. There was no stipulation for payment before they were taken away, and apparently none to leave them the full time. It does not appear whether or not they were kept the full time. In *Crawshay v. Homfray,* 4 B. & Ald. [Eng.], 50, a usage to pay a wharfinger at Christmas, whether the property was removed sooner or not, was held to prevent a lien on property that remained after that time without payment. See, also, *Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.,* 49 Nebr., 869. In this last case the fact that goods were held under a contract to be shipped on demand, and that a sight draft was to be drawn for any amount due, seems to be the main reason for holding there was no right to retain possession till payment and so no lien. The making of an agreement for monthly payments, with no agreement that the property should remain that long, or for payment when it should be removed, would seem to be inconsistent with a lien on defendant's part. If such a con-

tract is derivable from the evidence, the case should have been submitted to the jury on this question. If the contract, under the evidence, can not be regarded as one for general storage merely at a fixed rate, with no time of payment agreed upon, then the instruction should have been for plaintiff. It seems clear from the cases cited that if payment is to be made at a specified time, and there is no agreement that the goods remain till that time, the lien arising from an implied understanding that payment is to be made before delivery of the goods can not arise. Some of these cases—especially the older ones—use language implying that any specific contract does away with the implied one. It seems, however, to be clear that this is the case only when the express agreement is of such a nature as to indicate the parties did not intend also to be bound by the implied one to pay on delivery.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HENRY M. SNELL, ADMINISTRATOR, APPELLANT, V. WILLIAM H. MARGRITZ ET AL., APPELLEES.

FILED FEBRUARY 19, 1902. No. 11,123.

Commissioner's opinion, Department No. 1.

1. **Assignment of Note: MORTGAGE.** An assignment of a note secured by a mortgage, carries with it the mortgage, and operates as a transfer thereof, without a formal written assignment.

2. **Payment: SURRENDER: DEMAND: RISK.** A purchaser of land incumbered by a mortgage showing that it was given to secure a negotiable note paid the amount of said note to the original mortgagee, there being no assignment of the mortgage of record, and secured from the mortgagee a release of the mortgage.

Held, that in paying to the original mortgagee before the note was due without demanding a surrender of the note, he assumed the risk that it might be held by some one other than the mortgagee.

APPEAL from the district court for Colfax county. Heard below before HOLLENBECK, J. *Reversed.*

Flansburg & Williams, for appellant.

George H. Thomas, contra.

DAY, C.

This suit was instituted in the district court of Colfax county to foreclose a mortgage upon certain lands owned by the defendants Reisch. Upon the trial the court found the issues in favor of the defendants and dismissed the suit. The plaintiff appeals.

The facts necessary to an understanding of the questions raised by this appeal are, briefly, as follows: On November 14, 1887, Wm. H. Margritz and Lucinda Margritz, his wife, being the owners of the land in suit, executed and delivered their negotiable promissory note for $1,000 to the order of C. H. Toncray, due and payable November 1, 1892. To secure the payment of this note, they executed the mortgage which is now sought to be foreclosed. The title to the lands subsequently passed from Margritz to Milo L. Carpenter, who, on October 24, 1889, conveyed them to the defendants Reisch. Toncray indorsed the note in blank, and each of the interest coupons thereto attached, and delivered them and the mortgage securing the same, together with the abstract of title, to a broker in New Haven, Connecticut, who, on May 1, 1888, sold said note and mortgage for full value to George Bull, who ever since has been the owner and holder of said note and mortgage. Upon the maturity of the note, the same not having been paid, Bull instituted this suit to foreclose the mortgage. While the suit was pending, Bull died, and Henry M. Snell, administrator of his estate, was substituted as party plaintiff. Carpenter conveyed the land

to Frank and George Reisch by a deed dated October 21, 1889, but which was not acknowledged till October 24, 1889. Apparently as part of the transaction, Frank Reisch, who was conducting the business, paid to C. H. Toncray the amount due upon the note and mortgage, and procured from him a release of said mortgage, dated October 23, 1889. This release and the deed were filed for record at the same time on the following day. The only evidence which tends to elucidate the transaction or to explain it in any manner is the testimony of Carpenter, who swears that Frank Reisch, after deducting the mortgage indebtedness from the agreed price, gave him a check for the balance, to wit, $1,332.60. The witness says: "I went to Fremont with Mr. Reisch and saw Mr. Toncray in regard to the claims that he had on the land. I think he made his arrangements with Mr. Toncray with reference to the payments. I know that I never received any part of the mortgage money." The testimony of this witness makes it clear that Reisch settled with Toncray, and obtained the release of the mortgage which he filed with his deed. There is no question of agency involved in this transaction. The question presented by the record is whether a party may safely pay the amount of a negotiable note and mortgage, before due, to the original mortgagee, without a surrender of the note and mortgage, there being no assignment of the mortgage on record. It has been held by this court that an assignment of the note secured by a mortgage carries with it the mortgage, and operates as a transfer thereof without a formal or written assignment. *Goodwin v. Cunningham,* 54 Nebr., 11; *Anderson v. Kreidler,* 56 Nebr., 171; *Cram v. Cotrell,* 48 Nebr., 646. The mortgage was recorded, and showed on its face that it was given to secure a negotiable note. Reisch, in settling with Toncray upon the supposition that he was still the owner and holder of the note and mortgage, did so at his peril, and assumed the burden of showing that he was the proper person to receive it. In *Richards v. Waller,* 49 Nebr., 639, this principle is recognized, as shown from the following

excerpt from the syllabus: "One who makes payment to a second person, not the owner of a note and not in possession of it, of money to be applied in payment of the debt thereby evidenced, assumes the burden of proving that the party to whom payment was made was empowered to collect the money." *South Branch Lumber Co. v. Littlejohn,* 31 Nebr., 606. In *Griffith v. Salleng,* 54 Nebr., 362, it is said, quoting from the syllabus: "A purchaser of land incumbered by a mortgage showing on its face that it was given to secure a bond with negotiable coupons attached representing the interest instalments, paid to the holder of the bond the amount thereof, took from him a release of the mortgage and paid to his vendor the remainder of the purchase price. Some of the interest coupons had been assigned to a third person and were overdue and unpaid. *Held,* That the holder of the interest coupons might maintain an action to foreclose the mortgage for default in their payment." We are cited by the appellee to the cases of *Whipple v. Fowler,* 41 Nebr., 675; *Cram v. Cotrell,* 48 Nebr., 646; *Bullock v. Pock,* 57 Nebr., 781, and *Porter v. Ourada,* 51 Nebr., 510, and kindred cases, where the rule is announced that, where a debt secured by a mortgage has been assigned, but no assignment of the mortgage is placed on record, an innocent purchaser of the mortgaged premises will be protected by a release of the mortgage executed by the original mortgagee. The rule above announced, however, has no application to the facts now being considered. In this case there was no reliance upon the record that the mortgage had been satisfied. Not only did Reisch know of the existence of the mortgage, but undertook personally the responsibility of paying it and discharging the lien. In paying the mortgage to the original mortgagee without demanding the note, he assumed the risk that it might be held by some one other than the original mortgagee.

Under the evidence in this case we think the court should have entered a decree of foreclosure for the plaintiff for the amount prayed in the petition. We therefore

recommend that the judgment be reversed with directions to enter a decree of foreclosure for plaintiff for the amount prayed in the petition.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and cause remanded, with directions to enter a decree of foreclosure for plaintiff for the amount prayed in the petition.

REVERSED WITH DIRECTIONS.

JOHN HOPKINS, WARDEN, V. STATE OF NEBRASKA, EX REL. OMAHA COOPERAGE COMPANY.

FILED FEBRUARY 19, 1902. No. 11,020.

Commissioner's opinion, Department No. 2.

1. **Mandamus: REPLEVIN: WARDEN OF PENITENTIARY.** Where an order of replevin was issued against the warden to recover possession of specific personal property situated within the yard of the penitentiary of this state, and he, as such officer, refused to allow the sheriff holding such process for service to enter that institution to make proper service of and execute the writ, *held*, that it was the warden's duty to permit proper service and execution thereof, and mandamus would lie to compel him to perform such duty.

2. **Adequate Remedy at Law.** Facts in this case examined, and it is *held* that there was no such adequate remedy at law in the case as would make it necessary to deny the writ of mandamus.

3. **Affidavit: ALTERNATIVE WRIT: SUBMISSION UPON PLEADINGS.** Where the affidavit, the alternative writ of mandamus and the return of the respondent thereto present no disputed question of fact for trial, and the case is properly submitted on the pleadings alone, a judge of the district court has jurisdiction at chambers to allow the peremptory writ. *Linch v. State*, 30 Nebr., 740; *Byrum v. Peterson*, 34 Nebr., 237.

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

Constantine J. Smyth, Attorney General, Willis D. Old

ham, Deputy, Paul Pizey and *George F. Corcoran,* for plaintiff in error.

Ed P. Smith, contra.

BARNES, C.

This action comes to this court on a petition in error from the judgment and order of the district court for Lancaster county awarding a writ of peremptory mandamus against the plaintiff in error. The record shows that this action was commenced in the name of the state, on the relation of the Omaha Cooperage Company, against the plaintiff in error herein. The affidavit of relator and the alternative writ set forth, among other things, that a certain contract prior thereto had been entered into between the Lincoln Cooperage Company and the state of Nebraska, under which the Lincoln Cooperage Company had erected and moved within the yards of the Nebraska penitentiary a large amount of machinery and materials to be used in the manufacture of cooperage under the contract; that at the expiration of the contract the Lincoln Cooperage Company was notified by the warden to remove the machinery and property from the yards and grounds of the penitentiary; that thereafter the Lincoln Cooperage Company sold its property so situated within the penitentiary yard to the Omaha Cooperage Company; that the Omaha Cooperage Company was permitted to remove a portion thereof, but two hundred and seventy-two thousand staves still remained in the yard, and the warden refused to permit the Omaha Cooperage Company to remove them. The record further shows by the affidavit and alternative writ, that after the warden refused to permit the removal of the two hundred and seventy-two thousand staves the Omaha Cooperage Company commenced an action in the district court for Lancaster county to replevy the staves from the plaintiff herein, John Hopkins, the warden of the penitentiary, and filed its affidavit and petition in due form of law; that upon the filing of said

petition and the proper affidavit, a writ of replevin was duly issued out of the office of the clerk of the district court of Lancaster county, directed to the sheriff of said county, ordering him to seize and take into his custody the property therein described, to wit, two hundred and seventy-two thousand staves, and deliver them to the Omaha Cooperage Company, the plaintiff therein; that the sheriff attempted to execute the writ and take said property into his possession; that the property was stored within the grounds and walls of the penitentiary yard, and the defendant, John Hopkins, plaintiff herein, as warden of the penitentiary, refused to permit the sheriff to enter upon or into the yard where the staves were stored or piled, and thus prevented the sheriff from executing the writ of replevin, and from taking possession of the property and turning it over to the plaintiff, the Omaha Cooperage Company, thereunder. It is further shown that the said Hopkins did not claim any title in the staves, nor did he claim any lien thereon by virtue of any contract with the Lincoln Cooperage Company or otherwise. The only claim made by the warden was, that the Lincoln Cooperage Company owed the state an unsettled amount due upon its contract heretofore mentioned. The record further shows that the staves were located and piled in the yards of the penitentiary in such a way that they could be removed without in any way interfering with, disturbing or molesting the prisoners confined in the penitentiary, and without in any way rendering liable their escape, and without interfering with the care, control or discipline of the same; that they were so located that no inconvenience or wrong could result to the control or management of the penitentiary or its inmates by permitting the sheriff to properly and lawfully execute the writ of replevin. The return of the respondent to the alternative writ of mandamus admitted all the allegations of fact set forth in the affidavit of the relator and in the alternative writ, except the genuineness of the sale of the property. In justification of his action in refusing to

permit the sheriff to enter and serve the writ of replevin and execute the same by taking possession of the staves and turning them over to the plaintiff in the replevin suit, the respondent, the warden of the penitentiary, simply answered that it was not his duty to permit the sheriff to enter, and denied that the sheriff had any legal right to enter upon the penitentiary grounds for the purpose of executing the writ. It was also stated in the return that the Lincoln Cooperage Company was indebted to the state of Nebraska, as a further justification of his refusal to permit the sheriff to enter and execute his writ. On the hearing before Judge Holmes, which was had in vacation, the judge found that there were no material facts controverted by the respondent; that the question of the validity of the sale could be litigated alone in the replevin action. No evidence was introduced or offered, but the case was submitted upon the affidavit, the alternative writ, and the answer of the respondent thereto. The judge therefore granted a peremptory writ of mandamus against the warden, the plaintiff herein, compelling him to permit the sheriff of Lancaster county to enter into and upon the yard and grounds of the penitentiary for the purpose of executing the writ of replevin then in his hands. From this order the respondent has prosecuted error to this court.

1. It is contended by the respondent that it was his duty, as warden of the penitentiary, to exclude and keep without the walls of that institution every person not specifically designated in the statutes as entitled to admission therein; that the sheriff, armed with a writ of replevin for the recovery of specific personal property situated within the prison yard, issued by the district court of Lancaster county, was not so designated in the statutes, and therefore he had the right, and it was his duty, to exclude such officer, and prevent the execution of the process of the court. We can not so hold. Section 195 of the Code of Civil Procedure specifically provides that when the sheriff or other officer has in his hands a writ of

replevin he "may break open any building or inclosure in which the property claimed, or any part thereof, is concealed; but not until he has been refused an entrance into said building or inclosure and the delivery of the property, after having demanded the same." It would thus seem that the sheriff of Lancaster county was empowered to break into the inclosure in which the staves were situated in order to execute his writ. We commend, however, his conservative action and good judgment in not so doing, but in resorting to the courts for the writ of mandamus herein. There should be no place, office or institution within the borders of this state where the officers of the law can not go to make service of the orders and process of our courts in a suitable, legal and orderly manner. It can not be said that any of our officers created by law are above the law itself, and exempt from its obligations. Many instances may be cited where the process of our courts must be served within the penitentiary. It frequently occurs that persons confined therein are ordered by the courts to appear and give evidence in judicial proceedings pending in such courts many miles from that institution. It is the duty of the officer when such order is issued and placed in his hands, to go to the penitentiary, make service of his order therein, and transport the convict to the place where such court is held. It is the duty of the warden to admit such officer to the prison, allow the order to be served, and obey its commands. When a writ of habeas corpus is issued by a court of competent jurisdiction on behalf of one confined within the penitentiary, and is placed in the hands of the proper officer for service, it is customary for such officer to go into the prison, execute his process, and bring the person designated therein, together with the warden, before the court issuing the writ. In such cases it is the duty of the warden, as such officer, to permit the service, and obey the commands of the writ. Although such duty may not be specifically set forth in the statutes, it is a duty which arises out of and results from the office of the respondent.

He can not take the position that it is his duty, as such officer, to exclude the sheriff from the penitentiary, and thus prevent the service of the process of the court, and, if mistaken, then say that it was not his duty to admit the officer and permit him to serve his writ. We hold that it is the duty of the warden of the penitentiary, when, as in this case, it can be done without injury to the institution, its inmates, its proper and orderly conduct and its discipline, to admit within its walls the officer of the court armed with its process, and permit the legal and orderly service of the same; that in case he, as such officer, refuses to do so, mandamus will lie to compel him to perform such duty.

2. It is urged that the peremptory writ of mandamus should not have been allowed because the relator had an adequate remedy at law; that, if the writ of replevin could not be served, and the property turned over to the relator, the action could have proceeded as one for damages. The Code provides in an action of replevin, when the property claimed has not been taken, or has been returned by the sheriff for want of the statutory undertaking, that the action may proceed as one for damages only. Code of Civil Procedure, sec. 193. This in effect changes the suit from replevin to conversion. This can only be done, however, where the property can not be found, taken, and delivered to the plaintiff, or where he can not give the statutory bond. In such a case the remedy may or may not be adequate. The action of conversion or trover has always existed at the common law. The legislature of this state, however, has created the statutory action of replevin, in which the plaintiff may immediately recover and take into his possession the specific articles of personal property which are being wrongfully withheld from him. It was evidently the belief of the lawmakers that such an action afforded a surer, speedier and more adequate measure of relief for the wrong complained of than trover or conversion. This is true in most instances. Take, for instance, the case at bar. The relator was en-

gaged in manufacturing. It needed the staves described in the writ of replevin for its immediate use in carrying on its business. It could ill afford the delay necessary to procure other like material from a distant market. If it could obtain possession of these staves, it could use them at once, and with profit, in making up its manufactured product. The bare market value thereof at the end of a protracted litigation would not be an adequate remedy at law in such a case. Again, a judgment against respondent might have been absolutely worthless. The officer knew where the material was. If allowed to execute his writ, he could at once take it, and turn it over to the relator, and it could without delay proceed with its business. A remedy which is used to enforce a right or the performance of a duty, unless it reaches the end intended and actually compels the performance of the duty contemplated, is not adequate. Mandamus is not excluded by other legal remedies which are not adequate to secure the specific relief needed. We therefore hold that there was no such adequate remedy at law in this case as would defeat the relator's right to the writ of mandamus.

3. It is further urged that the district court did not have jurisdiction at chambers, in this case, to allow the peremptory writ, and for that reason the judgment should be reversed. The return to the alternative writ of mandamus admitted all the facts set forth in the affidavit and the writ. It was alleged, however, by the respondent, that the Lincoln Cooperage Company was indebted to the state of Nebraska, and therefore he should be permitted to hold the property in controversy, and prevent the execution of the writ. It was admitted, however, that neither the state nor the respondent had any lien upon the staves in question. It was further stated in the return that the sale of the property in question by the Lincoln Cooperage Company to the relator was not a bona-fide transaction. Neither of these facts constituted a defense to the issuance of the peremptory writ. They might have been considered and litigated in the replevin suit, but certainly not in this

proceeding for the writ of mandamus. Therefore the district judge was right in holding that there was no controverted fact in issue upon the hearing; that the right to the peremptory writ should be determined without the introduction of any evidence, and upon the affidavit, alternative writ, and the return of the respondent thereto. In fact, no evidence was offered by the respondent. It was held in *Linch v. State,* 30 Nebr., 740, and *Byrum v. Peterson,* 34 Nebr., 237, that where there was no controversy as to any essential facts, the judge of the district court had authority to grant the peremptory writ of mandamus at chambers.

We therefore hold that Judge Holmes, at the time he allowed the peremptory writ of mandamus in this case, had full power and jurisdiction so to do. We further hold that there is no error in the record and proceedings herein, and that the judgment and order of the district court should be affirmed.

POUND, C., concurs.

OLDHAM, C., having been of counsel, took no part in the hearing.

By the Court: For the reasons stated in the foregoing opinion, the judgment and order of the district court herein is

AFFIRMED.

NEBRASKA MERCANTILE MUTUAL INSURANCE COMPANY v. JOHN J. SASEK.

FILED FEBRUARY 19, 1902. No. 11,151.

Commissioner's opinion, Department No. 2.

1. **Cumulative Instructions.** It is not error to refuse to give an instruction, where, at the request of the same party, another one is given, making the giving of the first instruction requested unnecessary.

2. **Insurance: ADDITIONAL INSURANCE: WAIVER.** Where it is provided in an insurance policy that no additional insurance shall be

taken out on the property described therein without the consent of the company, procuring additional insurance without such consent renders the policy void. But the secretary or other officer of the company, empowered to waive such condition, may do so by an indorsement on the policy, and thereby revive and continue it in force as a contract of insurance.

3. **Insurance Policy: ACTION: WAIVER.** In an action on an insurance policy, where the question as to whether or not the proper officer of the company, empowered so to do by the policy, has waived the provision against additional insurance and consented thereto by an indorsement thereon, is properly raised by the pleadings, and is submitted to a jury upon conflicting evidence, under proper instructions, this court will not disturb the finding of the jury upon that question.

4. **Conflicting Evidence.** Where there is a sharp conflict of evidence upon any material question of fact put in issue by the pleadings in the trial of a case, and each side is supported in its contention by nearly an equal number of witnesses, the verdict of a jury based on such conflicting evidence will not be disturbed or set aside.

5. **Fire Insurance Policy: UNCONTRADICTED EVIDENCE.** In an action on an insurance policy for the loss of a stock of goods by fire, covered by it, where there is some competent evidence of the value of the property insured, and this evidence is not controverted or questioned in any manner by the insurance company, the verdict of a jury based thereon will not be set aside for want of evidence to sustain it.

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

Fayette I. Foss, Edwin M. Coffin, B. V. Kohout and *Elliott J. Clements,* for plaintiff in error.

A. S. Sands and *Frank H. Woods, contra.*

BARNES, C.

This action was originally commenced in the district court of Saline county by John J. Sasek against the Nebraska Mercantile Mutual Insurance Company on a policy of insurance issued by it to Sasek, Prokop & Co., of Swanton, Saline county, Nebraska, on the 16th day of December, 1897, for a period of one year, for the sum of $1,000, upon a stock of general merchandise situated in the store

of said company in that town. The petition was in the usual form in such cases, and set forth the fact that on the 27th day of July, 1898, Sasek, Prokop & Co., to whom the policy was issued, assigned the same to John J. Sasek; that a copy of the assignment was forwarded to the insurance company and was approved, in writing on the back thereof, by the secretary of said company. It was alleged, in addition to said fact, that on the 8th day of February, 1898, Sasek, Prokop & Co. obtained additional insurance upon the same stock of goods in the Home Fire Insurance Company of Omaha for the sum of $1,500; that notice of that fact was set forth in the assignment made by Sasek, Prokop & Co. to Sasek, and that the insurance company, with full knowledge of such fact and with the assignment duly indorsed on the back of said policy, containing such statement and notice, which was before its officers at the time, by the act of the secretary of the company, who was duly authorized thereto, agreed and consented to the assignment, and approved the said additional insurance, and kept and allowed its said policy to remain in full force and effect. An answer was filed to this petition by the insurance company, admitting the issuance and delivery of the policy sued upon, and the assignment thereof to Sasek, and, as a defense to the action, set forth the by-laws of the company, by which it claims Sasek, being a member of this mutual company, was bound, and the following conditions contained in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the assured shall not have, or hereafter shall make, or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon, or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this

policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured, unless so written or attached." After pleading these conditions the company concluded its answer substantially as follows: And the defendant also alleges that all of the above provisions, by-laws, etc., were in force at the time of the issuance of said policy; that said policy was issued under the laws of the state of Nebraska, governing mutual insurance companies; that when said plaintiff took out said additional insurance in the sum of $1,500, which was done on the 8th day of February, 1898, the defendant had no knowledge of the same, nor was the defendant or its agents ever notified or advised of the same; and that the defendant did not consent to the same, and that it could not, by law, consent to the same, and therefore that said policy became void and of no force and effect. Sasek replied to the answer substantially as follows: Plaintiff replies and says that when the policy was assigned from Sasek, Prokop & Co. to John J. Sasek on July 27, 1898, that the words "with $1,500 concurrent insurance" were written in said assignment, and that the company thereby must have had knowledge of the said concurrent insurance, and therefore they are estopped from denying the same. On this principal issue the cause was tried to a jury. The trial resulted in a verdict and judgment against the insurance company, and it thereupon brought the case to this court on a petition in error.

1. It is claimed by the plaintiff in error that the court erred in overruling its objection to the introduction of any evidence, because the petition did not state facts sufficient to constitute a cause of action. The substance of this claim is that the policy became void on and after the tak-

ing out of the additional insurance on February 8, 1898; that these facts appeared from the petition, and therefore no cause of action was stated. Plaintiff seems to have lost sight of the fact that the petition stated that certain acts were done by the secretary of the company, which, if true, were sufficient to revive the policy, continue it in full force and assign it to the defendant Sasek. We hold that the petition did state facts sufficient, if true, to constitute a cause of action, and that the objection was properly overruled. We agree with the plaintiff that the procuring and taking out of the additional insurance on February 8, 1898, taken in connection with the conditions of the policy, rendered it void. There can be no doubt but that it remained void, and of no force and effect, unless it was renewed and reinstated by the assignment, and the acts of the secretary of the company consenting thereto on July 27, 1898. The fact as to whether or not the plaintiff, with full notice and knowledge of and concerning the additional insurance on July 27, 1898, consented thereto and agreed to the assignment of the policy to the defendant, and thus continued it in force as a contract of insurance, was practically the only question at issue in the trial of the case. This was the only controverted question which by the instructions of the trial court was submitted to the jury. Therefore the plaintiff's second contention, that the court erred in refusing to give the jury instruction No. 1 at its request, which directed the jury to return a verdict in its favor, can not be maintained. With this issue before the jury, and a conflict of evidence thereon, it was not proper for the court to instruct the jury to return a verdict for either party.

2. Plaintiff at the trial requested the court to give the jury the following instruction: "5. The jury are instructed that the witness, Alois Slepicka, is what is known as an 'insurance broker,' and an insurance broker is the agent of the insured; and that all the acts that he does in procuring insurance for the insured, the insured will be bound by, and that notice to the said Alois Slepicka, he

being the agent of the insured, would not be notice to the defendant herein." The court refused this request, and the plaintiff contends that such refusal was error. An examination of the record shows that there was no evidence offered, given or received that Alois Slepicka was or claimed to be the agent of the plaintiff, and no claim was made on the trial that plaintiff was bound by his acts, or that notice to him was notice to the plaintiff. As before stated, the only question in issue was whether the assignment on the back of the policy gave notice to the secretary of the plaintiff, and whether or not, under the circumstances, his act in consenting in writing to such assignment and condition waived the conditions of the policy, revived it, and thus rendered it a valid contract of insurance. The court, at the plaintiff's request, gave the following instruction: "You are instructed that it devolves upon the plaintiff to prove by a preponderance of the evidence that when the policy was received by the defendant company, July 27, 1898, at Lincoln, Nebraska, it was indorsed 'with $1,500 concurrent insurance' and that the company, with such indorsement thereon, consented thereto. If the plaintiff fails to so establish then you must find in favor of the defendant." The giving of this instruction rendered the former one entirely unnecessary, and the court did not err in refusing to give it.

3. It is urged that the court erred in refusing to allow the application to be introduced in evidence. We can not so hold. The court rightly held that the policy had been rendered void by the taking out of the additional insurance, and that no recovery could be had thereon unless the plaintiff, with full knowledge of the facts, had consented to the assignment of it and to the additional insurance, and thus revived it or continued it in force. Therefore this evidence was rightly excluded as immaterial. We have examined the record to ascertain whether or not any errors were committed in receiving and rejecting evidence, and find nothing therein which shows any prejudicial error. Indeed, all of the rulings of the court seem to have been most favorable to the plaintiff in error.

4. It is strenuously urged that the evidence does not sustain the verdict, in this: that it does not show that the plaintiff's officers, with knowledge of the facts relating to the additional insurance, ever approved thereof or consented thereto, by approving the assignment of the policy when it contained the words, "With $1,500 concurrent insurance." An examination of the evidence shows that four witnesses, of presumably good reputation, testified that the words, "With $1,500 concurrent insurance," were in and a part of the assignment on the 27th day of July, 1898, when it was sent to the plaintiff for its approval and consent thereto. One officer of the plaintiff, and the stenographer in the plaintiff's office, testify that those words were not in the assignment at that time; and one of the plaintiff's officers testifies that he saw the policy immediately after the fire, and that these words were not in the assignment at that date. Thus we have three witnesses testifying against four on this disputed question of fact. The jury, to whom this question was submitted, under suitable and apt instructions from the court, found this fact against the plaintiff in error. We can not disturb such finding. If the question had been submitted to us, knowing the high character and standing of the plaintiff's witnesses, we would have been inclined to have found for the plaintiff; but a court of review can not substitute itself for the jury, and where such a tribunal, with such a sharp conflict of evidence before it, has determined the contested fact, we can not disturb such finding and determination.

5. It is further urged by plaintiff that there was no evidence to show the value of the goods insured at the time of the fire, and therefore the verdict was not supported by sufficient evidence, and should be set aside and the case reversed. We think that the bill of exceptions, as corrected by the order of this court, fairly shows, by at least some competent evidence, that the value of the goods in stock at the time of the fire, and which were all destroyed, was something over $3,000. This evidence was not con-

troverted or denied at the trial, and was not questioned by the plaintiff. The total insurance thereon was only $2,500. Therefore we are constrained to hold that there was sufficient evidence on this point to sustain the verdict. A careful examination of the record fails to disclose any prejudicial error, and the judgment of the district court should be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HOLCOMB, J., not sitting.

CHARLES WESTON, AUDITOR, v. LEE HERDMAN.

FILED FEBRUARY 19, 1902. No. 12,426.

Commissioner's opinion, Department No. 2.

1. **Specific Appropriation:** CONSTITUTION: LEGISLATURE. A specific appropriation "made by law," within the meaning of section 22, article 3, of the constitution of the state of Nebraska, is an appropriation made either by direction of the constitution itself, or one made by the legislature under the forms and in the manner prescribed in the constitution for drawing money from the public treasury.

2. **Reporter of Supreme Court:** SALARY: CONSTITUTION: SPECIAL LEGISLATIVE ENACTMENT. The appropriation for the salary of the reporter and *ex-officio* clerk and librarian of the supreme court is made by section 25, article 16, of the constitution, and requires no special legislative enactment.

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

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for plaintiff in error.

Frank Irvine and *Robert Ryan, contra.*

OLDHAM, C.

On the 22d day of July, 1901, the defendant in error presented his voucher in proper form and duly verified to the auditor of public accounts, and demanded that a warrant should issue thereunder for his salary as reporter and *ex-officio* clerk and librarian of the supreme court of the state of Nebraska for the quarter ending July 1, 1901. On presentation of this claim the auditor rejected the same "for the reason that no appropriation has been made by the legislature for the payment of this claim." The defendant in error thereupon appealed the claim from the decision of the auditor to the district court of Lancaster county, Nebraska. When his appeal had been docketed in the district court he filed his petition setting up his appointment and qualification as reporter and *ex-officio* clerk and librarian of the supreme court of the state of Nebraska, and that he had performed services as such reporter, clerk and librarian for the quarter ending July 1, 1901. He also alleged the filing of his claim with the auditor and the action of the auditor thereon, as hereinbefore set out, and prayed that the decision of the auditor be reversed and an order and mandate be issued requiring the auditor to issue a warrant upon the treasury for the amount of his salary for the quarter ending July 1, 1901. To this petition the auditor filed a general demurrer. This demurrer was overruled by the trial court, and, the auditor refusing to further plead, judgment was rendered on the petition as prayed for. From this judgment the auditor has prosecuted error to this court.

There are no disputed facts in this case. The only question involved is as to the authority of the auditor to adjust a claim, and draw a warrant for the salary of the reporter, clerk and librarian of this court, without a specific appropriation having been made for such purpose by the legislature of the state of Nebraska. Section 22 of article 3 of the constitution prohibits the drawing of money from the treasury "except in pursuance of a specific

appropriation made by law." Under our state government an appropriation "made by law" must emanate from an act of the legislature, or from the primary source of power, —the constitution itself.

In the early case of *State v. Weston,* 4 Nebr., 216, it was held that where the constitution fixed the salary of a state officer and provided for its payment quarterly from any funds not otherwise appropriated, that such constitutional enactments operated as an appropriation of the amount necessary to pay such salary, and no legislative enactment was required. In the later case of *State v. Weston,* 6 Nebr., 16, the court properly restricted the rule announced in *State v. Weston, supra,* to those officers whose salaries are fixed by the constitution, as distinguished from those whose compensation is left to the discretion of the legislature. In discussing the restrictions enforced by section 22, article 3 of the constitution, the court in this case says: "It will be observed that this provision does not require the appropriation to be made by act of the legislature, but merely that it be 'made by law,' so that it may be done either by direction of the constitution itself, that being the supreme law of the state, or by the legislature through the forms prescribed for drawing money from the public treasury." It is clear from the admitted facts in this case that, if the reporter and clerk of this court is entitled to a warrant on the claim which he filed with the auditor in the case at bar, his right must be founded on a plain direction of the constitution, as it is entirely unsupported by a specific legislative appropriation. Turning now to article 6 of the constitution, we find that it prescribes a specific salary of $2,500 per annum for each of the judges of the supreme and district courts. We find, also, that it defines the jurisdiction and constitutes the offices of county judge, justices of the peace and police magistrates, without any specific direction as to compensation in the various sections constituting these offices. The only provision for compensation of these latter officers is contained in the concluding portion of section 20, article

6, which says: "All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law." Section 8 of article 6 provides as follows: "There shall be appointed by the supreme court a reporter, who shall also act as clerk of the supreme court, and librarian of the law and miscellaneous library of the state, whose term of office shall be four years, unless sooner removed by the court, whose salary shall be fixed by law, not to exceed fifteen hundred dollars per annum." Now, the question is, does this section make a specific direction for the payment of a salary to the reporter and clerk of this court, or is he left in that class of judicial officers whose compensation is only such "as may be provided by law"? We think that a fair construction of section 8 would interpret it to mean that the reporter and clerk of this court should receive a salary fixed by law at not to exceed $1,500 per annum. The mandate in this section is imperative that the reporter and clerk shall receive a salary, and, second, that such salary shall not exceed $1,500 per annum. Having thus been provided with a salary, as distinguished from any other kind of compensation, the reporter and clerk of this court is clearly taken out of that class of judicial officers whose compensation is left solely to the discretion of the legislature. Turning then to section 25 of article 16 of the constitution, we find the following provision: "The auditor shall draw the warrants of the state quarterly for the payment of the salaries of all officers under this constitution, whose compensation is not otherwise provided for, which shall be paid out of any funds not otherwise appropriated." Here, then, is an appropriation, by the highest source of civil power, from any unappropriated funds of the state, for the purpose of paying the salaries of all constitutional officers "whose compensation is not otherwise provided for." In obedience to the command of section 8 of article 6, the legislature has enacted section 17, chapter 19, of the Compiled Statutes of Nebraska, which provides: "The reporter of the supreme court, who under the

provisions of section 8, article 6 of the constitution, acts as clerk thereof * * * shall receive an annual salary of $1,500, payable as the salary of other state officers is paid." Here, then, is an enactment that fixes a specific compensation as salary for the reporter and clerk of this court, within the constitutional limits. While we fully agree with the vigorous contention of the deputy attorney general that this section of the statute is not self-executing, and that, standing alone, it would not carry with it a continuing appropriation for the salary of this office, yet the view we take of the matter is that this statute simply fixes the amount of the salary to be allowed to the reporter and clerk of this court, in obedience to the mandate of the constitution, and that the appropriation for such salary is made by section 25 of article 16 of the constitution.

The only contention urged against the payment of this claim by the deputy attorney general is the fact that the constitution did not fix in specific terms the exact salary which the clerk and reporter of this court should receive. He admits frankly, that if this had been done, the auditor would have no standing in this case, in view of the holding of this court in *State v. Weston,* 4 Nebr., 216. A contention similar to this was urged in the case of *Reid v. Smoulter,* 128 Pa. St., 324, 5 L. R. A., 517. In this case the constitution of the state of Pennsylvania provided for separate orphans' courts in counties of a certain population in that state. It also provided for the offices of clerk and assistant clerk of such courts, and made it the duty of the general assembly to pass such laws as might be necessary to carry the same into full force and effect. At the next session of the general assembly an act was passed providing for a salary of $1,500 per year for the assistant clerk of the orphans' court. A subsequent legislature repealed this statute providing for this salary. The question arose on the right of the deputy clerk to draw his salary, notwithstanding the act of the legislature in repealing the statute. In determining the question in the clerk's favor, the court

said: "If the legislature may repeal the act adjusting the salary, without making any further or other provision in that behalf, it may practically abolish the office. If the assistant clerk may be thus deprived of the office, the clerk of the court and the judge are both liable to the same fate, and in this way, that might be done by indirection which could not be done directly. It is true that the salary is a matter which, by the constitution, is submitted to the discretion of the legislature. In the exercise of that discretion, by the act of 1874 the salary was fixed at $1,500, and this rule of compensation will continue until by some other statute it is changed. The salary first fixed may perhaps be increased or diminished, subject to the restriction of the 13th section of the 3rd article of the constitution, as the legislature should from time to time see fit to provide, but to repeal the provision for a salary altogether, is to remove the clerk from his office." The reasoning of this case is supported in principle by the holdings in *State v. Hickman,* 9 Mont., 370; *Thomas v. Owens,* 4 Md., 189; *Reynolds v. Taylor,* 43 Ala., 420. Applying the doctrine of this case to the case at bar, we are constrained to hold that while the legislature might reduce the salary of the reporter and clerk of this court from the amount fixed by section 17, chapter 19, Compiled Statutes, yet it can not entirely abolish the salary of such officer, by failing to make an appropriation for such purpose, for, if it could, then by indirection it would virtually nullify the provision of the constitution creating such office, for, as said by the great dramatist,

> "You take my house, when you do take the prop
> That doth sustain my house; you take my life,
> When you do take the means whereby I live."

It is therefore recommended that the judgment of the district court be affirmed.

BARNES, C., concurring.

I fully concur in the opinion of my Brother Oldham in this case. This court has held in *State v. Weston,* 4 Nebr., 216, and in *State v. Weston,* 6 Nebr., 16, that no

specific legislative appropriation is necessary to authorize the auditor to draw his warrant for the payment of the salaries of those officers created by, and whose salaries are fixed in, the constitution. The supreme court reporter, ex-officio clerk and librarian, being one of the officers provided for by the constitution, it remains only to inquire whether or not his salary is fixed therein. We think that it is so fixed. That portion of the constitution which creates the office also provides for the appointment of such officer, and that he shall receive a salary to be fixed by law, not to exceed $1,500 per annum. We believe that this fixes the salary until the legislature, by proper legal enactment, shall change the amount. It may be that the legislature could reduce that amount at a proper time, and by suitable enactment in that behalf; but, until some such action is taken, I hold that the amount of the compensation is fixed at $1,500 per annum. Such must have been the understanding of the constitution makers. Suppose that after the adoption of the constitution, the organization of the court, and the appointment of the reporter, the legislature had failed to take any action in relation to the salary of such reporter at all, what would have been the result? The clerk could not have been expected or required to serve without any compensation, and without his services the court itself could do no business. Thus the powers of one of the governmental departments provided for by the constitution itself would have been completely paralyzed. Such a condition of affairs could not have been contemplated. The salary of the clerk is fixed by the constitution, and the intention was simply to allow the legislature to reduce the amount thereof, if it should be found too great to be a reasonable compensation for the performance of the duties of the office. In case it were necessary for the affirmance of the judgment of the court below, I would so hold.

POUND, C., concurring.

I concur in the opinion of my Brother Oldham. In ad-

dition one further remark might be made. It was argued that an appropriation must be certain in amount, and we were cited to the definition in *State v. Wallichs,* 12 Nebr., 407. But it seems to me we may well apply the maxim that that is certain which may be rendered certain. The constitution requires a specific appropriation made by law. In section 8, article 6, of the constitution, and section 17, chapter 19, Compiled Statutes, enacted pursuant thereto, we have such appropriation, within the purview of that phrase. The constitutional provision contemplates and expressly refers to such a general law fixing the exact sum. I can see no reason for not construing them together, and a reference to the statute, which the constitution plainly invites us to make, removes all uncertainty.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE W. LEAVITT, APPELLEE, V. S. D. MERCER COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 19, 1902. No. 9,710.

Commissioner's opinion, Department No. 2.

1. **Misjoinder:** DEMURRER: REVIEW. Rulings upon demurrers for misjoinder of causes of action, will not be reviewed upon appeal.

2. ———: ANSWER: MISJOINDER ALSO PLEA TO MERITS. An answer setting up facts which go to show a misjoinder of causes of action, but are also material to the merits, no specific objection being made to the misjoinder, will not be taken to raise such defect.

3. **Certificate of Tax Sale:** PRESUMPTIVE EVIDENCE: BURDEN OF PROOF. The county treasurer's certificate of tax sale is presumptive evidence of a sale to the purchaser named therein, and the burden is upon defendants, who claim sale was made to some one else, to prove such fact.

4. **"Forthwith."** The word "forthwith" in section 111, article 1, chapter 77, Compiled Statutes, means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the moneys to be paid.

5. **Purchaser at Tax Sale: DELAY IN PAYMENT.** Delay of a purchaser at tax sale in paying to the treasurer the taxes and costs due on the land sold, owing solely to the large number of tracts of land to be sold, and inability of the treasurer, with the clerical force at his disposal, to make the sale in its regular order at an earlier date, does not invalidate a sale otherwise entirely regular.

APPEAL from the district court for Douglas county. Heard below before KEYSOR, J. Rehearing of case reported in 61 Nebr., 874. *Judgment below modified.*

Albert Swartzlander, for apppellants.

Henry P. Leavitt, contra.

POUND, C.

This is a rehearing. At the former hearing the cause was disposed of on the authority of *Green v. Hellman,* 61 Nebr., 875. But the cases differ, in that in this case the lower court held the tax sale valid, and rendered a decree accordingly, whereas in the case cited the decree of the district court went on the theory of an irregular sale, and held the purchaser subrogated to the rights of the county. There the court, without passing upon the question here raised, held that, even if the sale was irregular, the taxes were not avoided by the irregularity. But the decree now before us requires us to construe section 111, article 1, chapter 77, Compiled Statutes, and determine what is meant by payment "forthwith," as there required.

Two other points have been urged upon the rehearing, which may be first disposed of. There seems to have been a misjoinder of causes of action in the petition. Demurrers were interposed upon that ground and overruled. It is clear that we can not review such rulings on appeal, as they are purely interlocutory in character. One of the defendants insists that it raised the objection in its answer. But no specific objection to that effect is to be found therein. Certain facts are set up which go to show a misjoinder. But they are also material to the merits,

particularly to any decree that might be rendered as to costs. We do not think the answer may be said fairly to take the objection. Of course, it can not be taken here in such case. *Claire v. Claire,* 10 Nebr., 54. It is also claimed that the evidence tends to show a sale to one Pierce, and not to the plaintiff's assignor. The county treasurer's certificate of tax sale was presumptive evidence of a sale to the purchaser named therein, and the burden was upon the defendants to prove a sale to some one else. *Battelle v. McIntosh,* 62 Nebr., 647. The treasurer's memorandum relied upon to contradict the certificate does not of itself meet this burden.

With respect to the principal point at issue, we think the decree is right, and that the former judgment should be adhered to. The district court found that the delay in payment "was owing to the fact that the public tax sales for said year were so large that the treasurer, with the clerical force at his disposal, was unable to make out the sale in question at an earlier date, making out said tax sales in their regular order," and that the "said delay was not chargeable to the purchaser at said sale." The word "forthwith," as used in the statute, must be given a reasonable construction consistent with the exigencies of business. So construed, we think it means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the moneys to be paid. To require the purchaser to pay before the treasurer can receive would be to hold that there can be but very few valid sales, whenever there are a large number to be made. A similar view was taken in construing the word "immediately," in *Huff v. Babbott,* 14 Nebr., 150. Turning to the statutes, we find that the receipt of money in payment of taxes by a county treasurer is hedged about with many formalities. He must "enter such payment in his book, and give a receipt therefor, specifying for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid," and said receipt must bear

his "genuine signature." He must also "enter the name of the owner or of the person paying the tax, opposite each tract or lot of land when he collects the tax thereon, and the post-office address of the person paying said tax." Compiled Statutes, ch. 77, art. 1, sec. 103. The receipt must "describe the land as it is described in the tax-roll and give the valuation thereof," and, in addition, "on the reverse side of the receipt there shall be a statement giving the amount of each kind of tax for each one hundred dollars." Sec. 104. Moreover, the treasurer "shall not receipt for more than one year's taxes on the same property in one tax receipt, but shall keep a separate and distinct series of numbers of receipts issued for the taxes of each year for which the same have been levied and assessed." Sec. 107. Having done all this, the treasurer must enter in his cash book "an account of all money by him received, specifying in proper columns provided for that purpose, the date of payment, the number of the receipt issued therefor, by whom paid, and on account of what fund or funds the same was paid, whether state, county, school, road, sinking fund, or otherwise, and the amount paid in warrants, orders, or receipts, each in a separate column, and the total amount for which the receipt was given in another column." Sec. 106. Next he "shall write on the tax lists, opposite the description of the real estate or personal property whereon the same were levied, the word 'paid,' together with the date of such payment, and the name of the person paying the same." Sec. 108. It must be apparent that there is a limit to the number of payments any treasurer and his deputies can receive in any one day under these statutory requirements. We ought not to ask purchasers to pay faster than the proper officials can take their money.

There seems to be a slight error in the decree in that it is made to bear ten per cent. interest from the first day of the term, contrary to the ruling of this court in *Merrill v. Ijams*, 58 Nebr., 706, 709. Appellee has offered to remit the excess over seven per cent., but we think it would be

proper to modify the decree to that extent in this court. Accordingly, we recommend that the decree be modified by providing that it bear interest at the rate of seven per cent. per annum, and that, so modified, it be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified by providing that it bear interest at the rate of seven per cent. per annum, and, as so modified, it is affirmed.

JUDGMENT ACCORDINGLY.

COUNTY OF KEITH V. OGALALLA POWER & IRRIGATION COMPANY ET AL.

FILED FEBRUARY 19, 1902. No. 10,760.

Commissioner's opinion, Department No. 2.

1. **Contract: BOND: CONSIDERATION: OBLIGEE.** A bond given to secure performance of a contract between the principal and the obligee is without consideration, if the obligee is not bound by such contract.

2. **Precinct Bond: INTERNAL IMPROVEMENTS: NOTICE: TERMS OF PROPOSITION: AUTHORITY OF COUNTY COMMISSIONERS.** Where bonds are voted by a precinct in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners in contracting with reference to such improvement.

3. **Strict Compliance.** In such case the voters of the precinct are entitled to demand strict compliance with the contract which they authorized, and a contract differing substantially as to the parties thereto or terms thereof from that voted upon, is not binding upon the municipality.

ERROR from the district court for Keith county. Tried below before SULLIVAN, J. Affirmed.

H. E. Goodall, Gaines, Kelby & Storey, John H. Bower, Edward R. Duffie and *James H. Van Dusen,* for plaintiff in error.

N. P. McDonald and *Edwin E. Squires, contra.*

POUND, C.

This is an action upon a bond given by the Ogalalla Power & Irrigation Company and certain sureties to the county of Keith and Ogalalla precinct therein to secure performance of a contract between the company and the county commissioners of said county acting for the precinct. Several questions of importance have been argued, but we deem one of them so decisive that we shall confine ourselves thereto. One Solon L. Wiley presented a written proposition to the county commissioners, proposing to construct a water power and irrigation canal from a point on the South Platte river about thirteen miles above the village of Ogalalla to said village, if bonds of the precinct to the amount of $35,000 were donated in aid of the enterprise. Upon petition of upwards of fifty freeholders of the precinct the county commissioners called an election, at which the issuance of such bonds was authorized. Thereafter Wiley organized the defendant corporation, which entered into a contract with the commissioners for the construction of a canal and proceeded with the work. The bond in suit was given to secure full performance of that contract. The lower court held, we think correctly, that the contract was invalid, and not binding upon the precinct, and hence that the bond was without consideration, and unenforceable. While at common law a bond was a formal contract, requiring no consideration, there can be no question that our statute abolishing private seals has reduced it to the level of all other agreements and made it a simple contract. *Luce v. Foster,* 42 Nebr., 818. Where a bond is given to secure performance of a contract, the entering into such contract by the obligee is obviously its consideration, and, if the contract made is not binding upon the obligee, and he has done nothing of any legal validity or effect, the bond must fail. Where bonds are voted by a municipality in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the voters are entitled to demand strict

compliance with the contract which they authorized. The section cited provides that notice shall be given prior to the election, as required in cases where bonds are voted by a county; and the statute governing such cases requires that the whole question shall be contained in the published notice. Compiled Statutes, 1901, ch. 18, art. 1, sec. 28. Hence it is manifest that the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners conferred by such election. The notice stated that the bonds were to be issued for the purpose of being donated to S. L. Wiley to aid in the construction of an irrigating and water power canal, and that they were not to be delivered to said Wiley until he entered into a good and sufficient undertaking to perform all the terms of "his propositions made to said precinct, and now on file in the office of the county clerk of Keith county." The proposition was signed by Wiley, but purported to be made by Wiley and "his associates or assigns." But we do not think the voters of Ogalalla precinct intended to deal with any such indefinite and unknown persons. They did not vote on the proposition made by Wiley to aid him or his associates or assigns, but their action was limited to a donation to him in aid of his undertaking. Nowhere in the notice is any one else suggested. The reference to the written proposition only incorporates the terms as to what Wiley was to do. It can not supersede the plain and express statement in the notice itself as to the party with whom the precinct was to deal. We do not doubt that it would have been proper for the county commissioners to enter into a contract embodying the terms of the proposition, and to take a bond securing performance of such contract. That would be equivalent to incorporating the terms of the proposition in the bond authorized and required by the election. But they did not do this. Not only did they make a contract with a different person, for Wiley's ownership of stock in the corporation, whatever the amount, would not make them legally identical (*Humphreys v. McKissock*, 140 U. S., 304; *Button*

v. Hoffman, 61 Wis., 20, 20 N. W. Rep., 667), but they varied the terms of the proposition referred to in the notice of election in many particulars. For instance, the proposition was that Ogalalla precinct should have the use of the water for domestic purposes. But the contract secured by the bond in suit provides only that the company should furnish water to Ogalalla village for domestic purposes, fire protection and water-power. We take judicial notice that Ogalalla village, territorially, is but a small portion of the precinct, and it is obvious that this departure might have altered the result very materially had the voters passed upon the proposition in its changed form. A contract differing substantially as to the parties thereto or terms thereof from that voted upon, is not binding upon the precinct. *George v. Cleveland,* 53 Nebr., 716, and cases cited. In *George v. Cleveland* this court said that the compliance must be "strict and literal." But even if a fair and substantial compliance were sufficient, we think the precinct in this case could have repudiated the contract and prevented its execution, and hence that the bond is unenforceable. *Edwards County v. Jennings,* 33 S. W. Rep. [Tex. Civ. App.*], 585. We have no doubt that the moneys paid out under this contract may be recovered back from those to whom they were paid. Whether the petition was sufficient to authorize a judgment of that kind against the company we need not decide, as the petition in error and the briefs raise no such question. This action is to recover on the bond, and its object is so stated by counsel for plaintiff in error. As there could have been no action on the contract, there can be none on the bond for its nonperformance.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

*This case does not appear in 11 Texas Civil Appeals, its chronological place. It was probably not officially reported.—REPORTER.

SOVEREIGN CAMP OF WOODMEN OF THE WORLD V. HONORA GRANDON.

FILED FEBRUARY 19, 1902. No. 10,864.

Commissioner's opinion, Department No. 3.

1. **Insurance:** MUTUAL BENEFIT: DELINQUENT MEMBER: REINSTATEMENT: DEPOSITING LETTER IN MAIL. The constitution of a mutual benefit association provided that a member suspended for the non-payment of dues and assessments might be reinstated by personally applying therefor and paying to the clerk of his camp all arrearages, and, if in good health, his reinstatement should take place and his certificate again become valid as soon as payment had been received and recorded by the clerk. If the delinquent member does not appear in person to pay his arrearages, he shall then send to the clerk a written statement on an official form to be furnished by the association, to the effect that he is in good health, as a condition precedent to reinstatement, and waiving all rights thereto if his written statement shall be found to be untrue. *Held*, That a suspended member signing the written statement provided for in the above rule, and depositing the same in a letter-box, enclosed in an envelope stamped and addressed to the clerk of the camp, had sufficiently complied with the requirements of the constitution above quoted, although the statement did not reach the clerk until after the death of the suspended member.

2. **Physician.** A physician may testify that he was called to attend a patient, and to the number and dates of his professional visits, as these facts are not privileged under section 333 of the Code of Civil Procedure.

3. ———: WAIVER OF PRIVILEGE: CROSS-EXAMINATION. In a suit between the representative of a deceased person and an insurance company, the physician who attended the deceased in his last illness was called by the defendant, and testified to the fact of having attended the deceased, and to the time when first called, and some other matters relating thereto, but was not allowed to testify as to the condition of the deceased or the ailment from which he was suffering. The physician, at the request of the plaintiff, had given her a written statement to the effect that the deceased was not seriously sick until the evening previous to his death, and on his cross-examination the physician admitted making the statement, and the same was offered and admitted in evidence as a part of his cross-examination. *Held*, That this constituted a waiver of her privilege on the part of the plaintiff, and that the defendant should have been permitted to re-examine the physician as to the condition of his patient.

4. **Record**: BOARD OF HEALTH: PRIVILEGED CHARACTER. A record kept under the ordinances of a city for the evident purpose of assisting the board of health in the conduct of the affairs of that office, is not such a public record as to be entitled to admission in evidence to show the truth of the matters therein recited, and especially should it be rejected as evidence when offered to establish a fact which would not be admissible against a party because of its privileged character.

ERROR from the district court for Douglas county. Tried below before POWELL, J. *Reversed.*

Brome & Burnett, for plaintiff in error.

Timothy J. Mahoney and *J. A. C. Kennedy, contra.*

DUFFIE, C.

The plaintiff in error is a mutual benefit association doing a life insurance business in Douglas county, Nebraska, and elsewhere throughout the United States. On June 18, 1894, Thomas Grandon, the husband of the defendant in error, became a member of Alpha Camp, No. 1; and the plaintiff in error issued to said Thomas Grandon its beneficiary certificate, by the terms of which it agreed, in consideration of certain payments made and to be made, to pay the defendant in error the sum of $2,000 at the death of said Thomas Grandon. Grandon died May 6, 1897, and it is alleged in the petition filed in the district court that at the date of his death he was still a member of said fraternity, in good standing, and the holder of said beneficiary certificate, and died without having in anywise changed the appointee therein. It is further alleged that due notice and proof of the death of said Grandon was furnished to the defendant, but that defendant has wholly failed, refused and neglected to pay the plaintiff the amount due her under said certificate. The answer of the defendant admits that it is a mutual benefit association, and that Grandon became a member of said association in June, 1894, being a member of Alpha Camp, No. 1, located at Omaha, Nebraska; admits that it issued to Thomas Grandon its beneficiary certificate, and alleges

that it was provided by the terms of said certificate that if Grandon, at the time of his death, should be in good standing as a member of this fraternity, then and in that event it would pay the plaintiff below the sum of $2,000 at the death of said Grandon. The answer admits the death of Grandon and proof of such death. As a defense to the action, it is alleged that Grandon had failed to comply with the constitution and laws adopted by defendant governing said order and its members; that section 108 of the constitution of the order provided as follows: "On or about the 20th day of each month, the sovereign commander and chairman of the sovereign finance committee shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered for payment and shall so notify the sovereign clerk. In beneficiary head camp jurisdictions, this shall be determined in such manner as its laws may provide"; that section 109 of the constitution is as follows: "Every member of this order, unless otherwise notified by the clerk of his camp, in the manner herein provided, shall pay to the said clerk every month, one assessment in the beneficiary fund, together with one monthly payment of the sovereign camp or beneficiary head camp general fund dues and camp dues, as levied, also any additional assessments for beneficiary fund or special general fund dues, which may have been ordered by the sovereign camp or beneficiary head camp, as the case may be; and if he fails to pay either on or before the first day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void." The answer further alleges that at the time Grandon became a member, and at all times since, the constitution and laws of the defendant contained the following provision: "Should a suspended member personally appear and apply for reinstatement within three months from the date of his suspension and pay all arrearages, if in good health. he shall be restored to membership and his beneficiary certificate again become valid as soon as said payment

shall have been received and recorded by the clerk of his camp. If a delinquent member does not appear in person to pay his arrearages, he shall send to the clerk a written statement on the official form, furnished by the sovereign camp or beneficiary head camp, to the effect that he is in good health as a condition precedent to reinstatement and waiving all rights thereto if his said written statement shall be found untrue. If the representations and statements made in said written statement be untrue, then said payments shall not cause his reinstatement." It is further alleged that Thomas Grandon was not, at the time of his death, a member of said fraternity in good standing, for the following reasons: That the amount of each assessment to be paid by said Grandon was the sum of $1.45; that the amount of camp dues to be paid by him was 30 cents monthly. It is alleged that he failed to pay assessment No. 70 for $1.45, as well, also, as camp dues for the month of February, 1897, and that by reason of said default and non-payment, his beneficiary certificate became wholly null and void. It is further alleged that assessment No. 71 was duly made by the sovereign commander and chairman of the finance committee on March 20, 1897, for the payment of deaths registered, and April 20, 1897, assessments Nos. 72 and 73 were duly made; that up to May 5, 1897, Grandon had failed to pay assessments 70, 71, 72 and 73, which amount, in the aggregate, to the sum of $5.80; that he also had failed to pay his camp dues up to May 1, 1897, which amount, in the aggregate, to the sum of $1.20, and that he had been suspended for such non-payment from and after March 1, 1897. It is further alleged in the answer that on May 5, 1897, the daughter of Thomas Grandon called at the office of the clerk of Alpha Camp, and ascertained the amount necessary to reinstate him, and paid the amount; that the clerk informed her at the time that, Grandon not having called in person and paid the amount, it was necessary for him to send a certificate, as provided by the constitution and laws of the order; that he gave her a blank certificate in the

official form furnished by the sovereign camp, which was to be filled out and signed by said Grandon, and which certificate contained a statement that said Grandon was in good health, as a condition precedent to reinstatement, and waiving all rights thereto if his said written statement shall be found untrue; that on the next day, to wit, May 6, 1897, said certificate, signed by said Thomas Grandon by the making of his mark thereon, was received by the clerk through the United States mail, but that Grandon had died on said day, previous to the receipt of said certificate by the clerk. It is further alleged that Thomas Grandon was not in good health at the time of signing said certificate, and that by reason of the foregoing facts he had never been reinstated in the order, and that the defendant was not liable for the amount of his certificate. A trial of the case resulted in a verdict for the plaintiff below, on which judgment was entered, and the record is brought to this court for review.

One of the controversies between the parties is the meaning of the word "send" found in the following clause of the constitution of the order: "If a delinquent member does not appear in person to pay his arrearages, he shall send to the clerk a written statement on the official form, furnished by the sovereign camp or beneficiary head camp, to the effect that he is in good health as a condition precedent to reinstatement, and waiving all rights thereto if his said written statement shall be found to be untrue. If the representations and statements made in said written statement be untrue, then said payments shall not cause his reinstatement." It will be borne in mind that Grandon was delinquent in the payment of four assessments and three instalments of monthly dues to his camp. On the afternoon of May 5, 1897, the daughter of Grandon called on Allen, the clerk of Alpha Camp, and paid him the amount of such delinquent dues and assessments. Allen informed her that one in default who did not appear in person to pay his dues must send his written statement, on the official form furnished by the sovereign camp, that

he is in good health, as a condition precedent to his reinstatement, and waiving all rights thereto if his statement shall be found to be untrue. On the evening of the same day, Grandon signed a certificate as required, and the same was deposited in one of the mailing boxes in the city of Omaha, but was not received at the post-office until 11 A. M. of the 6th of May, and did not reach the hands of the clerk until some time in the afternoon of May 6th, and after the death of Grandon. Plaintiff in error insists that mailing the certificate was not sending it to the clerk of the camp, or that, if it was, it can not be considered as sent until it actually reached the clerk, and that reinstatement should date from the time the certificate reached the clerk, and not from the time of depositing it in the mail. The constitution provides that the certificate must be "sent," not that it shall be received, as a condition precedent to reinstatement.

Much of the ordinary business of the company, must, in the nature of things, have been transacted through the mail, and it is not unfair to presume that this provision of the constitution was intended for the benefit of members who resided at a distance from the camp, and who, as a matter of convenience, if not necessity, were compelled to use the mails instead of a messenger. There is nothing in the constitution stating in what manner this certificate shall be sent, and the clerk in this case directed that it should be sent by mail, and furnished a stamped envelope for that purpose. This is evidence of the construction put upon the constitution by the officers of the order, and we are agreed that the depositing of this certificate in the mail was a compliance with the rules of the order. This holding is supported by *Jackson v. Northwestern Mutual Relief Ass'n,* 47 N. W. Rep. [Wis.], 733.

On the trial of the case, the defendant below called Dr. Malster as a witness, and he testified that he was a physician, and that he had been called to attend Grandon in his last illness. He gave some evidence as to the time when called, and the number of calls made; but, because

of objections made by the plaintiff below, he was not allowed to testify as to Grandon's condition. The plaintiff below, as a part of her cross-examination, exhibits a written statement, signed by the doctor, in the following form: "Omaha, August 19, 1897. This is to certify that I treated T. Grandon in his last sickness, and that he was not dangerously sick until the night before he died." This statement she introduced in evidence as a part of the doctor's cross-examination. The company then sought to examine the doctor further, claiming that by the introduction of this statement the plaintiff had waived her privileges, and that it was entitled to show by the witness the condition of Grandon, and of what illness he was suffering. The court refused to allow this examination to be made, and this holding of the court is one of the errors assigned and argued. We do not know upon what theory the district court refused this examination, but it was probably upon the theory advanced by the plaintiff below in her brief here, and, that her position may be fully understood, we quote from the brief: "The plaintiff in error called Dr. Malster to show that he had treated Thomas Grandon. The only possible object of this testimony was to show, by inference, from the fact of treatment that Grandon was not in good health. The defendant in error then offered the doctor's written statement as cross-examination. There was no objection that it was not cross-examination. It was offered as such and received as such without objection. It was not offered as part of the plaintiff's case, and therefore no waiver can be inferred from it. If the defendant below could put the doctor on the stand and draw out testimony tending to show that Grandon was not in good health and the plaintiff could not then cross-examine so as to weaken that evidence without thereby waiving the privilege, the statutory privilege is of no avail." Our statute relating to witnesses and their competency contains the following provision relating to professional communications: "No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any

denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Code of Civil Procedure, sec. 333. "The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred." Code of Civil Procedure, sec. 334. The rule in this state, as well as in other states having a like statute, is that the above sections protect a party against any disclosure by a physician made to him in the course of his professional employment, and necessary and proper to enable him to discharge his duty to his patient. Not only are such communications privileged, but whatever knowledge the physician may gain from observing his condition and symptoms is likewise privileged. There can be no doubt as to the rights of the patient in this respect, and the courts, in a proper case, are vigilant to see that these rights are fully protected. But the fact that a physician was called to attend a patient is not a privileged communication. The supreme court of Michigan, in construing a similar statute, said: "The fact that a doctor is the family physician of the insured, and the fact that he attended the insured professionally, and the dates and number of his visits, are each and all facts which are not within the prohibition of the statute, and to which the physician may be permitted to testify." *Briesenmeister v. Knights of Pythias,* 81 Mich., 525. In *Cooley v. Foltz,* 85 Mich., 47, we find the following statement: "Plaintiff introduced one physician known as an 'eclectic,' and who had never graduated at any regular school of medicine, who testified to her injuries. The defendant then introduced two physicians as witnesses who had been called to treat her both before and after the alleged trouble with the defendant. They obtained no knowledge of her ailments and condition except what they had obtained in their professional capacity. This testi-

mony was objected to as inadmissible under How. Stat., 7516. The objection was well taken, and the testimony should have been excluded. *Briesenmeister v. Supreme Lodge,* 81 Mich., 525, and authorities there cited. The entire subject is there fully discussed, rendering further mention here unnecessary. The defendant evidently recognizes the error, as he has filed no brief in this court. In the event of a new trial it is proper to say that it was competent for the defense to introduce these witnesses, and prove by them that they had been called by the plaintiff to examine and prescribe for her. The failure of the plaintiff to produce them as witnesses was a legitimate fact for the jury in determining the merits of the case." The plaintiff in error had a right to call Doctor Malster to show by him that he had waited upon Grandon in his professional capacity. No privilege was violated in so doing, and the defendant in error, by introducing the written statement of the doctor that Grandon was not seriously sick until the evening previous to his death, opened up the question of his condition, and thereby waived the privilege which the statute gave her. In *Morris v. Railway Co.,* 148 N. Y., 88, it is said in effect that statutory prohibition can not be used both as a shield and a sword. If a party to the suit of his own volition in any manner or form places before the jury the evidence of the physician as to what he observed or what was said to him, he can not longer object on the ground that the knowledge furnishing the basis of such confidence was obtained while treating the patient in a professional capacity. We have no doubt that it was error on the part of the court to refuse to allow the plaintiff in error to further examine the doctor as to the physical condition of Grandon at the time referred to in his written statement, and that this is of such materiality as to require a reversal of the case.

There is but one question requiring further consideration. An ordinance of the city of Omaha makes it the duty of every undertaker or other person, before removing any corpse for burial, to obtain from the secretary of the

board of health a permit to do so, and, before obtaining such permit, he shall deposit with said secretary a certificate setting forth, among other matters, the cause and date of death, and duration of last illness of deceased, which certificate shall be signed by the physician or surgeon in attendance at the time of death. In case no physician or surgeon attended the deceased, then the certificate must be made by some relative or attendant. It will be observed that it is only by implication that the ordinance above referred to requires the physician to make and sign the certificate contemplated by the ordinance. The certificate, when made, is not required to be under oath, and its purpose is evidently to assist the health department in the performance of the duties devolving upon that office. It is a mere police regulation, and is not intended for the purpose of supplying the public at large with information upon which reliance may be placed in the business affairs of the community. We do not think the record is of such character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation. There is another reason, which, in our opinion, makes it incompetent. If signed by a physician, it contains matter relating to his patient which the physician is not allowed to disclose as a witness upon the trial against the objection of his patient or those representing him. That a record of this character, reciting privileged communications, may be used in evidence against a party where the testimony of the physician making it could not be received, is a proposition so inconsistent with reason and natural rules of justice that we can not give our consent thereto. The court properly refused to allow the certificate in evidence.

Because of the error of the court in refusing a further examination of Doctor Malster, we recommend a reversal of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

NOTE.—*Privileged Communications.—Physician and Patient.*—At common law, the protection accorded to professional communications was not extended to physicians and surgeons. Taylor, 481. In recognition of the necessity for a full confidence between physician and patient, the legislatures of the following states and territories have extended the privilege to communications between physician and patient: Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Wisconsin and Wyoming. The restrictive clause of the several states varies considerably. I believe that New York was the first state to pass such a law. The New York statute reads: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity." Code of Civil Procedure, par. 834. The restrictive clause that physician or surgeon "shall not be allowed to disclose," etc., has been substantially copied by Iowa, Michigan, Pennsylvania and Nebraska. In Nebraska the physician and surgeon are placed in the same category with the attorney, minister and priest. Code of Civil Procedure, sec. 333. The New York statute will not protect communications of a confidential nature made to one not legally qualified to practice, even against the protest of his patient. *Wiel v. Cowles*, 45 Hun [N. Y.], 307. Hence one dealing with another purporting to be a physician and surgeon, is charged with knowledge of his disability. The several statutes of California, Colorado, Idaho, Minnesota, Nevada, North Dakota, Oregon, Utah and Washington, provide that the physician either *shall not* or *can not* be examined. The statute of Montana that he *shall not be a witness.* The statute of Ohio that he *shall not testify;* and this restriction has been copied by Wyoming. The statutes of Indiana, Kansas and Missouri provide that a physician shall not be competent to testify to information professionally obtained, and this provision has been substantially copied in Oklahoma. The statutes of Arkansas, North Carolina and Wisconsin provide the physician shall not be required, or compelled, to testify. Arkansas extends this protection to the "trained nurse," while North Carolina, by a proviso, leaves the matter in the hands of the presiding judge. The statutes of California, Idaho, Minnesota, Montana, Oregon, Pennsylvania, Utah and Washington expressly restrict the application to civil cases. The statutes of Kansas, Nebraska, Nevada, Ohio, Oklahoma and Wyoming provide that the patient may waive the privilege and allow the witness to testify. As the privilege by these statutes

is for the benefit of the patient, it is not impossible that courts might hold, as they have held in regard to attorneys, that this, like any personal privilege, might be waived in the absence of a statute. The mere fact that one is a licensed physician, does not, *ipso facto*, confer the privilege. The confidential relation must exist at the time the information is obtained. *Jacobs v. Cross*, 19 Minn., 523. The relation must not be presumed; it must be proved. *People v. Schuyler*, 106 N. Y., 298, 12 N. E. Rep., 783. It is not necessary to the existence of the relation that the patient himself summon the physician; the legal effect is the same if he be summoned by the attending physician, by the friends of the patient or by strangers. *Renihan v. Dennin*, 103 N. Y., 573. Where the public prosecutor sends a physician to examine a person upon whom a crime has been committed, for the purpose of obtaining evidence, and he treats the sufferer, the relation attaches and the physician is disqualified as a witness. *People v. Murphy*, 101 N. Y., 126. The same is true of a physician sent on a like errand by the defendant, in a suit for personal injuries. *Weitz v. Mound City R. Co.*, 53 Mo. App., 39; *Freel v. Market Street R. Co.*, 97 Cal., 40. It is otherwise when he visits the patient only for the purpose of information. *Nesbit v. People*, 19 Colo., 441, 36 Pac. Rep., 221; *People v. Kemmler*, 119 N. Y., 580. (The latter is the celebrated electrocution case.) The information which a physician is forbidden to disclose, is not confined to communications made by the patient. But the restriction applies to all facts which necessarily come to a physician in a professional case. *People v. Stout*, 3 Parker's Rep. [N. Y.], 670. This question has never been passed upon by the supreme court of Nebraska. But in the eighth judicial district of this state, at the November, 1897, term of district court for Cedar county, Evans, J., presiding, the case of *Rawhouser v. Aukeny* (bastardy) was tried, when the defendant offered as a witness one Augustus Hamilton, who, after qualifying as a physician, and testifying that he had been consulted by the prosecutrix and had made an examination, was asked what was the result of the examination with reference to her being pregnant. The question was objected to as calling for the result of a professional consultation and examination. The objection was sustained. The ruling was not assigned as error on review before the supreme court. To the same effect is *Kelley v. Highfield*, 15 Ore., 277; and in Indiana whose statute, like our own, uses the word "communication," the supreme court "sets the seal of real secrecy and confidence upon what the physician observes in respect to the patient's person." *Williams v. Johnson*, 112 Ind., 273. There are certain communications outside professional privilege. *Collins v. Mack*, 31 Ark., 684. There is some disagreement amongst authorities as to whether a physician can testify with reference to his patient being drunk or sober. *Linz v. Massachusetts Mutual Life Ins. Co.*, 8 Mo. App., 363; *Kling v. City of Kansas*, 27 Mo. App., 231. The former case allows of the physician so testifying; the latter forbids him to so testify. The rule of exclusion applies to testamentary capacity. *Renihan v. Dennin*, 103 N. Y., 573. Communications for the purpose of doing an unlawful act or committing a crime are not privileged.

People v. Lane, 101 Cal., 513, 36 Pac. Rep., 16; *State v. Kidd*, 89 Ia., 54; *State v. Smith*, 99 Ia., 26, 68 N. W. Rep., 428. A physician is not precluded from giving the number and dates of his professional visits. *Briesenmeister v. Knights of Pythias*, 81 Mich., 252; *Dittrich v. City of Detroit*, 98 Mich., 245, 57 N. W. Rep., 125. A physician took an unprofessional friend with him to attend a case of confinement. The doctor was sick and fatigued from overwork. The roads were so bad that a horse could neither be ridden nor driven over them. His non-professional friend reluctantly consented to go with him and assist in carrying the lantern, umbrella and obstetrical instruments. It was in midwinter. The house was 14x16 and had but one room. During the accouchement, the doctor's companion conducted himself with great propriety, sitting with his face to the wall; and only once when the patient, in a labor-pain, had kicked a female assistant in the pit of the stomach, was he called to assist. He held one of her hands, but returned to his former position when the agony was past. The doctor did not disclose the non-professional character of his companion. The woman recovered in an action on the case against both the doctor and his companion for "shame and mortification," by this violation of professional confidence. *De May v. Roberts*, 46 Mich., 160-166.—REPORTER.

ALBERT GULLION v. MARGARET TRAVER ET AL.

FILED FEBRUARY 19, 1902. No. 11,080.

Commissioner's opinion, Department No. 3.

1. **Motion for New Trial:** AMENDMENT: UNAVOIDABLE DELAY. A motion for a new trial can not be amended after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict.

2. **Motion for New Trial:** AMENDMENT: LIMITATION. Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from verdict, will not be considered by this court.

3. **Instruction:** RULE OF DAMAGES. The refusal to give an instruction correctly stating a rule of damages, but which became immaterial on account of the finding of the jury, is not reversible error.

4. **Verdict.** The verdict of a jury will not be disturbed when based on conflicting evidence.

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

Mockett & Polk and *C. S. Polk,* for plaintiff in error.

David K. Barr and *Jesse L. Root, contra.*

DUFFIE, C.

This is an action in replevin brought by the plaintiff to recover certain personal property described in a chattel mortgage claimed to have been executed by the defendant in error, Margaret Traver, and George Traver, her husband. Charles P. Traver intervened in the action, claiming to be the owner of one cow described in the mortgage. The jury returned a verdict for the defendants and intervener, upon which judgment was entered by the court, and the plaintiff in error has brought the record to this court for review.

Some preliminary questions should be disposed of before proceeding to examine the case upon its merits. The verdict of the jury was returned and filed November 28, 1898, and the plaintiff in error filed his motion for a new trial December 1, 1898. December 10, 1898, the court made an order granting leave to the plaintiff to amend his motion for a new trial. The record does not disclose any written application made to the court for leave to amend the motion, nor does it appear upon what ground such leave was granted, or that any showing was made or required as a basis for the order. In *Aultman, Miller & Co. v. Leahey,* 24 Nebr., 286, the plaintiff, after the expiration of the three days allowed by the statute for filing a motion for a new trial, applied to the court, and obtained leave to amend his motion. This court refused to consider the matters set out in the amendment, and relating to the power of the court in such cases said: "Section 316 of the Code of Civil Procedure provides that 'the application for a new trial must be made at the term the verdict is rendered, and, except for the cause of newly discovered evi-

dence, shall be within three days after the verdict was rendered, unless unavoidably prevented.' This amendment embodies a new and definite assignment of error. It was not made until the fourth day after the verdict was rendered, after the expiration of the time limited by the Code, without the finding by the court that the plaintiff 'was unavoidably prevented' from a compliance with the statute, as a palliation for the amendment. Is it not, therefore, to be rejected? If it may be said that the application was made within the statutory limit, and that the right of amendment to pleadings is inherent in the court, rendering this amendment consubstantial with the original assignments, it may also be suggested that the amendment was an apparent necessity in bringing the application within the rule that, 'the [attention of] the trial court be specifically called to each alleged error, in a motion for a new trial, and the same be also specifically pointed out to the supreme court in the petition in error,' and without which the original allegations were too incomplete and insufficient to support the vague contentions of error presented to the court. The amendment comprised substantially the whole of error assigned. It does not seem, therefore, to have been competent for the court to have extended the time limited by the Code, by the allowance of a substitute, as an amendment, after the expiration of the three days appointed, after the verdict. The authority of the legislature to regulate, by the Code, applications for new trials, will not be disputed. It has done so in a mandatory provision. This amendment is no less than an infraction of it. It is an improper suspension of the rule of the Code."

In the motion first filed no exceptions were taken to the instructions of the court, the only error alleged relating to instructions being that the court erred in refusing to give instruction No. 1, asked by the plaintiff. Following the rule announced in *Aultman, Miller & Co. v. Leahey,* we can not consider the errors assigned in the amended motion filed for a new trial attacking the correctness of

the instructions given by the court to the jury. The refusal of the court to instruct the jury as requested by the plaintiff in instruction No. 1 is not reversible error, unless from an examination of the evidence it shall appear that the verdict of the jury is not supported by sufficient evidence. The instruction related wholly to the damages which the plaintiff should recover for part of the mortgaged property which the defendant had sold and disposed of, provided the jury found for the plaintiff. As the jury returned a verdict for the defendants this became wholly immaterial, and the failure to give the instruction could not in any manner prejudice the plaintiff.

It appears from the record before us that the defendant George Traver was indebted to one Cutler. This indebtedness was evidenced by a note which had been indorsed by Cutler to Gullion, the plaintiff in error. On the evening of January 8, 1896, Cutler and Quackenbush, a bookkeeper for the First National Bank of Greenwood, drove out to the Travers farm to obtain security upon the note. A real-estate mortgage securing the note was made and executed at that time. Further security being demanded, the chattel mortgage in question in this case was signed by Mrs. and Mr. Traver, and given to Quackenbush, with instructions to fill in a description of the property intended to be covered thereby from a first mortgage then held upon the same property by the First National Bank of Greenwood. It is claimed by the defendants that Quackenbush was to hold the mortgage until the Travers could get to town and examine the mortgage and the description of property contained therein. It is asserted, and not denied, that a portion of the property included in the chattel mortgage held by the First National Bank of Greenwood had been sold, and the proceeds applied upon that mortgage, and for this reason the Travers insist that they desired to examine the mortgage before its delivery, to be certain that it did not cover any property not then owned by them. Mr. Traver was sick at the time, and the evidence is practically undisputed that he did not get to town

until the 19th of January, 1896. In the meantime, Quackenbush had filled in the mortgage with a description of the property, and on the 13th of January, 1896, had filed a copy of the same with the register of deeds of Cass county. The issue was sharply made that there never had been any delivery of this mortgage by Traver and his wife.

There is ample evidence in the record to support the finding of the jury that no delivery was in fact ever made. In this condition of the case, we can not, under the well-known rule of the court, interfere with the findings of the jury. We therefore recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANNIE H. CHAPPLE v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

FILED FEBRUARY 19, 1902. No. 10,716.

Commissioner's opinion, Department No. 3.

1. **Life Insurance**: ASSESSMENT: LIABILITY: NOTICE: BY-LAW: FORFEITURE FOR NON-PAYMENT. Although a by-law of a beneficiary life insurance association requires the clerk of the local body of the order to notify the members of their liability for assessments, his failure so to do will not prevent a forfeiture for non-payment if another by-law expressly provides that such failure shall have that effect.

2. **Assessment**: SUBSTANTIAL COMPLIANCE WITH BY-LAW. Substantial compliance with a by-law of such association, empowering two designated officers of the society to make an assessment on a certain day in each calendar month, and requiring the clerk of a superior branch of the order to immediately give notice of the making of same to the clerks of inferior associations, will be sufficient to uphold the assessment.

3. ———: ABSTRACT EQUITY. An assessment for the precise purpose specified in the by-laws of such an association will not be treated

as invalid solely because it may not appear to be abstractly equitable.

4. **Forfeiture of Membership: FACT OF DELINQUENCY ITSELF.** When the by-laws of such an association expressly declare that the fact of delinquency in payment of an assessment shall work a forfeiture of membership, and that thereafter the delinquent shall not be "entitled to receive the password, or to participate in any of the business or social proceedings of his camp, he may be admitted to a meeting to pay his arrearages, but must retire if he does not pay same," such forfeiture is not waived by the mere fact that the member "was present at all the meetings and participated in all the social proceedings of said camp, up and to the time of his death," which occurred soon after he had become delinquent.

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

Nelson C. Pratt, for plaintiff in error.

Brome & Burnett, contra.

AMES, C.

On or about the 21st day of February, 1895, William H. Chapple, husband of the plaintiff in error, became a member of the defendant association, and of Alpha Camp No. 1, thereof, situated at Omaha, in this state. At the time he received a certificate of membership, providing, in effect, that, if he should die while in good standing as a member, his wife, the plaintiff, should be entitled to participate in the mortuary fund of the association, to the amount of $2,000. This certificate expressly bound the member to whom it was issued, by all the by-laws, rules and regulations of the defendant, and at the time of its issuance the former complied with all the requirements of the society, requisite to make him a member of the same in good standing, and he became such member. Among the objects and powers of the association specified in its by-laws is the creating of "a fund from which, upon reasonable and satisfactory proofs of the death of a member, who has complied with the lawful requirements of the order, there shall be paid a sum not exceeding $3,000, to" his beneficiary.

One of the regulations of the order is that on the 20th day of each month two designated officers of the association "shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered for payment, during the ensuing month, and the sovereign clerk shall immediately mail notice thereof to each camp," whereupon the clerk of the local camp is required to remit the contents of the beneficiary fund to the sovereign clerk. The money thus remitted is required to be used, so far as necessary, for the payment of death losses.

It will be seen from the foregoing that it is not intended that assessments shall be levied for the payment of past or current death losses, but are anticipatory in their nature, and designed to maintain a fund out of which losses shall be paid as they shall be incurred. This fact is mentioned here because we think that it disposes of one of the objections of the plaintiff in error, which is that the assessments, or part of them, in the payment of which Chapple is alleged to be delinquent, were not for the payment of losses occasioned by the deaths of members occurring during his membership. One of the by-laws provides that "the liability of a member to contribute to the payment of death losses shall commence with the date at which his certificate was issued by the sovereign clerk." The first assessment for which it is claimed that Chapple was liable and delinquent was made on or about April 20, which was two months after he became a member. So far as this feature of the matter is concerned, his liability therefor was consequently within the very letter of his contract. In this particular respect, the case is substantially identical with that of *Fulton v. Stevens,* 74 N. W. Rep. [Wis.], 803, and the same rule applies with equal force to the succeeding assessments involved in this litigation.

It is further objected that the first assessment was invalid because of not having been made at the time or in the manner required by the above-mentioned by-law. The two officers who were empowered to make it do not appear

to have been intended to constitute a board or tribunal, but the authority to do this act was lodged in them as individuals, and they were not required to keep or make any record of their action in the premises. One of these officers testified that he was unable to say, positively, whether the assessment was made on the 19th, 20th, or 21st of the month, and it is not certain whether at the time it was made the two men were together; but the witnesses testified that it was their custom always to confer with each other, either by word of mouth, or by letter, telephone or telegram, and that the assessments were made as results of such conferences, and were joint acts of both. We think that the regulation relative to making the assessments is so far directory that a substantial compliance therewith will suffice, and that there was such compliance in this instance. A very similar question was before the supreme court of Minnesota in *Mee v. Bankers' Life Ass'n* (69 Minn., 210, 212), and was disposed of in the following manner: "The first point made by plaintiff's counsel is that the so-called December assessment was invalid for two distinct reasons: (*a*) Because all steps looking toward the assessment were taken prior to a time specifically prescribed by the by-laws; (*b*) because no complete assessment was made by the board of trustees or by its resolution, what was relied on being largely the acts of the secretary or of some clerk under his direction. We do not think it worth while to discuss this point at length. It stood admitted that ten death losses had actually occurred when on November 6, 1893, an assessment being necessary and obligatory upon the association, the board of trustees, by resolution, made and levied the regular December assessment upon all members, to be collected according to the articles of the association. From that time on until the last day of November the secretary and one or more clerks were engaged in preparing, causing to be printed, and in getting ready for mailing the necessary notices of assessment or mortuary calls for over 12,000 members. These notices were dated December 1, and

mailed on the last day of November. The articles provided that all assessments for the payment of death losses should be made by resolution of the board of trustees, and a by-law had been adopted, which read 'until and unless otherwise ordered by the board of trustees, mortuary assessments' shall be made only on the first secular days of April, July, and December in each year, and by special resolution. Although the resolution in question was adopted November 6, it was expressly made for the December assessment. It was necessary for the resolution to be made and adopted prior to the first secular day in December, long enough before, at least, to prepare the notices for mailing, and this is what was done. That the secretary and his clerks performed a large amount of clerical work incident upon the adoption of the resolution is of no consequence whatsoever. The articles and the by-laws were substantially complied with, and the assessment regularly and properly made."

The same principles apply to the notification by the clerk of the sovereign camp to the clerk of the local camp of the fact of such assessments. He is required to make such notification "immediately" by mail. The notices in the case at bar were not sent until the first of the month following that in which they were made. This was pursuant to a custom adopted for the convenience of the person sending them, and does not appear to have been the cause of any loss or inconvenience to anybody else. So slight a variance from a prescribed rule by a mere clerical officer ought not to be held to defeat a previously valid assessment. Concerning the collection of assessments after notice thereof has been received by the clerk of the local camp, there are the following provisions in the by-laws of the association, to which we have given our own numbers: 1. "Every member shall be notified by the clerk whenever an assessment is ordered to be levied, before the 10th day of every calendar month, unless the official notice is ordered, by the sovereign executive council, to be published in an official organ." 2. "Clerks shall notify members of

assessments and dues by sending a notice, by mail, to his last known address, or by leaving it at his usual place of residence or business on or before the 10th day of each month when a payment is to be made." 3. "The failure of the clerk to notify a member of assessments, shall not relieve a member from the payment of assessments or dues, according to the call or requirements of the sovereign camp, and he shall stand suspended for non-payment of same as if he had received actual notice. And it shall be the duty of every member who may not receive a notice from the clerk of the camp for the payment of assessments or dues to inquire of the clerk of the camp, on or before the last day of each month, whether any calls for assessments or dues have been made or liability incurred against him, and if any, he shall pay the same according to the call of the sovereign camp, and by-laws of the camp or vote of same, and upon a failure to do so, shall stand suspended." Undoubtedly all these rules, having relation to the same matter, are to be construed together, and language could hardly be more explicit for rendering the giving of notice merely directory and non-essential than is that of the last of them. It is not contended that Chapple was ignorant of these regulations, or that he was imposed upon or misled in any way with respect to any matter treated of by them; and it would be a waste of time to discuss the evidence as to whether the clerk did notify him, or attempt to do so, or whether, if he sent a notice by mail, it was properly addressed. We think, however, that there is sufficient evidence to uphold a finding that the clerk of the local camp gave the required notices. Another by-law enacts: 4. "On or before the last day of each month each member shall pay the assessments and dues, if any, which may have been levied for the month. A member failing to pay any assessment or dues within the time required by law, shall stand suspended, and shall not thereafter be entitled to any of the benefits of the order, and his certificate shall be canceled and void, and he can not attend any meetings of his camp until he has been duly reinstated in ac-

cordance with the laws of the order." Chapple died on the 9th of June, delinquent of three successive assessments, and his widow, the plaintiff in error, and the beneficiary named in his membership certificate, brought this action to recover thereon. The answer pleaded substantially the foregoing facts, and, as an avoidance of them, the reply contained the following matter, which was upon motion stricken out: "He is not entitled to receive the password or to participate in any of the business or social proceedings of his camp. He may be admitted to a meeting to pay his arrearages, but must retire if he does not pay same. That the said W. H. Chapple was present at all the meetings, and participated in all the social proceedings of said camp, up and to the time of his death." The plaintiff in error contends that the order striking this matter from the reply is erroneous, for the following reasons, as stated in his brief: "The contention of plaintiff in error is that, by the defendant in error permitting W. H. Chapple to attend the meetings of said order, that it thereby waived the payment of the assessments, which assessments were due and unpaid as claimed by the defendant in error, and, granting that such assessments were not paid, that they, by reason of the waiver in permitting the said W. H. Chapple to attend the meetings, he still was in good standing, and his beneficiary entitled to all the rights and privileges under the certificate issued by the defendant in error." In support of this contention the plaintiff in error cites several authorities in which it is held that the clerk of the local camp, who is entrusted with the duty of collecting the assessments, is for that purpose the agent of the superior branch or body of the society for which the service is performed, and that if, in so doing, he adopts a course of business or conduct, upon the sufficiency and propriety of which the members, in good faith, rely, and to which they conform, they or their beneficiaries will not be deprived of the rights and benefits of membership, because of the fact that the course pursued is in violation of the known rules of the order. With the principles of those

decisions we are fully in accord, but they do not seem to us to be applicable to the question at issue in this case. It was the clerk of the local camp, not the camp itself, that was the agent in the premises. No action by the camp was required to suspend the deceased from the right to attend its meetings and participate in its social proceedings. He lost that right instantly by the reason of the fact of delinquency. The failure of the members to resent his intrusion into their meetings, or their forbearance to eject him therefrom and to forbid him to participate with them socially, wrought him no injury, and had no tendency to mislead him. No affirmative act is alleged to have been done either by the clerk or by the camp which had a tendency toward that result. A jury was waived, and the cause tried to the court, who found generally for the defendant, and rendered a judgment of dismissal and for costs. We think he did not err, and it is recommended that the judgment be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be

AFFIRMED.

RUTH BROWN ET AL. V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.*

FILED FEBRUARY 19, 1902. No. 11,121.

Commissioner's opinion, Department No. 3.

1. **Railroad Right of Way: DEPOSIT WITH COUNTY JUDGE: LIABILITY OF COMPANY.** The deposit of money by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged.

2. ———: ———: ———. One whose property has been taken by a railway company for a right of way by statutory proceedings for that purpose may, after the proceedings have terminated, recover the amount awarded to him by an action at law against

*Rehearing allowed. Reversal adhered to.

the company, and he is not bound to resort to the fund deposited with the county judge during the proceedings, as required by statute.

3. ——: ——: ——: REPUDIATION: ESTOPPEL. A railway company, after having prosecuted proceedings to obtain a right of way to a final determination, is estopped to repudiate or abandon them, and is bound to pay the amount of the award to the landowner.

ERROR from the district court for Lancaster county. Tried below before TUTTLE, J. *Reversed.*

Benjamin F. Johnson, for plaintiffs in error.

W. F. Evans and *Billingsley & Greene, contra.*

AMES, C.

In 1892 the defendant in error began proceedings in the county court for Lancaster county for the acquisition, in the usual manner, of a right of way for railroad purposes over and upon certain lots in the city of Lincoln, a part of which were owned by the plaintiffs in error, and a part by one Westerfield. Commissioners appointed for the purpose assessed the total damages to these lots at $1,600, and this amount of money was thereupon deposited by the company with the county judge. Upon an appeal to the district court this award was for some reason set aside, and afterwards, under a new commission issuing from the county court, damages were assessed at $950. The property owners and the company then agreed to refrain from the further prosecution of the proceedings, and in consideration thereof it was stipulated that the compensation to be paid to the former should be $1,200, or, as the pleadings phrase it, the award should be increased to that sum, one-half thereof to be paid to Westerfield and the other half to the plaintiffs in error. The money deposited by the company at the time of the first appraisement was permitted by it to be retained by the county judge and was directed by it to be applied, so far as requisite, to the satisfaction of such claims for damages as should finally be established in the behalf of the property owners. Soon

after the making of the agreement, Westerfield was, with the consent of the company, permitted to withdraw $600 from the fund; but it was further stipulated between the latter and the plaintiffs in error that their part of the sum agreed upon should not be withdrawn until they should convey to the company, by sufficient warranty deeds, the fee title to that part of the lots belonging to them. It is alleged by the company and denied by the plaintiffs in error that it was an expressed part of the agreement that the property owners should look to the funds in the hands of the county judge for their money, but none of the stipulations is in writing and there is no evidence upon the point in the record. With this exception, however, there is no dispute as to what occurred between the parties, and we think the fair interpretation of the pleadings and circumstances is that both of them understood that the amount of the award, $950, and an additional $250, making a total of $1,200, should remain in the hands of the judge in the character of a statutory deposit, until withdrawn by the parties entitled to it by the terms of the compromise. Westerfield, as already noted, withdrew his money speedily, but there was some delay on the part of the plaintiffs in error because there was some difficulty about their title which needed to be settled by a decree of court before they could make satisfactory deeds of warranty conveying their land. This difficulty was finally overcome, and the required deeds were executed and delivered; and a demand was made upon the company to pay $600 to the plaintiffs in error in consideration of the premises. Payment was refused, and this action was brought to recover the sum demanded. It is admitted that neither party has withdrawn the money from the county judge or his successor in office, or made any attempt or request to do so. The trial judge was of the opinion that upon this state of facts the plaintiffs were not entitled to recover, and instructed the jury to return a verdict for the defendant, and thus is presented the only question in the case.

We are of the opinion that the district court erred. The constitution of this state provides, section 21, article 1: "The property of no person shall be taken or damaged for public use without just compensation therefor." The language of this section is imperative, and the right of the property owners to compensation is unqualified. This right can not be impaired or modified by legislation or otherwise. He is not compensated until the sum to which he is entitled is paid or tendered to him or to some one authorized by him to receive it. It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that payment or deposit with such appointee shall be equivalent to payment to him. If the statute expressly so provided, or was susceptible of that construction, it would be unconstitutional and void. In our opinion such is not its meaning, although it goes to the furthest limit permissible. The money, after the assessment has been made, is deposited with the county judge, not as payment, but as security that payment shall be made; and no act of the railway company, or of the court, or of any other person except the property owner, can convert it into a payment, or relieve the corporation of its obligation, not to secure, but actually to make, just compensation for the property taken or damaged. The property owner may, if he chooses, waive his privilege, and apply for and receive the sum awarded and deposited, and by so doing he, of course, relieves both the company and the judge of all further or other responsibility; but he may also, if he prefers, stand upon his constitutional right and demand that the sum awarded be paid to him, or to an agent of his own choosing. Neither during the pendency of the proceedings nor after they have ended can he be compelled to resort for the satisfaction of his demands to the uncertain security of official responsibility, nor to incur the risk of official delinquency. He can not be charged with the negligence or shortcomings of an agent in whose appointment he did not concur, nor can he be accused of

negligence because of failure to demand of a third person a sum of money which his adversary is under obligation to pay himself. The proceeding is instituted at the instance and for the benefit of the railway company, and the deposit is permitted to be made solely for its convenience. Having made it, the company obtains a license to enter upon the land, but does not accomplish a taking of the property, or acquire an easement therein, until it has satisfied the constitutional requirement and made compensation therefor to the person owning the same. Commenting upon similar constitutional and statutory enactments, the supreme court of Iowa, in *White v. Wabash, St. L. & P. R. Co.*, 64 Ia., 281, 20 N. W. Rep., 436, say: "These provisions are in harmony with the constitution. The payment of the money to the sheriff can not be regarded as a payment to the landowner. Section 1244 provides that the amount of damages shall be paid to the sheriff 'for the use' of the owner of the land. This evidently means nothing more than that it shall be paid by the sheriff at the proper time to the owner. The sheriff can not be regarded as the agent of the owner, but rather as the agent of the railway company, which invoked his services by instituting the proceedings. The money can not be regarded as having been paid into court, and therefore in the custody of the law. But, if this be not so, the payment to the sheriff is not payment to the landowners. If, through the unfaithfulness or mistake of the sheriff, or the failure to pursue the directions of the statute, the money should be lost, and not reach the hands of the landowner, the loss ought not to fall upon him, but rather upon the railway company, which was the mover in the proceedings, and received the benefits flowing from them. *Blackshire v. Atchison, T. & S. F. R. Co.*, 13 Kan., 514."

There is evidence in the record that the county judge with whom the deposit was made failed to account for the money or to pay it over to his successor in office, and, continuing in default, had departed from the state; but we

have omitted to comment upon this fact, because, in our opinion, it is immaterial. The undisputed facts are that at about the time of the making of the award the defendant entered into possession of the property, and has since enjoyed an easement in it for railroad purposes, and that the plaintiffs in error have not been compensated therefor. But actual possession by the railway company is not essential to the plaintiff's right of recovery. The former, after having prosecuted the proceedings to a final determination, is estopped to repudiate or abandon them and is bound to pay the amount of the award to the landowner. *Drath v. Burlington & M. R. R. Co.*, 15 Nebr., 367. Upon that state of facts, the plaintiffs, not the defendant, were entitled to recover, and the instruction complained of was erroneous.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

REVERSED AND REMANDED.

OSCAR HOLWAY V. AMERICAN EXCHANGE NATIONAL BANK OF LINCOLN.

FILED FEBRUARY 19, 1902. No. 10,968.

Commissioner's opinion, Department No. 3.

1. **General Demurrer.** A general demurrer does not raise the question whether there is a defect of parties.
2. **Special Demurrer:** ORDER. An order overruling a special demurrer will not be reviewed where no exception to such order is saved.
3. **Order of Attachment:** AMENDED PETITION: ANOTHER CAUSE OF ACTION: DISMISSAL. Where an order of attachment issues in an action, and property is levied upon thereunder, and an amended

petition is subsequently filed, which, in addition to the cause of action stated in the original petition, sets forth another and different cause of action, and the first cause of action is dismissed before trial, the attachment is thereby dissolved, and an order for the sale of the attached property, in satisfaction of the judgment rendered on the second cause of action, is erroneous.

ERROR from the district court for Custer county. Tried below before GRIMES, J. *Affirmed in part.*

Holcomb Bros. and *C. L. Gutterson,* for plaintiff in error.

Sawyer & Snell, Kirkpatrick & Hager and *Cameron & Reese, contra.*

ALBERT, C.

The relief sought by the original petition filed in this case was to subject the individual property of the defendant to the payment of a certain judgment rendered in favor of the plaintiff and against W. Holway & Co., a copartnership, of which, it was alleged, the defendant in this case was a member. A writ of attachment issued, under which certain real estate of the defendant was attached. Thereafter, the plaintiff filed an amended petition, which, in addition to the cause of action set forth in its original petition, set forth a second cause of action on certain promissory notes, executed by W. Holway & Co. and W. Holway to the Bank of Callaway and by it indorsed and delivered to the plaintiff. A demurrer to the amended petition was interposed on the ground, among others, that there was a defect of parties. The demurrer was sustained as to the first cause of action for some reason, and overruled as to the second. No exception was taken by the defendant to the order overruling the demurrer. Afterward, for some reason not clear to us, the court made an order requiring the plaintiff to elect upon which cause of action it would stand; in pursuance of which order, the plaintiff elected to stand on the second cause of action. No exception was taken by the defendant

to this order, nor to the election of the plaintiff made in pursuance of it. The issues were made up and submitted to the court without a jury. The court found in favor of the plaintiff and rendered judgment for the amount claimed, and ordered a sale of the attached property for the satisfaction of the judgment. The defendant brings the case here on error. We will refer to the parties by the title in the district court.

It is first urged that the court erred in overruling defendant's objection to the introduction of any testimony in support of the second cause of action set forth in the petition, for the reason that the facts therein stated are not sufficient to constitute a cause of action. The petition sufficiently shows that the notes were executed and delivered by W. Holway & Co. and W. Holway to the Bank of Callaway; that W. Holway & Co. was a copartnership; that the defendant in this case was a member of such copartnership; that the notes are past due and unpaid; the indorsement and transfer of the notes to the plaintiff; the amount due and owing thereon, from the defendant to the plaintiff; that being true a cause of action against the defendant is stated. In this behalf, however, it is urged that if the defendant is liable at all, it was jointly with his copartner. Whatever merit there may be in this objection, it is one that can not be successfully raised by a general demurrer. At common law, the non-joinder of parties was available only by plea in abatement. Under the Code, it renders a petition vulnerable to a special demurrer. Defendant's demurrer, interposed before answer, on the ground of a defect of parties, properly presented the question. The demurrer was overruled, and no exception taken. From this record we must infer that the ruling, at the time, was acquiesced in by the defendant. If so, it can not be urged as a ground for reversal in this court.

Considerable space is given in the brief to a discussion of the statutory provisions for actions against copartnerships. Such discussion is wholly foreign to this case.

This is not an action against a partnership, but against an individual member. The right to maintain an action against a partnership, as such, is a statutory innovation. The right to maintain an action against the individual members of a firm on a partnership obligation has never, so far as we know, been questioned. Formerly it was the only method to enforce a partnership liability at law.

Complaint is made that the evidence in this case was taken at the time when one judge presided, whereas the case was submitted and judgment rendered when a different judge occupied the bench. We find in the record a stipulation whereby the cause was submitted on the evidence taken when the former judge presided. Parties will not be heard to complain of a procedure adopted at their request, or with their consent.

The defendant insists that the finding of the trial court that the defendant was a member of the firm of W. Holway & Co., and that the notes in suit are a partnership liability, is not sustained by sufficient evidence. The evidence upon this point is quite voluminous. To set it out at length would amount to a reproduction of a large portion of the bill of exceptions. Hence we shall content ourselves with stating that one witness testifies unequivocally that he himself was a member of the firm, and that the defendant was also a member of the firm of W. Holway & Co. Other witnesses testify to the fact that the other partner of the firm introduced the defendant to them, respectively, as his partner. Another witness testifies that the defendant stated to them that he was a member of the firm. In the face of such evidence on that issue, it can not truthfully be said that the finding of the court thereon is not sustained by sufficient evidence. That the notes were given for partnership debts, while not so clearly established as the defendant's relation to the firm, is amply sustained by the evidence. It is said in this connection that a part of the evidence in respect to these issues is incompetent. That may be. But it is a well-settled rule of this court that, where an action is tried to the court without a jury and

there is sufficient competent evidence in the record to sustain the findings, the judgment will not be reversed on account of the admission of incompetent evidence. The presumption of law is that such evidence was not considered by the court.

Another ground of complaint is that there is a variance between the allegations of the petition and the proof, in this: that it is alleged in the petition that the plaintiff is the owner and holder of the notes, whereas it develops in the testimony that the notes were indorsed and delivered to the plaintiff as collateral security for an indebtedness. That does not constitute a variance. On the state of facts shown in evidence, the plaintiff was the legal holder and owner of the notes. The plaintiff was the only one authorized to maintain an action for the recovery of the amount due on the notes. *Johnson v. Chilson,* 29 Nebr., 301.

It will be remembered that the order of attachment in this case issued on the original petition; that an amended petition was subsequently filed, setting up the cause of action set forth in the original petition, and a second cause of action, based on another state of facts; that the plaintiff elected to stand on the second cause of action, whereby the first cause of action was, in effect, dismissed. Complaint is now made that the court ordered a sale of the attached property for the payment of the amount found due, on the second cause of action. We think this complaint is well founded. By the dismissal of the first cause of action, which was the basis of the order of attachment, the attachment proceedings, being merely ancillary thereto, followed it. From that time on, the court had no jurisdiction over the attached property. The order directing a sale of the attached property is erroneous.

We recommend that the judgment of the district court against the defendant be affirmed, and that the order directing the sale of the attached property be reversed, and the cause remanded, with directions to the trial court to vacate and set aside the order directing such sale.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court against the defendant is affirmed, and the order directing the sale of the attached property is reversed, and the cause remanded with directions to the trial court to vacate and set aside the order directing such sale.

JUDGMENT ACCORDINGLY.

J. L. MOORE, TRUSTEE, APPELLEE, V. FRANCIS M. JACOBS, APPELLANT.

FILED MARCH 5, 1902. No. 11,368.

Confirmation: APPEAL.

APPEAL from the district court for Custer county. Heard below before GRIMES, J. *Affirmed.*

J. R. Dean and *J. S. Kirkpatrick,* for appellant.

S. B. Pound, Roscoe Pound and *C. L. Gutterson, contra.*

PER CURIAM.

An appeal is taken by the owner of the fee title from a final order of confirmation of sale of real estate in foreclosure proceedings. None of the objections presented to the trial court as reasons why confirmation should be denied, except one, are presented or argued in brief of counsel for appellant; hence such objections are to be taken and considered as having been waived. The objections argued in the brief, save one relating to the return of the sheriff to the order of sale, which is apparently without merit, were in nowise presented to the trial court, and therefore we can not consider them on this appeal.

The order of confirmation should be, and accordingly is,

AFFIRMED.

HENRY HAINES, APPELLEE, V. DANIEL L. BELLINGER, IMPLEADED WITH WILLIAM H. GRASSMEYER, APPELLANT.

FILED MARCH 5, 1902. No. 11,391.

Confirmation: APPEAL.

APPEAL from the district court for Buffalo county. Heard below before SULLIVAN, J. *Affirmed.*

B. O. Hostetler, for appellant.

William Gaslin, contra.

PER CURIAM.

Defendants, being the owners of the fee, appeal from an order of confirmation of sale entered in proceedings brought for the purpose of foreclosing a real estate mortgage. The questions presented for consideration by the appeal have in the main been passed upon and disposed of in the case of *Iowa Loan & Trust Co. v. Estate of Devall,* 63 Nebr., 826. Objection is made to the sufficiency of the affidavit of publication of the notice of sale. The objection is not well taken. The affidavit, as well as the sheriff's return, is sufficient evidence of publication of the notice as required by section 497 of the Code of Civil Procedure. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.,* 52 Nebr., 410. Objection is also made because in making the appraisement of the land, the same being a quarter section, the appraisers valued the entire tract, without taking into account a railroad right of way across the land and one acre deeded for church purposes. Conceding such to be the case, the appellants are in nowise prejudiced, and none others are complaining. On the authority of the cases cited, and for the reasons stated, the order appealed from should be, and accordingly is,

AFFIRMED.

SARAH JARVIS V. COUNTY OF CHASE.

FILED MARCH 5, 1902. No. 11,205.

1. **Notice of Appeal.** A notice of appeal, addressed to the county clerk, is served, within the meaning of section 37, chapter 18, article 1, Compiled Statutes, 1901, when it is delivered to such clerk.

2. ———: DELIVERY: FILING. The fact that such a notice was delivered to the clerk is a necessary inference from a statement in the record that it was filed with him by the appellant.

ERROR from the district court for Chase county. Tried below before NORRIS, J. *Reversed.*

Charles W. Meeker, for plaintiff in error.

P. W. Scott, contra.

SULLIVAN, C. J.

This proceeding in error brings up for review a decision of the district court dismissing an appeal taken by Sarah A. Jarvis from an order of the county board of Chase county disallowing a claim to recover back money paid for a tax-sale certificate covering real estate not subject to taxation. The question to be decided is whether the notice of appeal, which is conceded to be jurisdictional, was properly served. The statute provides (Compiled Statutes, 1901, ch. 18, art. 1, sec. 37) that when a claim of any person against a county is disallowed, in whole or in part, the claimant may appeal from the decision of the board to the district court, by causing a written notice to be served on the county clerk within twenty days from the date of the decision, and by executing a bond to the county, conditioned for the faithful prosecution of the appeal and the payment of costs. It also provides (sec. 39) that the clerk, upon such appeal being taken, shall make out and deliver to the clerk of the district court a transcript of the proceedings before the county board, and that the appeal

shall then be entered, tried and determined as are appeals from justices of the peace. It appears from the record before us that the notice of appeal was filed by Jarvis with the county clerk, but it is contended that this did not constitute due service. Notwithstanding the decisions cited by the county attorney, we think it did. The statute requiring notice to be served upon the clerk, must, of course, be substantially complied with; but, since the sole object of the appeal is to enable parties to obtain justice, we see no reason for judging harshly or condemning for trivial faults, the proceeding by which it is sought to transfer the cause to the appellate court. The notice here in question was addressed to the county clerk, and it is entirely certain that it was delivered to him, for he states in the transcript filed in the district court that he filed it and copied it within twenty days after the county board rendered the decision. The notice having been delivered to the county clerk within the time limited by the statute, and the appeal bond having been given and approved, the district court, when the transcript was filed, had jurisdiction of the case, and should have proceeded to a trial on the merits. Rigid interpretation and judicial refinement were carried too far when the court held that the county clerk could receive, file and copy the notice, without being served with it. Delivery was service, and the fact of delivery is a necessary inference from the recitals of the transcript. The supreme court of Minnesota, in *State v. Klitzke,* 46 Minn., 343, went so far as to hold that a notice of appeal addressed to the attorney for the appellee was served upon the clerk of the district court when it was filed in his office. This decision, doubtless, runs counter to the current of authority, but it illustrates the repugnance of courts to listen to mere captious criticism upon the steps taken by a defeated litigant in an effort to obtain a proper adjudication of his rights. The decision of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FARMERS & MERCHANTS' STATE BANK OF BEATRICE, APPELLEE, V. JAMES THORNBURG ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,228.

Judicial Sale: APPRAISEMENT. After land has been sold in execution of a decree of foreclosure it is too late to question the appraisement, except in case of fraud.

APPEAL from the district court for Gage county. Heard below before LETTON, J. *Affirmed.*

Ernest O. Kretsinger, for appellants.

Leonard W. Colby, contra.

SULLIVAN, C. J.

This is an appeal from an order of confirmation made by the district court of Gage county in an action brought by the Farmers' & Merchants' State Bank against James Thornburg to foreclose a mortgage upon lot 2 of block 35 in the city of Beatrice. The ground upon which the order is assailed is that the appraisers deducted from the gross value of the property the sum of $250 on account of a prior mortgage which had in fact been paid and released of record, but which was, nevertheless, through an error of the register of deeds, certified to the sheriff as a subsisting lien. The premises were valued by the appraisers at $2,800, and the interest of the defendant, after deducting the canceled mortgage and taxes, amounting to $12.05, was fixed at $2,537.95. The selling price was $1,692, which, it will be seen, was less than two-thirds of the value of such interest as fixed by the appraisers. Upon these facts, the district court did not err in overruling the motion to vacate the sale. It was the duty of the sheriff, acting in obedience to the provisions of section 491*d* of the Code of Civil Procedure, to deposit a copy of the appraisement in the office of the clerk of the district court before the sale was adver-

tised. If this duty was performed,—and presumably it was,—the defendant knew, or at least was charged with knowledge of the value of his interest in the property as fixed by the appraisers, and he should have then moved to set the appraisement aside if he was dissatisfied with it. It has been frequently decided by this court, and is now the settled rule, that objections to an appraisement not founded upon fraud must be filed with the clerk of the district court before the sale occurs. *Vought v. Foxworthy,* 38 Nebr., 790; *Kearney Land & Investment Co. v. Aspinwall,* 45 Nebr., 601; *Security Investment Co. v. Sizer,* 58 Nebr., 669. It is not claimed that the appraisers in this case acted fraudulently in deducting the $250 mortgage, and hence it was too late to question their appraisement after the sale had been made. The order of confirmation is

AFFIRMED.

J. K. SPEER V. STATE OF NEBRASKA.

FILED MARCH 5, 1902. No. 12,474.

1. **Proceeding for Prevention of Crime:** COSTS. The defendant in a proceeding for the prevention of crime may be taxed with costs only (1) where he is held to bail by the district court; and (2) where, for want of bail, he is sent to prison.
2. **Costs:** CRIMINAL CODE: CONVICTION. Sections 500 and 501 of the Criminal Code, authorize the taxation of costs only in cases where a crime has been charged and there has been a conviction in accordance with established procedure.

ERROR from the district court for Holt county. Tried below before HARRINGTON, J. *Reversed.*

R. R. Dickson and *E. H. Benedict,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

SULLIVAN, C. J.

This was a proceeding for the prevention of crime, brought under chapter 26 of the Criminal Code. The

plaintiff in error was charged with having threatened to commit murder and was arrested, brought before a magistrate, and upon examination, required to enter into a recognizance for his appearance at the next term of the district court, and in the meantime to keep the peace and be of good behavior generally, and especially toward Ed E. Hunter, the person who filed the complaint, and against whom the threats had been made. Bail was given in compliance with the order, and at the next term of the district court the parties appeared, the witnesses were examined and the case disposed of in the following manner:

"The court being fully advised in the premises finds that there was sufficient and just grounds for the complaint in this case and for binding the said J. K. Speer over to keep the peace. The court further finds that it is not necessary to require the defendant to enter into any further security to keep the peace in the future. The court further finds that said J. K. Speer is liable for all costs in this cause both in the county court and in this court; it is therefore ordered and decreed that said J. K. Speer pay all costs in this cause, the said J. K. Speer to stand committed until said costs are paid."

Only one question is raised by the petition in error, and that is whether the court had authority under the findings to tax the costs to Speer. Sections 274, 275 and 276 of chapter 26 aforesaid are as follows:

"Sec. 274. The district court to which any transcript or recognizance to keep the peace, as aforesaid, shall be returned, shall, upon the appearance of the parties complaining and complained of, examine the witnesses produced upon oath, and may either discharge the accused from his recognizance or commitment, or may order him to enter into such other and further security as may be just thereafter to keep the peace and be of good behavior for such term of time as the court may order.

"Sec. 275. For want of such security the court shall commit the person accused to the jail of the county, there to remain until such order be complied with, or he be other-

wise discharged by due course of law; but in no case shall a person so failing to give security be confined for a period of time exceeding one year.

"Sec. 276. Whether such person be held to bail or be committed for want thereof, the court shall, in either case, render judgment against him for the costs of the prosecution and award execution therefor."

From a consideration of these provisions of the statute it is manifest that when a case of this kind is heard in the district court, one of two things must be done: Either the accused must be discharged from his recognizance or commitment, or else he must be required to give other and further security to keep the peace and be of good behavior for such period as the court may direct. If the order for further security be not complied with, the defendant may be committed to the county jail. Section 276 authorizes the taxation of costs against an accused person in a proceeding for the prevention of crime in two cases only: (1) where he is held to bail; and (2) where for want of bail he is sent to prison. Speer was not required to give bail by the district court and he was not committed for want of bail. There was therefore no authority under chapter 26 for taxing him with the costs of the proceeding.

It is suggested, however, that the decision of the district court may be warranted by sections 500 and 501 of the Criminal Code. In our judgment these sections have no relation whatever to proceedings under chapter 26. The plaintiff in error was not charged with the commission of any crime, and consequently the court had no power to punish him. Before sentence can be pronounced against a person brought for any purpose before a court of criminal jurisdiction, he must be charged and convicted in accordance with established proceedure. The decision of the district court is

REVERSED.

NOTE.—*Peace Warrant.*—The circuit court is required to proceed with the examination *de novo*, and may therefore refuse to look at the legal sufficiency of the warrant under which the party was arrested. *Tomlin v. State*, 19 Ala., 9.—REPORTER.

FREDERICK HARRIS V. GEORGE JENNINGS ET AL.

FILED MARCH 5, 1902. No. 11,227.

1. **Nunc-Pro-Tunc Order:** SATISFACTORY EVIDENCE: BETTER EVIDENCE: RECORD. In deciding a motion for a nunc-pro-tunc order, the district court may act upon any satisfactory competent evidence in support thereof, although minutes of the proceedings, or other writing appearing in or among the records of the court are regarded as a better class of evidence.

2. **Evidence:** NUNC-PRO-TUNC ENTRY. Evidence examined and *held* sufficient to support an order made to correct the journals by a nunc-pro-tunc entry.

3. **Motion for New Trial.** A motion for a new trial must, in all cases, except for newly discovered evidence, be filed at the term at which the finding or decision sought to be vacated by the motion is rendered.

4. ——: OVERRULED: ASSIGNMENTS OF ERROR UNAVAILING. When a motion for a new trial is overruled, because not filed within the time required by statute, all matters necessarily included therein as grounds for a new trial are unavailing on review by proceedings in error.

ERROR from the district court for Webster county. Tried below before BEALL, J. *Affirmed.*

George R. Chaney, for plaintiff in error.

J. M. Chaffin, contra.

HOLCOMB, J.

By these proceedings plaintiff in error, plaintiff below, prosecutes error from an order or ruling of the district court sustaining a motion for a nunc-pro-tunc order. The ruling complained of is evidenced by the following entry on the journals of the trial court, as certified by the clerk: "Now, on this 11th day of April, A. D. 1899, this cause coming on to be heard, nunc-pro-tunc order granted on motion, showing injunction dissolved as of May 10th, 1898, to which ruling of the court the plaintiff excepts," etc. To the writer it appears doubtful whether the entry

quoted constitutes a valid final order, to reverse which proceedings in error will lie. It is more in the nature of a recital to the effect that the court granted the defendant's motion, and is in itself insufficient and lacking in the formal requisites to show that the court ordered and directed that its journals should be corrected so as to show an order of dissolution of the temporary injunction as of the time stated, and as a nunc-pro-tunc order. However, we pass this, treating the order as a valid and final one, from which error may be prosecuted. It is argued that the evidence is insufficient to sustain the order, and that there existed on the journals and records of the court no written memorandum, or other entry of any kind or character, as evidence that the court had at the time stated, or at any other time, ruled on the motion to dissolve the injunction, or had made an order of the kind sought to have evidenced by the correction of the journal asked for. The evidence in support of the motion was quite positive that the court had by a prior order, and at the time mentioned, dissolved the temporary injunction allowed in the case, and fixed the amount of a supersedeas bond to hold the injunction in force until a trial on the merits could be had at the sum of $100. The evidence was presented in the form of affidavits by the parties to the action and their attorney. There was no evidence of the order having been made from any minute or other writing appearing on the journals, records, or dockets of the court, and it must be conceded that such evidence would be far more satisfactory, and is regarded as a better class of evidence; and in some jurisdictions it is held that such evidence is essential to sustain a nunc-pro-tunc order. After speaking to the same point in another case, it is said in *Ackerman v. Ackerman,* 61 Nebr., 72: "This court, however, has adopted the rule, which seems the better one, that in the exercise of the power of correction of its records the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed upon any satisfactory evidence,"—citing *School District v. Bishop,* 46

Nebr., 850, and cases there cited; *In re Wight,* 134 U. S., 136, 10 Sup. Ct. Rep., 487, 33 L. Ed., 865; *Jacks v. Adamson,* 56 Ohio St., 397, 47 N. E. Rep., 48; 17 Ency. Pl. & Pr., 931, note 2. The evidence in the case at bar, under the rule stated, was sufficient to sustain the finding and order of the trial court, and we can not rightfully disturb it on that account.

Another insurmountable obstacle presents itself: No motion was made for a new trial within the time provided by statute, and consequently the trial court was right in overruling the motion, as it did, on the ground that the motion was not filed within the time and during the term at which the order complained of was made. The term of court at which the order was entered adjourned *sine die* on April 11. The motion for a new trial was not filed until April 13, and after the adjournment of the term. This neglect is fatal as to any question required to be presented to the trial court by motion for a new trial before a reviewing court is authorized to pass upon such question. The motion not being presented within the time provided by statute, the court was without authority to grant it, and could either have stricken it from the files or overruled it. *Nelson v. Farmland Security Co.,* 58 Nebr., 604, and cases there cited. All matters included in the motion are therefore of no avail to the plaintiff in error, and we need not examine the evidence in support of the motion, or of the proceedings had during the trial, some of which were assigned in the motion as ground for a new trial, and on which error is now sought to be predicated. We find nothing in the record calling for a reversal of the ruling of which complaint is made.

For the reasons stated the order of the trial court is

AFFIRMED.

GONZALES-MANDELBAUM COMPANY V. JOSEPH BROGHAMER.

FILED MARCH 5, 1902. No. 11,329.

Bill of Exceptions: QUASHED: ASSIGNMENTS: VERDICT: EVIDENCE: MOTION TO QUASH. Where a bill of exceptions is quashed, and the only assignments of error relate to the introduction of evidence, and a general assignment that the judgment is contrary to the law and the evidence, the reviewing court will only inquire whether the pleadings will support the judment rendered.

ERROR from the district court for Dawes county. Tried below before HOLLENBECK, J. *Affirmed.*

Albert W. Crites, for plaintiff in error.

Allen G. Fisher, contra.

HOLCOMB, J.

The trial court found generally in favor of the defendant in an action brought for the recovery of the value of certain merchandise alleged to have been sold and delivered to him by the plaintiff, and on such finding dismissed the action. Plaintiff prosecutes error. The only errors assigned relate to the rulings of the court in sustaining objections to the introduction of certain evidence, and a general assignment that the judgment is contrary to the law and the evidence. The bill of exceptions having heretofore been quashed, we are only required, in the consideration of such assignments of error, to ascertain from the record whether the judgment complained of can be sustained by the pleadings; and, the most casual examination disclosing such to be the case, the judgment of the trial court should be, and accordingly is,

AFFIRMED.

MRS. E. L. MOORE V. MICHAEL MORAN.

FILED MARCH 5, 1902. NO. 11,348.

1. **Replevin**: FIXTURES: MORTGAGE LIEN. A mortgagee of real estate can not, because of his mortgage lien, maintain an action in replevin for the possession of property removed from the mortgaged premises which he claims as fixtures to the realty.
2. **Purchase of Land**: THIRD PARTIES: NOTICE OF TITLE. A purchaser of land, with notice of title in third persons to buildings situated thereon, takes the real estate subject to the rights of such third parties in and to such structures.
3. **Freehold**: PERMANENT ANNEXATIONS: INTENT. When it is evident that houses were intended as permanent annexations to the freehold, they become a part of the realty, and pass with a conveyance of it, and that without regard to the character of the foundations on which they stand. *Freeman v. Lynch*, 8 Nebr., 192.
4. **Building Used as Residence**: PART OF FREEHOLD: TITLE: CLAIM OF OWNERSHIP: PURCHASE OF BUILDING. A bona-fide grantee of real estate, without notice, on which is situated a building used as a residence and apparently a part of the freehold, will take title to the land, including such building, divested of a claim of ownership by a third party whose rights are based on an alleged purchase of such building from the grantor as chattel property.
5. **Petition in Error**: AUTHENTICATION: TYPEWRITTEN SIGNATURE. A petition in error can not be treated as a nullity and entirely disregarded because authenticated in the name of plaintiff in error by her attorney, giving his name, each appearing only in typewriting.

ERROR from the district court for Keith county. Tried below before GRIMES, J. *Reversed.*

John H. Bower, for plaintiff in error.

Wilcox & Halligan, contra.

HOLCOMB, J.

This is an action in replevin, the property in controversy being sections of lumber and building material which prior to the replevin action had formed the main portion of a

small dwelling house, 14x18 feet in size, with an addition thereto 12x14 feet. The house was located on a tract of real estate purchased by the plaintiff in the replevin action but a short time prior to the institution of the action. The defendant claimed the property in dispute, which composed the main part of the building, by reason of an alleged purchase of the then owner of the real estate, who afterwards conveyed to the plaintiff, and claimed the addition as her own property, which she had loaned to the grantee of plaintiff while occupying the real estate as the owner thereof. After the submission of the evidence the court, by a peremptory instruction, directed a verdict for the plaintiff, leaving to the jury only the question of damage, which it was stipulated was only nominal. A motion for a new trial being overruled, the defendant prosecutes error to secure a reversal of the judgment rendered against her.

As to the principal issues involved, the evidence is without substantial conflict or contradiction. The record discloses that the plaintiff in the replevin action had, long prior to the transaction out of which the litigation arose, been the owner of the real estate on which the buildings were situated and had sold the same to one Wilbur, who, to secure the purchase price, executed a note secured by a mortgage thereon in favor of the plaintiff as grantor. After the purchase of the land, Wilbur bought of the defendant in replevin the main portion of the building in controversy, agreeing to pay therefor $25. He also at the same time borrowed of her the structure known as the "addition," agreeing to return the same at a future time. He neither paid for the main building nor returned the addition. The buildings were placed on the land on stones laid on the surface of the ground, with railroad ties placed between the stones, and against which dirt was thrown, forming a sort of embankment to the foundation as thus made. The main building consisted of two rooms, lathed and plastered, and with a brick chimney. The addition formed only one room, with no inside finish, and was fast-

ened to the main building with spike nails. It is conclusively shown that the plaintiff had notice of the character of the ownership of the addition, and that it belonged to the defendant. Wilbur, a short time before this action was instituted, reconveyed the real estate by the usual warranty deed to his grantor, in satisfaction of the amount owing on the purchase price, which was secured by the mortgage mentioned. Prior to the sale of the real estate to the plaintiff, he had sold to the defendant the main portion of the building, of which the material composing the same is in controversy; and she, relying on this contract of sale and her ownership of the addition, removed the same from the real estate on which located. Whether the deed reconveying the premises to the plaintiff was executed and delivered before the defendant had removed the building, or a portion thereof, is in controversy. The deed bears date December 14, and plaintiff testifies that it was executed and delivered on that date. The addition appears to have been removed about that date, and the main structure subsequently thereto. The transaction resulting in a reselling of the main structure to the defendant, and her authority to remove the same, with the addition then belonging to her, occurred during the month of September previous. It is testified that the Wilburs gave possession of the premises to plaintiff prior to the execution of the deed reconveying the land to him. The plaintiff, to establish his right to the property, relies exclusively on his title thereto derived from the deed of conveyance of the real estate, together with such rights as accrued to him through his prior mortgage thereon. But the mortgage gave to the plaintiff only a lien on the real estate embraced in its terms, and, until the equities of the mortgagor have been adjusted and foreclosed, the mortgagee had no such legal title or possessory right to property in the nature of chattels removed from the mortgaged premises, even though claimed as fixtures, as would establish the mortgagee's right thereto in a legal action of replevin. He could not,

because of his mortgage lien on the land, maintain an action in replevin for property removed therefrom, and claimed by him to be fixtures and appurtenant to the real estate. *Davidson v. Cox,* 11 Nebr., 250; *Hoagland v. Lowe,* 39 Nebr., 397; *Triplett v. Parmlee,* 16 Nebr., 649; *Ellsworth v. McDowell,* 44 Nebr., 707.

This brings us to a consideration of the plaintiff's right to the property in controversy through and by virtue of the deed of conveyance of the real estate on which the structures were situated. Conceding the execution and delivery of the deed the day it bears date, the evidence is conclusive that at the time he purchased the land the plaintiff was aware the addition to the main structure was owned by the defendant in replevin, and that it had been placed on the real estate temporarily, and with the intention of the parties to return the same to the owner in the near future. He was personally cognizant of the fact that the landowner never acquired title thereto, and had possession of the structure only as a borrowed chattel.

The evidence does not disclose such attaching to the soil or the main building as to make it a fixture as a matter of law. It seems reasonably clear that all parties regarded and treated it as chattel property, that it was not the intention to affix it permanently to the land, and that it remained the property of the person loaning the same,—the defendant in the replevin action,—of all of which the plaintiff had notice. *Freeman v. Lynch,* 8 Nebr., 192; *Sword v. Low,* 122 Ill., 487; *McDonald v. Shepard,* 25 Kan., 112.

In any view of the record as presented to us, the defendant's title to this portion of the property was so indisputably established by the evidence that no question of fact was left for the determination of the jury. The rule is that a purchaser of land with notice of title in third persons to buildings situated thereon takes the real estate subject to the rights of such third parties in and to such structures. *Wilgus v. Gettings,* 21 Ia., 177; *Coleman v. Lewis,* 27 Pa., 291; *Crippen v. Morrison,* 13 Mich., 23, 33.

As to the property which comprises the main structure, the facts and circumstances are dissimilar. The evidence discloses that it was purchased of the defendant in the replevin action, and erected by the owner of the land, and finished as a residence, and apparently became a permament accession to the freehold. It bore all the characteristics of a permanent fixture, and, so far as the evidence throws light on the question, was so intended when constructed. The defendant, who sold the house to Wilbur, so recognized the building as a part of the realty and filed a mechanic's lien for the purpose of securing to her the contract price for said building. It was used and occupied by the owner as a dwelling house, and apparently, to all intents and purposes, became a part of the realty, in the same manner as buildings in general do. The defendant claims the property by virtue of an alleged contract of sale made in September prior to the conveyance of the land to plaintiff in the following December. Nothing was accomplished in securing the delivery and possession of the property in pursuance of the alleged sale until after the plaintiff had purchased the land, and acquired title thereto and the possession thereof by his deed of conveyance dated December 14, 1897. He had no notice of the defendant's claim of title, and was a bona-fide purchaser, without reservation or exception by the grantor, and became entitled to all property that properly passed by the deed of conveyance he held. He relied on the situation as it then existed, disclosing, as it did, the main residence structure as a fixture belonging to, and part of, the real estate which he was purchasing. Under such circumstances, it can hardly be doubted that title to the building passed to him with the land, and whatever right the defendant may have had by her attempted purchase of the building as a chattel was thereby lost and she could not thereafter, as against the grantee, assert her right to it as a movable chattel. *Freeman v. Lynch,* 8 Nebr., 192; *Arlington Mill & Elevator Co. v. Yates,* 57 Nebr., 286, 292, and authorities therein cited; *Knowlton*

v. Johnson, 37 Mich., 47; *Ridgeway Stove Co. v. Way,* 141 Mass., 557; *Case Mfg. Co. v. Garven,* 45 Ohio St., 289; *Landon v. Platt,* 34 Conn., 517; *Rowand v. Anderson,* 33 Kan., 264; *Climer v. Wallace,* 28 Mo., 556. We conclude, therefore, that the plaintiff's title to such property is beyond dispute, and as to it no error was committed in directing a verdict for plaintiff.

It is argued by the defendant in error that, because the petition in error is not subscribed by the plaintiff in error or her attorney, it must be treated as a nullity, and as though no petition in error had in fact been filed in the case. The petition appears to be authenticated in the name of the plaintiff in error by her attorney in his own name, the names appearing only in typewriting. While probably the petition would be vulnerable to a motion to strike because not properly subscribed, we do not think it can be treated as a nullity and disregarded altogether. The petition in error is before us, purporting to be a pleading of the plaintiff in error, and an application of the party aggrieved for a review of the trial had, resulting in a judgment against her, assigning certain alleged errors in the trial of the action in the court below, and is, we hold, sufficient to require from us a consideration of the errors therein complained of.

The judgment, for the reasons first stated, must be reversed and the cause remanded, which is accordingly done.

REVERSED AND REMANDED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. MICHAEL WALENZ, APPELLANT.

FILED MARCH 5, 1902. No. 11,396.

1. **Motion to Vacate.** The filing of a motion to vacate a decree under the provision of subdivision 3 of section 602 of the Code of Civil Procedure does not of itself have the effect of avoiding or suspending further proceedings in the execution of the decree,

nor would a sale made in pursuance thereof be invalidated because such motion had not been acted on by the court nor waived by the party filing the same.

2. **Motion**: APPEAL. The action or non-action of a trial court on such motion can not be reviewed on an appeal from a final order of confirmation of sale.

APPEAL from the district court for Douglas county. Heard below before DICKINSON, J. *Affirmed.*

William H. Crow and *L. F. Hale,* for appellant.

E. H. Scott, contra.

HOLCOMB, J.

On appeal from an order of confirmation of sale of real estate in foreclosure proceedings appellant argues that the sale and order of confirmation can not be sustained, because, as alleged, the decree by virtue of which the subsequent proceedings were had is invalid and of no force and effect. The contention is grounded on the claim that after the rendition of the decree, and at a subsequent term, a motion was presented to the trial court to vacate and set aside the decree under the provision of the third subdivision of section 602 of the Code of Civil Procedure, authorizing the court to vacate its own decrees at a subsequent term on the ground of "mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order"; and that such motion has not been acted upon by the trial court nor waived by the appellant. If this is true,—which we do not undertake to determine,—there should be, and probably, upon calling the attention of the trial court to the fact, would be, a ruling on the motion to vacate the decree, allowing to either party, if dissatisfied, an exception, with the right of review. But, so long as the decree remains in force, is not vacated, and no proceedings are taken to reverse it or stay its execution, the mere filing of a motion to set it aside, on which no action is taken, will not have the legal effect of rendering it inoperative, or prevent a party from enforcing his rights

thereunder. No effort appears to have been made under the authority contained in section 607 to have further proceedings in the cause suspended pending a hearing on the motion to vacate, and no order suspending further proceedings under the decree appears in the record. The decree being in full force and effect notwithstanding the filing of a motion to have it vacated, and no suspension having been granted, the appellee was authorized to proceed thereunder, and sell the mortgaged property to satisfy the amount found due; and, the sale made in pursuance thereof being regular in all respects, and in conformity with law, the court very properly entered the order of confirmation appealed from. We may assume, in the absence of any record, that the motion to vacate has been overruled as without merit, in which event there can scarcely be any question as to the validity and effectiveness of the decree at all times since its rendition. In any event, we can not review the action or non-action of the trial court on the motion to vacate its decree in proceedings on appeal from a final order of confirmation. The order complained of is accordingly

AFFIRMED.

JOHN H. MERCHANT, APPELLEE, V. ANTHONY BAUMEISTER ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,402.

Confirmation: APPEAL: INADEQUATE APPRAISEMENT.

APPEAL from the district court for Douglas county. Heard below before SCOTT, J. *Affirmed.*

A. N. Ferguson, for appellants.

Dexter L. Thomas, contra.

HOLCOMB, J.

From an order of confirmation of a sale of real estate in foreclosure proceedings, defendants appeal, presenting

for our consideration only the alleged inadequacy of the appraisement made, which it is contended is so much below the true value as to be presumptively fraudulent. No actual fraud is charged or attempted to be proved. Several affidavits which are preserved by a bill of exceptions were filed in support of and against the appraisement as made by the officers acting under the decree. The evidence is conflicting and may be said to be fairly well balanced. The trial court, in the exercise of its equitable powers, being authorized to direct a new sale if the one made was for a manifestly inadequate price, notwithstanding the property sold for more than two-thirds of the appraised value, and not having done so, we can not say there was an abuse of discretion, or that the appraisement is presumptively fraudulent. The most that can be said is that the appraisers were mistaken, only, in their valuation, and this alone is insufficient to warrant the reversal of the order of confirmation. *Williams v. Taylor,* 63 Nebr., 717; *Cole v. Willard,* 62 Nebr., 839, and authorities there cited.

The order of confirmation ought to be affirmed, which is accordingly done.

AFFIRMED.

HENRY A. PIERCE, APPELLEE, V. ALICE E. ATWOOD, APPELLANT.*

FILED MARCH 5, 1902. No. 11,017.

1. **Collateral Security:** RIGHT OF SURETY: RELEASE BY CREDITOR. A surety has a right to demand that any securities held by the creditor as collateral for the payment of the debt shall be applied in satisfaction thereof, and if the creditor releases the collateral the surety will be discharged to the extent of the value of the collateral so released.

2. ———: ———: ———. If money is deposited upon such conditions that the creditor can require it to be applied upon his claim, and he consents that it be turned over to the principal debtor, without consent of the guarantor, the guarantor is thereby released.

*Judgment modified July 21, 1902, and rehearing denied. See clerk's record. See Pierce v. Atwood under Cases Modified, page lxiii.

APPEAL from the district court for Dodge county. Heard below before GRIMISON, J. *Reversed in part.*

Enos F. Gray and *William H. Atwood,* for appellant.

Courtright & Sidner, contra.

SEDGWICK, J.

This is an action to foreclose a mortgage made by Alice E. Atwood and her husband, W. H. Atwood, upon the separate property of the wife. Mrs. Atwood defends upon the ground that the loan of $1,000 which the mortgage was made to secure was made to her husband for his sole use and benefit, and that she signed the note and pledged her property for its payment, as surety for her husband. She further alleges that the plaintiff had within his control funds belonging to her husband sufficient to discharge the mortgage debt, and that he voluntarily released the same without her knowledge or consent. It is elementary law that a creditor who by his voluntary act parts with security for his debt thereby releases a surety or guarantor, to the extent of the value of the security parted with. *Bronson v. McCormick Harvesting Machine Co.*, 52 Nebr., 342; *City of Maquoketa v. Willey,* 35 Ia., 323; *Commercial Nat. Bank v. Henninger,* 105 Pa. St. 496. This requires us to examine the record, and to ascertain whether the plaintiff has so conducted himself in relation to this debt, and to any fund belonging to W. H. Atwood of which he had control, as to release Mrs. Atwood and her property from liability therefor. The evidence discloses that G. A. Davis and H. A. Pierce of Castile, N. Y., were engaged in the banking business in their home city, and also carried on a real estate loan business in Nebraska. In 1888 W. H. Atwood commenced attending to their business in the city of Fremont, and vicinity,—making loans, collecting interest and matured loans, and acting as their attorney in such foreclosure proceedings as were necessary. In July, 1894, W. H. Atwood borrowed of Davis & Pierce, $1,000,

his wife joining in the note, and executing the mortgage in controversy to secure the same. The mortgage covers the residence of the Atwoods, the title to which stood in the name of the wife; and we may assume that Davis and Pierce had knowledge of her title, as they had made a previous loan on this same property, and an abstract of title had been examined and approved by them when the first loan was made. In 1896 Atwood ceased collecting for Davis & Pierce, but continued to attend to certain foreclosure cases as their attorney. Atwood testified at that time a dispute arose over the amount due him from the firm, and that he requested a settlement and an application of the amount due him for services in discharge of this mortgage. The conversation relating to this matter was had with Davis, who died previous to the trial, and under the ruling in *Mead v. Weaver*, 42 Nebr., 149, this evidence can not be considered, being incompetent under section 329 of our Code of Civil Procedure. In May, 1896, a fee of $375 due Atwood in what is called the "Nielson Case" was applied on this loan, being used to pay one matured coupon, and $301, indorsed on the principal note. In November, 1895, a second mortgage was made upon the premises to Mrs. Cotterell, who filed a cross-bill in this action and obtained a decree of foreclosure; but, as no tenable objections are made to the decree so far as it directs a foreclosure of this mortgage, it will not be further considered. In 1897 there were two cases pending in the circuit court of the United States for the district of Nebraska, brought by Davis & Pierce to foreclose mortgages held by them. In both cases Atwood was attorney for the plaintiffs. In one of these, known as the "Abbott Case," Atwood collected the sum of $2,630.48. With $2,530 of this sum he purchased three drafts payable to his own order, retaining the balance in cash. He then filed an attorney's lien in the other case, which is called the "Meays Case," claiming $7,000, due him for fees for services performed for Davis & Pierce. The plaintiff thereupon formally discharged him as attorney in the case, and he

then filed a petition in intervention setting out his claim for services, and Pierce, the surviving partner, filed an answer and cross-petition. In December, 1897, the three drafts purchased by Atwood were deposited in escrow with one Briggs, under the following agreement made between the parties:

"Whereas, the amounts represented by drafts No. 172,817, and 172,818, and 172,819, aggregating $2,530, drawn by First National Bank of Fremont on Chase National Bank in favor of William H. Atwood, are in dispute between said Atwood, on one part, and H. A. Pierce and the executors of Giles A. Davis, on the other part, each party claiming the same, which dispute is about to be litigated in the United States Court. It is hereby agreed that said drafts shall be and hereby are placed on deposit with A. H. Briggs to be by him held until the termination of said dispute in court, and then delivered to the successful party. In case the amount thereby represented shall be divided, said A. H. Briggs shall cash said drafts and apportion the proceeds."

In the cross-bill filed by Pierce in the Meays case in the federal court, he set out the note secured by the mortgage in controversy in this action as a demand against Atwood.

A special master was appointed to report the facts under the law, and, after hearing the evidence, reported that "at the time William H. Atwood filed his intervening petition herein he had in his hands, as moneys of the cross-complainant, the sum of $2,630.48," and "that the services rendered to the said complainant by the said William H. Atwood were of the value of $1,592.39, and that the said William H. Atwood is entitled to receive said last-named amount as compensation for services rendered the said complainant," and "that the said William H. Atwood is indebted to the said cross-complainant upon the promissory note and coupon mentioned in the answer and cross-bill of Henry A. Pierce herein, and that the said note and coupon evidence a valid and subsisting obligation," and "that the cross-complainant herein is entitled to the entire

fund paid into this court upon the foreclosure proceedings in the above-entitled cause," and "that the cross-complainant herein is entitled to receive the said sum of $2,630.48 received by William H. Atwood as aforesaid, less the said amount of $1,592.39, the amount to which said William H. Atwood is entitled for his services aforesaid," and "that this disbursement will settle and pay all matters in controversy between said Atwood and said Pierce, except that said Atwood will still owe to the said Pierce the two notes mentioned in the cross-complaint of said Pierce,—one of said notes being for $1,000 face, dated July 26th, 1894, and the other one being for $70 face, of the same date, each having an indorsement thereon,"—and the following conclusions of law:

"(1.) I find that the complainant in said cross-bill, Henry A. Pierce, is entitled to receive the entire funds paid into this court upon the foreclosure proceedings in the above-entitled cause. (2.) I find that the complainant in said cross-bill, Henry A. Pierce, is entitled to receive of the $2,630.48, received as aforesaid, by said William H. Atwood, the sum of $1,038.09. (3.) I further find that said William H. Atwood is entitled to retain of the $2,630.48 received by him the sum of $1,592.39. (4.) I further find that the promissory note and coupon executed by the said William H. Atwood, and mentioned in the amended cross-bill of the said Henry A. Pierce herein, is a valid and subsisting obligation, and evidences a valid indebtedness from said William H. Atwood to said Henry A. Pierce. (5.) I further find (being requested by the parties to make a finding as to costs) that the costs of this proceeding should be borne and paid by the said cross-complainant, Henry A. Pierce. (6.) I further find that a decree should be entered herein, upon the issues aforesaid, awarding out of the $2,630.48 aforesaid, the sum of $1,592.39 to the said William H. Atwood, and the said $1,038.09 to the said cross-complainant, Henry A. Pierce, and awarding to the said Henry A. Pierce the entire sum paid into this court upon the foreclosure proceedings in the above-entitled cause,

and adjudging the indebtedness evidenced by the promissory note and coupon signed by said William H. Atwood, and mentioned in the amended cross-bill herein, to be valid and subsisting, and decreeing that the said complainant, Henry A. Pierce, pay the costs of this proceeding, and that judgment against him be entered therefor, and that execution be awarded thereon; that this settlement and disbursement of the funds be decreed to cancel all matters in dispute between the parties under the issues of this case, except that said note and coupon signed by said William H. Atwood, and now held by said Pierce, remain unpaid and a subsisting obligation from said Atwood to said Pierce thereon."

Shortly after the filing of this report the following stipulation was made and filed by the parties:

"Comes now William H. Atwood, interlocutory petitioner, and Henry A. Pierce, cross-complainant, and stipulate and move the court that the findings of fact of W. D. McHugh, special master, be approved, and that the conclusions of law of said special master be approved except as to the taxation of costs, and that decree be entered in accordance with the recommendation of said master, except that no attorney's docket fee be taxed in this controversy, and that the costs of this controversy be taxed equally against the interlocutory petitioner and cross-complainant."

A decree was thereupon entered conforming to the master's report, and thereafter the money in the hands of Briggs was by him paid over to Pierce and Atwood; each receiving the amount awarded him by the master's report.

It will be seen that, after the Abbott Case had been disposed of, issues were made up between Atwood, on the one part, and Davis and Pierce, on the other, involving the whole controversy between them, including the note herein sued upon, which Davis and Pierce had brought into those issues as a claim in their favor against Atwood. The issues being in that condition, the money, $2,530, which both parties to the litigation claimed, was by agreement be-

tween the parties placed in the hands of a third party, to be held by him "until the termination of said dispute in court." The meaning of the stipulation, clearly, is that whatever shall be due to either party out of this money on deposit upon the final determination of the court of all of the issues then presented to the court shall be paid to the party to whom it is due. It is clear that a court of equity would enforce this agreement, and that there was no way in which Atwood could get this money for his own use without satisfying the whole claim of Pierce & Davis, unless Pierce & Davis should voluntarily turn the money over to him. The master's report is predicated upon the idea that Pierce & Davis would release their claim on a part of the funds in the hands of Briggs, and dismiss their suit as to the note in question, and reinstate the note and hold it against Atwood. This idea was undoubtedly inspired by the parties themselves as the law would not have made such a disposition of the case without the consent of both parties, and, indeed, the consent of the parties is contained in their stipulation filed shortly after. The decree of the court was entered according to the stipulation. Could Pierce and Davis, after consenting that this money should be paid to Atwood, still hold the homestead of Mrs. Atwood, which she pledged as guarantor for her husband? The weight of authority is that a surety, when sued for the debt of his principal, may offset a claim which is due to the principal from the creditor. 1 Brandt, Suretyship & Guaranty, sec. 236. Our statute provides that, "when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." Code of Civil Procedure, sec. 106. And it is insisted that the common-law rule that the creditor may pay an independent debt which he owes to the principal, and still hold the sureties liable for the whole debt guaranteed by him,

does not obtain in this state, or, at all events, if the creditor has any lien upon or any means of controlling the application of any funds of the principal, so as to make it available in the satisfaction of his claim, he can not relinquish such fund to the principal without releasing the surety, and we think that this is undoubtedly the rule. In *City of Maquoketa v. Willey,* 35 Ia., 323, it is said:

"The creditor, however, can not relinquish any hold he has acquired upon the property of the debtor without resorting to the proper proceedings to make therefrom the debt. And this rule is alike applicable if the property has been voluntarily placed in the hands of the creditor, or he has acquired a lien thereon by proceedings at law. This is unquestionably the rule of the authorities. They will be found collected and discussed in 3 Leading Cases in Equity (Hare & Wallace's notes, p. 552, *Rus v. Berrington*) and 2 Am. Leading Cases, 260 (Hare & Wallace's Notes to *Pain v. Packard* and *King v. Baldwin*). See upon this point *Chambers v. Cochran & Brock,* 18 Ia., 159. This rule is well founded upon the equitable doctrine that he who, by his wilful act, causes a loss, ought to endure its consequences and not transfer its effects to an innocent party. The creditor, having in his hands property to secure the debt, voluntarily placed there by the principal debtor, would not be permitted to relinquish it or appropriate it to other purposes. By such an act the property would be lost so far as the satisfaction of the debt is affected. The case is not different if the property should come to the hands of the creditor by his own act, as through the institution of legal proceedings. In either case it is plain that equity and fair dealing toward the surety demand that he appropriate the property to the payment of the debt."

The question of the ownership of the property, and the right of the creditor to apply it upon his claim, had, in a former action, been submitted to a referee, who had reported that the property belonged to a third party and was not applicable upon the claim of the plaintiff. The

parties afterward stipulated that the report of the referee should be confirmed, which was done. Upon this branch of the case the court said:

"The judgment was rendered upon the referee's report without objection and upon the consent of the city; that is, of its attorney in the case, for whose act in this matter the city must be held responsible. As we have seen, the judgment was unauthorized by law. It is then the case of a judgment by consent adverse to the rights and interest of the defendant. Under it certain property upon which the city had a legal hold for the satisfaction of its claim against Murphy was discharged and thus lost to defendant. It was a voluntary relinquishment, for the judgment by consent, contrary to the rules of law and the rights of the parties, must be so considered. Under the principles above announced, the loss resulting therefrom must be borne alone by the plaintiff."

And so in the case at bar the money was so placed that it was under the control of the plaintiff, so that without his consent its application upon his claim could not have been prevented. It is manifest that under such circumstances his consent that this money be paid to the principal debtor would release the surety.

The decree of the district court, on the petition of plaintiff, is reversed and the cause remanded with instructions to dismiss the action as to Mrs. Atwood, and to render judgment for the amount of the note and interest against Mr. Atwood. The decree, on the cross-petition of Cotterell, is affirmed.

JUDGMENT ACCORDINGLY.

E. A. BENSON V. JOHN S. CAULFIELD, REVIVED IN THE NAME OF CHARLES E. CLAPP, ADMINISTRATOR.

FILED MARCH 5, 1902. No. 11,206.

Commissioner's opinion, Department No. 1.

1. **Indemnity Bond**: RECITALS: LEVY: RECOVERY. The fact that an indemnity bond recites that the officer has been directed to levy upon property of the judgment debtor, will not prevent a recovery, if he was actually directed to levy upon property of a third party, and does so at request of the principal in the bond.
2. ———: CONDITION: PAYMENT OF JUDGMENT: BREACH OF BOND. Where a bond is conditioned to indemnify the officer against all "harm, trouble, damage, costs, suits, actions, judgments and executions" growing out of the levy, the payment by the officer, after its affirmance, of a judgment in conversion for taking the property, constitutes a new breach of the bond.
3. **Statute of Limitations.** The statute of limitations does not run against an action for damages upon such breach until the statutory time after the payment.
4. **Surety**: PAYMENT OF CONVERSION: ASSIGNMENT OF JUDGMENT: CONSIDERATION. The fact that the funds for the payment of the conversion judgment were furnished by a surety on the officer's bond as sheriff does not impeach an allegation that the officer paid it, and the furnishing of the funds is a sufficient consideration for an assignment of the indemnity to the officer's surety.

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

Hall & McCulloch, for plaintiff in error.

Byron G. Burbank, contra.

HASTINGS, C.

This action is brought upon an indemnity bond given April 24, 1888, to William Coburn, sheriff of Douglas county, in the penal sum of $1,955, to indemnify Coburn against all "harm, trouble, damage, costs, suits, actions, judgments and executions" that might arise, come, or be

brought against him on account of the levy of an execution on a judgment in favor of William L. Hall and against the New York Storage & Loan Company. The execution was, at the request of plaintiff, levied upon certain property which was claimed by one John L. Watson. At the close of plaintiff's testimony, defendant Benson moved for an instruction in his favor, and again at the close of the case renewed the motion, and at that time plaintiff also asked a similar instruction; and the court granted plaintiff's request, and instructed as follows:

"You are instructed that under the pleadings, the law and the evidence herein, you should return a verdict for the plaintiff against the defendant E. A. Benson, for the sum of three thousand four hundred and twenty-one and 25-100 ($3,421.25) dollars, being $1,955 of principal and $1,466.25 interest, at seven per cent. from April 24, 1888, to February 6, 1899."

Twenty-seven errors are assigned, only one of which, viz., the fourth, which complains of the giving of the above instruction, need be considered. Evidently, if this instruction was correct, and no other verdict was possible in the case, it is immaterial what errors there may have been in the admission or rejection of evidence, except as such errors affect the question of the propriety of this instruction. The rightfulness of this instruction is assailed for three principal reasons: (1) Evidence does not show any breach of the bond; (2) action upon it was barred by the statute of limitations; and (3) no cause of action arose in favor of plaintiff, Caulfield. The bond was in favor of Coburn, and it is claimed that Coburn never acquired any right of action, because he paid nothing on the judgment, and could assign none to Caulfield.

The first point is urged on the ground that the bond recites that the execution is directed to be levied upon the property of the New York Storage & Loan Company. It is urged that, if this had been done, there would have arisen no trouble, because of the levy, and that the bond provides for no indemnity against taking anybody's else

property. This objection can not be sustained, for the reason, first, that it does away with the palpable meaning of the bond, which is to indemnify the sheriff against levying upon property to which he was directed, as the testimony shows, by the judgment creditor Hall. In the next place, it appears clearly that Hall's judgment was set aside and the execution quashed, so that it does not follow that liability would not have attached, if the levy had been made upon the property of the storage company. The second reason hardly seems to be any better. It is true that the bond indemnified Coburn against judgments. Numerous cases are cited by plaintiff in error, that where one is indemnified against judgments a right of action accrues when judgment is rendered, and damages to an amount sufficient for the satisfaction of such judgment are recoverable at once. No case, however, has been shown which holds that only one condition of the bond creates a cause of action. The bond sued upon here contained an indemnity not only against judgments, but against harm, costs, suits and damages. It is true that the judgment which was finally paid by Coburn in this action was rendered March 14, 1893, and this action was begun December 7, 1898. It is also true, however, that September 30, 1898, Coburn paid the judgment recovered by Watson for conversion of the goods levied upon, with interest and costs, amounting to $5,416. That this was a valid and enforceable judgment, duly and regularly obtained against the sheriff on account of the levy of this writ of execution, seems clear upon the evidence, and was once determined by this court. *Coburn v. Watson,* 48 Nebr., 257. That the making of this payment under compulsion of the judgment was a "harm and damage" arising out of the levy of the execution procured by means of this indemnity bond, seems clear. If so, it was a new breach of the condition of the bond and recoverable for, independently of the question whether there could have been a recovery for the breach caused by the mere rendition of the judgment. If this is true, the statute of limitations would not begin to

run as to this breach of the bond until the time of payment, September 30, 1898. The third reason assigned for considering this instruction for plaintiff erroneous, rests upon the proofs adduced as to the manner of payment of the judgment recovered against Coburn. It appears that it was paid by the plaintiff, Caulfield, through Coburn. Caulfield, as the proof shows, gave Coburn a note secured by mortgage on Caulfield's property, and payable to Watson, and cash to make up the total amount due on the judgment, $5,416. Coburn used these funds to pay the judgment, took a receipt to himself, and assigned his indemnity to plaintiff Caulfield, who was one of the sureties on his sheriff's bond. This was ample consideration for the assignment of the bond, and supports the allegation that Coburn paid the judgment, and, for value, assigned the indemnity.

As above suggested, we do not think it necessary to examine the alleged errors in the admission of testimony. They could have produced no harm, in our view of the case, because we find the testimony, as a whole, enough to compel a verdict in favor of Caulfield to the amount of his assigned indemnity. The verdict, however, is too large. The penalty of the bond is only $1,955. The breach of the bond for which this action is brought, and this recovery had, occurred on September 30, 1898. The right to sue for the breach by reason of the rendition of judgment in March, 1893, was barred by the statute of limitations, if it ever existed. The limit of damages for the recovery upon a penal bond in this state seems to be the amount of the penalty and interest from the time the condition is broken. *Mullen v. Morris,* 43 Nebr., 596, 608. The extent, therefore, of plaintiff's recovery would be $1,955 and interest at seven per cent from September 30, 1898, up to the first day of the term at which judgment in this action was rendered, viz., February 6, 1899. This amount is $47.90. The interest, however, allowed in the verdict is $1,466.25, —an excess of $1,418.35 over the true amount. The instruction complained of was erroneous to that extent. A

new trial should be granted, or a remittitur directed for this sum. It is therefore recommended that if the above excess interest of $1,418.35 be remitted from the judgment in this case within thirty days, that the judgment be affirmed as to the remainder, and interest from the date of its rendition; that otherwise the judgment be reversed and the cause remanded; and that plaintiff in error recover costs in this court.

DAY, C., concurs. KIRKPATRICK, C., not sitting.

By the Court: For the reasons given in the foregoing opinion, it is ordered that if the excess interest of $1,418.35 be remitted from the judgment in this case within thirty days, the judgment be affirmed as to the remainder, with interest from the date of its rendition; otherwise that the judgment be reversed and the cause remanded; and that plaintiff in error recover costs in this court.

JUDGMENT ACCORDINGLY.

BANKERS' RESERVE LIFE ASSOCIATION v. LANTIE J. FINN.

FILED MARCH 5, 1902. No. 11,257.

Commissioner's opinion, Department No. 1.

1. **Tendering Answer After Demurrer: WAIVER.** Tendering answer, and asking leave to file same, after the overruling of a demurrer to a petition, is a waiver of mere formal defects in the petition and of any irregularity in the time or manner of acting on the demurrer.

2. **Refusal of Leave to File.** Not error to refuse leave to file an answer setting up that the action was prematurely brought where the facts alleged were insufficient to sustain such plea.

3. **Life Insurance Policy: PROOF OF DEATH.** Under a life insurance policy providing for payment in ninety days after satisfactory proof of death, an objection to such proofs, which in no way impeaches the sufficiency of the showing of the death of

assured, but complains as to the condition of his health, when first insured, shows no ground for delaying action more than ninety days after such proof was submitted.

4. Default: ISSUE OF LAW: COSTS. Under section 432 of the Code of Civil Procedure, the court, on the determination of an issue of law, or when a party is in default, may, at the request of the party not in default, assess damages on proof without the intervention of a jury.

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

Timothy J. Mahoney and *J. A. C. Kennedy*, for plaintiff in error.

Weaver & Giller, contra.

HASTINGS, C.

Plaintiff in error and defendant below in this case complains "that the entire course pursued by the district court in this case was one of arbitrary abuse of authority, by which the plaintiff in error was unlawfully deprived of every and any opportunity to be heard upon the merits of the case." It certainly seems that the defendant was not permitted to be heard upon the merits of his case. It remains to be ascertained whether there were any merits to be examined. This is an action upon a policy of life insurance, and to plaintiff's petition below a motion was interposed to require the plaintiff to make her petition more certain by setting out the date of the delivery of the policy and the insured's condition of health at that time. This policy contained the following clause: "This policy takes effect and becomes binding upon the association only upon the actual delivery thereof to the applicant while in life and in good health, and the payment in cash to the association of the first annual premium or installment thereof while in good health." The petition alleges that July 1, 1897, the deceased "took out a policy of life insurance in the defendant association." As the policy expressly provided that it should have no effect until delivery, this was

an allegation of delivery to the deceased on that date. Granting that the provision in question was a condition precedent, there was no occasion shown for requiring any more specific plea of its performance than was contained in the petition, which alleged: "All of the conditions of said policy to be performed and fulfilled by said Harold H. Finn or plaintiff have been duly performed and complied with." This allegation was certainly a compliance with section 128 of the Code of Civil Procedure, and there seems to have been no error on the part of the court in overruling the motion. The motion had been filed by T. W. Blackburn as defendant's attorney. He took an exception to its overruling and then withdrew his appearance as attorney for the defendant. This was on March 28. On March 30, a general demurrer was filed on behalf of defendant, signed, "B. H. Robison, Pres." Defendant employed no attorney until April 29 when Mr. Robison states that he employed T. J. Mahoney, and was informed by Mr. Mahoney that the latter was engaged in the Kerr murder trial, and would be unable to give the matter any attention for probably two weeks. On May 3, a notice was served upon President Robison, there being no attorney of record, that the demurrer would be called up by plaintiff on Saturday, May 6, at 9:30, or as soon thereafter as counsel could be heard. At that time the clerk of T. J. Mahoney appeared and gave notice to the court that Mr. Mahoney had been employed and desired to appear, and it seems that nothing further was done on that day. On Wednesday, May 10, the demurrer was called up and overruled by the court, and the finding entered that it was filed for delay only, and the sum of $10 for the benefit of plaintiff was taxed, as costs, against the defendant. Counsel admits that in tendering an answer, and asking leave to file it, he has waived any merely technical error in the petition or in the time and manner of overruling the demurrer. But it is insisted that his demurrer was good, and that the petition presented no cause of action. The basis of the claim is the failure on the part of plaintiff to plead speci-

fically the fulfillment of the condition as to good health at the time of the delivery of the policy. It is urged that section 128 of the Code of Civil Procedure, cited above, does not apply, for the reason that this is a condition precedent, not in the contract, but to be performed prior to its taking effect. As this condition is created by express stipulation in the contract, and would have no existence if it were not in the contract, and a part of it, we are not able to draw this distinction. As above indicated, the allegation that all conditions had been "performed and fulfilled" and "complied with" seems sufficient under the statute. No entry of leave to plead was made, and there would be no right to plead without leave so long as such finding remained unreversed upon the records. However, on May 17, 1899, the defendant filed an answer, and on June 1 plaintiff filed a motion to strike it out, because filed without leave of court, and without authority of law. This motion was sustained and defendant excepted. On June 3, defendant filed a motion for leave to refile the answer, supported by affidavits showing the foregoing state of facts. On June 12, defendant's motion for leave to answer was overruled, and defendant excepted. The court then proceeded, over defendant's objection, to take the proofs and rendered judgment in favor of plaintiff for $2,112.71 and costs. On June 14, a motion was filed to vacate this judgment, because of error in refusing to strike from plaintiff's petition; because of error in overruling the motion to cause plaintiff to make her petition more specific; error in sustaining the motion to strike defendant's answer; error in calling up for disposition and overruling defendant's demurrer to plaintiff's petition; irregularity in the proceedings of the court; abuse of discretion in striking out defendant's answer; error in overruling the motion for leave to refile; irregularities in the hearing of the cause on June 12, and the entry of default on that date without notice to defendant, and in the absence of defendant's attorney after the court had been informed in open court that the attorney was employed in a trial in another court.

This motion was overruled, and the same grounds of error are alleged in this court.

In tendering an answer and asking leave to file it on June 3, the defendant must be held to have waived errors of form and procedure occurring prior to that time. The real question presented here is whether there was an abuse of discretion in refusing to allow defendant to file the answer presented. The only issue tendered by the answer was that the action on part of plaintiff was prematurely brought. The policy provides that the association shall within ninety days after receipt of evidence satisfactory to it of the death of the insured, pay to the beneficiary said sum insured, after deducting the balance of the current year's premiums, if any, and any indebtedness of the insured or beneficiary to the association. This is the only provision as to any delay. It is true that there are further provisions that it shall be the duty of the beneficiary to notify the association of the death, in writing, and furnish as soon as possible, on the blanks provided by the association, such proofs and affidavits as the executive committee may require in order to satisfactorily establish the facts as to the life and death of the insured and the legality of the claim against the association; and all matter so furnished to the association may at its option be used by it as evidence of the facts therein stated. This provision, however, seems to be in no way connected with the ninety-day clause by its terms, nor does it seem that it should be by its meaning. No complaint is made of any lack of proof of the death of the insured. The fact of such death is not denied, and is impliedly admitted in the answer. The ninety days were apparently provided for the purpose of enabling the defendant to procure these other additional proofs and showing, which it is made the duty of the beneficiary to furnish. The answer shows that after receiving plaintiff's proofs on July 13, they were retained without objection until October 13, ninety-two days, and then returned, with a requirement of affidavits from other physicians who had attended the deceased during the last year

of his life. It seems neither necessary nor proper to hold that after they are all furnished and complete, and the whole ninety days, after a sufficient proof of death had been furnished, have been employed in the getting of them, then a further truce of another ninety days should be required before any legal proceedings could be taken. It seems clear that no defense to this action was tendered in the answer, and that no prejudicial error appears in the refusal to permit it to be filed.

It remains, then, only to consider whether or not there was any prejudicial error in taking proofs and entering judgment when the motion for leave to file was overruled, or any abuse of discretion in so doing. Section 432 of the Code provides:

"If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee, master, or commissioner, or may direct the same to be ascertained or assessed by a jury," etc.

In this case, an issue of law had certainly been made and decided, and, on the overruling of the application to answer, the defendant was in default, and it was competent for the court to proceed to take the proofs and assess the damages. The complaint that the proceeding was without notice to the defendant is clearly without merit, as it was taken on the occasion of passing on defendant's own motion for leave to file, and in his presence. If, as we conclude, there was no error in refusing permission to file this answer, it seems equally clear that there was no error in proceeding, at the request of the plaintiff, and on plaintiff's waiving a jury, to assess the damages. The proof tendered was sufficient to warrant the action of the court, and it is recommended that the judgment be affirmed.

DAY, C., concurs. KIRKPATRICK, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

BANK OF MILLER ET AL. V. JAMES E. RICHMON.*

FILED MARCH 5, 1902. No. 10,303.

Commissioner's opinion, Department No. 1.

1. **Malicious Prosecution: PROBABLE CAUSE: PREVIOUS GOOD CHARACTER OF PLAINTIFF.** In an action for malicious prosecution of a criminal action, or for an offense which imputes moral turpitude or want of integrity, it is competent for the plaintiff, in making his case in chief, to show his previous good character as bearing directly upon the question of probable cause, where such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it.

2. **Arrest in Civil Action: FORMAL DISCHARGE.** Where a person is charged with being about to leave the state for the purpose of avoiding an examination concerning his property, and is arrested under the provisions of section 535 of the Code of Civil Procedure, and brought before the county judge for examination, an order, made upon hearing, that there was not sufficient evidence to warrant the arrest of the accused, is sufficient to show the proceedings fully terminated so far as the question of malicious prosecution is concerned, although the record fails to show a formal discharge.

3. **Instruction: PROBABLE CAUSE: COURT.** The question as to what constitutes probable cause is a question for the court to determine, and not for the jury; that is, the court must determine, as a matter of law, whether the facts are of such a character as would warrant a man of ordinary prudence in filing a complaint. An instruction which leaves to the jury to determine not only the facts, but also whether these facts would constitute probable cause, is erroneous.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

Willis L. Hand, for plaintiffs in error.

Norris Brown and *Willis D. Oldham, contra.*

*Rehearing allowed. Reversal adhered to.

DAY, C.

James E. Richmon brought this action in the district court of Buffalo county against the Bank of Miller and Nelson Maddox to recover damages for malicious prosecution. The trial resulted in a judgment in favor of the plaintiff for $400, to review which the defendants have brought error to this court.

The petition alleged that on January 13, 1898, the defendants falsely, maliciously and without reasonable or probable cause, caused the plaintiff to be arrested under the provisions of section 535 of the Code of Civil Procedure, which provides for the arrest and detention of debtors about to leave the state to avoid an examination concerning their property until such time as the examination can be had. The answer admitted the filing of the affidavit and the arrest and detention of the plaintiff, but alleged that defendants acted upon sufficient and reliable information, which led them to believe, and they did believe, that plaintiff was about to leave the state for the purpose of defrauding his creditors and avoiding an examination concerning his property; that they acted in good faith and without malice, and upon the advice of counsel, to whom they had previously communicated all the facts.

A number of errors are assigned for a reversal of the judgment, some of which we deem it unnecessary to consider, as they are not likely to again arise upon another trial of the case. Upon the trial the plaintiff was permitted, over the objection of the defendants, to introduce evidence tending to show his good reputation in the community at the time of his arrest. This ruling of the court is one of the errors now complained of. In ordinary civil suits it is undoubtedly the rule that evidence of good character is not permissible in making out a case in chief, and the authorities are in conflict as to whether in actions for malicious prosecution of a criminal action the plaintiff may, in the first instance prove his good character. Some courts of high authority maintain the view that in actions

for malicious prosecution of a criminal action, the plaintiff may, in the first instance, prove his own good character as tending to show that the prosecution was without probable cause. In *McIntire v. Levering,* 148 Mass., 546, it is said: In an action for malicious prosecution plaintiff, in order to prove that the prosecution was without probable cause, may show his good reputation, known to the defendant when the prosecution was commenced. This view also finds support in the following cases: *Woodworth v. Mills,* 61 Wis., 44; *Israel v. Brooks,* 23 Ill., 575; *Miller v. Brown,* 3 Mo., 127 and *Blizzard v. Hays,* 46 Ind., 166. While it is true that every one is presumed to have a good character until the contrary is shown, and this presumption ordinarily saves the necessity of proof, yet when one is charged with crime, or with an act which imputes moral turpitude or want of integrity, he is not obliged to rest upon the legal presumptions in his favor, but may show, if he can, his good character. So, in an action for malicious prosecution, where the party is charged with a criminal act, or an offence involving moral turpitude or lack of integrity, the better rule, as it seems to us, is to permit the plaintiff, in making his case in chief, to show his previous good character, as bearing directly upon the question of probable cause, where it is shown that such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it. In the case at bar the affidavit which formed the basis for the arrest, does not charge the plaintiff with the commission of a crime as the term is ordinarily understood, but does charge him with an offense which necessarily imputes a bad character for integrity and fair dealing. We think, therefore, that it was competent for the plaintiff to show that immediately prior to the commencement of the prosecution he bore a good reputation for honesty and fair dealing, which was known to the defendants, or which ought to have been known to them on account of the general knowledge in the community.

Another error, argued at some length, was that the al-

leged malicious prosecution was not fully terminated at the date of the commencement of this action, and hence the present suit was prematurely brought. The record shows that upon the arrest of the plaintiff he was taken before the county judge for examination, and upon the hearing the county judge found that there was not sufficient evidence to warrant the arrest of the plaintiff; but the court thereafter proceeded with the examination, which disclosed that the plaintiff had $18 in his possession, which the court ordered him to turn over to the defendant on its judgment, and in default of such payment to be committed to the sheriff. We think the proceedings were fully terminated, so far as the question of malicious prosecution is concerned, when the county judge made his order that there was not sufficient evidence to warrant the arrest of plaintiff, and that plaintiff was not about to leave the state. The order with reference to the payment of the money into court was an incident of the examination of the plaintiff under the statute, and not a part of his arrest and detention. Upon the same day of these proceedings before the county judge the present action was commenced, and, in order to show that all of the orders of the county court had been made before this action was instituted, one of the attorneys was called as a witness, and testified that the petition was not prepared or filed until after the decision of the county court. In this, we think, there was no error.

It is also urged that the proof does not sustain the allegations of the petition, because the petition states that the defendants charged the plaintiff with a crime, whereas the affidavit offered in evidence in proof of the charge shows that the plaintiff was not charged with a crime, but it was merely a charge that he was about to leave the state for the purpose of avoiding an examination concerning his property and to defraud his creditors. The petition, however, sets forth at length the affidavit upon which the plaintiff was arrested, and, while the acts complained of were not, in a technical sense, a crime, punishable by crim-

inal process, we think the petition having set forth the terms of the affidavit they were sufficiently pleaded to permit the affidavit to be offered in evidence. In one part of the petition the acts of the plaintiff were referred to as an "offense."

Another error complained of relates to certain instructions given by the court upon its own motion, one of which was as follows: "The defendant Maddox claims that he had information from others of facts and circumstances which caused him to believe the defendant [plaintiff] was about to leave the state to avoid examination as to the property he owned. It is for you to determine whether or not such information if he had the same, was sufficient to justify him in instituting the proceedings against the plaintiff. And in this connection you are instructed that the information that would justify the making of the complaint against another for the purpose of having him arrested, must be of such character and obtained from such sources that business men generally of ordinary care and prudence and discretion would feel authorized to act upon it under similar circumstances. If in this case the jury believe from the evidence that defendant made the alleged affidavit before the county judge for the arrest of the plaintiff and that he was arrested in consequence thereof, then it is a question of fact to be determined by the jury from the evidence whether the defendant when he made the complaint, acted upon such information as men of ordinary care and prudence would have felt justified in acting upon under like circumstances." It is the settled law of this state that the question as to what constitutes probable cause is a question for the court to determine, and not for the jury. Where the facts are undisputed, the court must say whether or not there was probable cause; that is, the court must determine as a matter of law whether the facts are of such a character as would warrant a man of ordinary care and prudence in filing a complaint. The province of the jury is to determine whether certain alleged facts exist, but the court must determine the sufficiency of these

facts to constitute probable cause. In an action for malicious prosecution, where the facts are disputed, the jury is to determine what the facts are; the sufficiency of the facts to constitute probable cause is for the court. Such is the holding in *Jonasen v. Kennedy,* 39 Nebr., 313. The instruction here complained of leaves to the jury to determine not only the facts, but also whether those facts would constitute probable cause. There was no other instruction in which the court informed the jury what facts would constitute probable cause. In this instruction, we think, there was error.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

NOTE.—The character and reputation of the defendant for chastity and virtue is not at issue in an action of bastardy. *Stoppert v. Nierle,* 45 Nebr., 105; *Houser v. State,* 93 Ind., 228; *Low v. Mitchell,* 18 Me., 372, 375. The general character is not regarded as put in issue by one unlawful or fraudulent act. *Low v. Mitchell, supra; Attorney General v. Bowman,* 2 B. & P. [Eng.], 532, note *a; Nash v. Gilkeson,* 5 S. & R. [Pa.], 352. Evidence of good character not admissible in civil suit for maliciously burning plaintiff's wheat stacks. *Barton v. Thompson,* 56 Ia., 571. Different rule in action for libel and slander. See Townsend, Libel and Slander.—REPORTER.

ALBION MILLING COMPANY V. FIRST NATIONAL BANK OF WEEPING WATER ET AL.

FILED MARCH 5, 1902. No. 11,293.

Commissioner's opinion, Department No. 2.

1. **Brief: ARGUMENT: INSTRUCTIONS: ASSIGNMENT OF ERROR: CONSIDERATION.** Where, in an argument and brief, error is assigned for giving and refusing a group of instructions and no reason

is pointed out, or authorities cited, by or from which the court can determine the several questions involved in the assignment, the matter should receive no consideration.

2. Faulty Answer: REPLY: REQUEST FOR INSTRUCTION: REFUSAL. Where an answer is faulty, but is replied to and treated by the plaintiff as sufficient during the whole trial and proceedings, the court should refuse to instruct the jury, at plaintiff's request, that certain of the facts alleged in the petition were not denied by such answer.

3. Financial Worth: HONEST OPINION: LIABILITY. Where one gives an honest opinion as to the financial worth and standing of a third party, and as to whether or not such third party is entitled to credit, based on information, which information he imparts to the person making the inquiry at the time such opinion is given, the mere fact that he was mistaken in his opinion will not make him liable in an action for fraud and deceit, to one who acts thereon.

4. Verdict. Where it is clear, from the law and the evidence, that the verdict returned by the jury is the only one which can be sustained in the case, it will not be set aside for errors occurring at the trial.

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

Nelson C. Pratt, for plaintiff in error

J. E. Douglass, contra.

BARNES, C.

This action was commenced in the district court of Cass county by the plaintiff herein against the defendants for fraud and deceit alleged to have been practiced upon it by defendants, by making false statements in regard to the business character, financial standing, and responsibility of a third party, to wit, one S. M. Prouty, who was engaged in selling flour and other milling products in the village of Weeping Water, Cass county, Nebraska, and also as to the advisability of extending credit to him. The petition was in the usual form, and the facts stated therein, if true, were sufficient to constitute a cause of action. The answer of the defendants, though not closely or carefully

drawn, or couched in apt legal phrase, in substance denied the material allegations of the plaintiff's petition. To this answer the plaintiff filed a reply. The case was duly tried and the jury returned a verdict for the defendants. A motion for a new trial was overruled, judgment was entered for the defendants upon the verdict, and plaintiff brings the case to this court by petition in error.

The only evidence offered by the plaintiff in support of the allegations of its petition, as to the false and fraudulent representations complained of, was given by one Mr. Elliott. After testifying that he had received a letter from Mr. Prouty stating that he, Prouty, wished to handle the plaintiff's milling products, and would like credit in the transaction for about $500, the witness was interrogated and further testified as follows:

Q. You may state what, if anything, you did after you received that letter, Mr. Elliott.

A. I called up the First National Bank of Weeping Water,—called the central office, and asked for the president or cashier of the First National Bank. She called back and said that the president was out, but the cashier was there, and had a talk with him. I told him that Mr. Prouty had been talking with us about buying some flour, and asked the First National Bank,—or, rather, the cashier,—and asked him what he knew; and he said he had been there for some time in business; he seemed to be doing well himself, and they kept his account there at the bank; that he asked them for no funds; as so far as he knew he was getting along nicely. He then asked me about what the probable amount would be. I told him about $500, and he said "Yes; I should say he would be good for that amount easily"; he didn't owe them anything.

This conversation over the telephone was claimed to have taken place on the 28th day of October, 1896. Defendant Murtey, the other party to the conversation, testified for the defendant, substantially as follows:

Q. What did the party talking over your phone say to you?

A. He said he had an order from Mr. Prouty, and he wanted to know what I thought about it.

Q. What question did he ask?

A. He wanted his standing in a general way,—financial standing.

Q. What did you tell him?

A. I told him he had been meeting his bills; that he had dealt with us some time and he owed us nothing; that he seemed to be honest, as far as I could say,—straightforward.

Q. What else did you tell him?

A. I think I asked him what was the amount of his shipment, and I think he said about $500,—something of that sort.

Q. What did you say to him?

A. I told him that probably he might be good for that, I wasn't certain about it, however.

This was all the evidence of any kind that was introduced upon the trial in relation to the alleged representations and statements made by the defendants, or any of them, to the plaintiff, as to the financial standing of Mr. Prouty. Further on the witness testified that Mr. Prouty had an account at that time at the bank; that it was not overdrawn; that he was not indebted to the bank anything at all; that he had heard no objections to Prouty's dealings; that he had paid his bills so far as he knew, and there had been no pending claims against him up to that time, to the bank, to his knowledge; that he had paid for everything, so far as he knew. The credit was finally given to Prouty on the last days of January and the first days of February, 1897. This evidence is quoted in full in order that a clear understanding may be had of the questions hereinafter determined.

1. The first assignments of error set forth in the plaintiff's brief are under the head of "Instructions," and are as follows: "Instruction No. 3, given by the court on its own motion, and in particular that portion which is as follows: 'But if it or its officer or officers attempted to give

such information, then it or its officer or officers were bound under the law to give honest information, such as was within their knowledge,'—plaintiff contends is not a correct statement of the law; and likewise instruction No. 4, given by the court on its own motion, and instruction No. 1, requested by defendants and by the court given, and instruction No. 7, requested by the defendants and by the court given." We ought not to be required to consider this assignment. It has been frequently held that where error is assigned in the giving and refusing of a group of instructions, and one of them is proper the whole assignment of error fails. No reason is pointed out, and no authorities are cited by which we can determine whether the position taken by counsel is correct.

2. The next assignment of error is as follows: "The first, second and third instruction asked for by plaintiff should have been given." We decline to consider this assignment of error for the reasons given above. It is claimed, however, that by one of these paragraphs the court was asked to instruct the jury that the statements set forth in paragraph five of the petition were not denied. We have examined this question, and hold that the request was properly refused, for the reason that no demurrer was ever filed to the answer, no motion to make it more specific and certain was ever urged; no objection was offered at the trial that it did not state facts sufficient to constitute a defense, but, on the contrary, it was always treated as though every allegation contained in the petition was suitably denied. It was decided in the case of *Rosenbaum v. Russell*, 35 Nebr., 513, that an answer, although faulty, will be held to be sufficient when assailed for the first time by a motion for a new trial. We think that rule is applicable to the facts in this case.

3. Errors are assigned for the giving of other instructions tendered by the defendant, and the refusal to give those tendered by the plaintiff. All of these instructions were directed to the main question of the liability of the defendants. By the instructions asked for by plaintiff

the court was requested to instruct the jury that if the defendants made the representations set forth in the evidence without knowing whether their statements were true or not, and the plaintiff had relied thereon to its injury, it would be entitled to recover. The plaintiff has mistaken the law of this case. The statement made to its agent, Elliott, by the defendant Murtey, when they conversed together by telephone, taken in the light of all of the circumstances and interpreted by the plain import of its language, can not with reason be considered as anything more than a fair expression of his opinion of the financial condition and worth of Mr. Prouty. Indeed, from its very nature, it could not be anything else. In the conversation Murtey gave Elliott all of the information on that subject which he had himself, and on which his opinion was based; and the plaintiff thereafter was as well able to form an opinion as to the advisability of extending credit to Prouty as was defendant Murtey, and these statements in no way rendered him liable to the plaintiff in an action for fraud and deceit. *Tryon v. Whitmarsh,* 1 Met. [Mass.], 1; *Marsh v. Falker,* 40 N. Y., 562; *Meyer v. Amidon,* 45 N. Y., 169; *Cowley v. Smyth,* 50 Am. Rep. [N. J.], 432. In the case of *Tryon v. Whitemarsh, supra,* which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiff was set aside for the reason that the judge should have instructed the jury that the defendants would not be liable, if they were of the opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. The plaintiff's own evidence in this case, therefore, would not sustain a verdict in its favor and against Murtey. As to the defendant bank, the evidence fails to show that it ever had any interest in or anything to do with the matter in its corporate capacity. Indeed, it is doubtful if, under its charter powers, it could take any such part in the transaction as would create liability on its part. As to the defendant Louis Foltz, who

is described as the president of the bank, the evidence shows conclusively that he never knew anything about the transaction until more than three months after it took place, and after he had loaned Prouty some of his own money, and had taken a mortgage and a bill of sale to secure its repayment.

Therefore the evidence of the plaintiff was not sufficient to sustain a verdict against any of the defendants, and the court did not err in refusing the instructions asked for by the plaintiff. We are not called upon to examine any of the other assignments of error, and we recommend that the judgment of the district court be affirmed.

POUND, C, concurs.

OLDHAM, C., concurring.

I prefer to express no opinion on what is said in support of the first and second paragraph of syllabus, but I concur in the result for the reason that it is clear to my mind that the evidence contained in the record is not sufficient to sustain a judgment against any of the defendants. I think that the trial court would have been justified, at the close of plaintiff's evidence, in directing a verdict for the defendants.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER HALMES, APPELLEE, V. GEORGE E. DOVEY ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,144.

Commissioner's opinion, Department No. 2.

1. **Judgment Creditor: JUDGMENT: EXECUTION.** The right of a judgment creditor to take out an execution on his judgment, is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law.

2. **Judgment Lien:** STATUTE: EXECUTION. A judgment lien is created by statute, and is destroyed by statute if its provisions requiring the taking out of an execution are not complied with.

3. **Dormant Judgment:** REVIVOR: LIEN. When a dormant judgment is revived, it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor.

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

A. N. Sullivan, for appellants.

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

OLDHAM, C.

This action was begun in the district court of Cass county on the 13th day of August, 1898, by Peter Halmes, for the purpose of restraining the sheriff of Cass county from levying an execution on certain real estate belonging to said Halmes. George E. Dovey, the judgment creditor, was also made a party defendant. The material facts, as appear by the record, are that on April 9, 1888, said George E. Dovey recovered a judgment in the district court of Cass county against one Thomas for the sum of $1,780.95. At the time of the rendition of the judgment, Thomas was the owner of the real estate involved in this controversy, but conveyed the same by deed to one Nicholas Halmes on July 17, 1888. On July 21, 1888, Dovey took out an execution on this judgment, and levied on some personalty, but did not levy on the real estate. On July 9, 1891, an alias execution was issued, on which, according to the testimony of the clerk of the court, there was made no return thereof. These were the only executions issued on this judgment until July 7, 1898, when the execution was issued which is the subject of this action. In the meantime, viz., on or about June 16, 1898, Dovey procured a revivor of this judgment, which, according to his own theory, had become dormant. The petition alleges and the evidence shows that on July 14, 1896, said Peter Halmes acquired the legal title

to this real estate by a deeded conveyance from Nicholas Halmes. In fact, this is conceded; but Dovey claims that by reason of the fact that there was a suit begun on April 3, 1893, by said Nicholas Halmes against said Dovey for specific performance of an alleged contract concerning this land, which suit was not terminated until April 15, 1898, that his right to issue execution was suspended during the pendency of this action, and that the judgment did not become dormant in fact, and he had not, therefore, lost his judgment lien on said land. This contention was tried, and the court found in favor of Halmes and rendered a decree perpetually enjoining the levy of an execution on said lands to satisfy said judgment. From this decree, Dovey appeals to this court.

The main question presented, then, is, was the right of Dovey to take out an execution on his judgment against Thomas suspended during the pendency of the action for specific performance brought by Nicholas Halmes against Dovey? In that suit Thomas was not a party. The validity of the judgment of Dovey against Thomas was not assailed. Dovey was not restrained from taking out an execution. There was no attempt made by this action to prevent Dovey from collecting his judgment from Thomas. The object of the suit was for the sole purpose of compelling Dovey to release his judgment lien on this land by reason of an alleged contract to do so. It was heard by the district court for Cass county, and a decree was rendered therein by the court on September 4, 1894, dismissing the petition of Nicholas Halmes "for want of equity and a failure to prove allegations therein." It was appealed to this court, but the record fails to show any supersedeas bond. So whatever may have been its effect before trial, it is certain that after the date of the trial Dovey was not embarrassed in any way by its pendency. The right to have an execution issued is a valuable right, for this is the only means provided by law to enforce the judgment. This right can only be taken away by some act done in compliance with law. It can never be taken away by anything

less. Neither can the failure to take out an execution be excused on the ground that the judgment creditor believed that his right thereto was suspended, unless by law it actually was suspended. From the statement of the above facts, it is clearly apparent that Dovey at all times had the right to take out an execution on his judgment against Thomas, and that the right to do so was not suspended by that action.

It is suggested by counsel for Dovey that there was an execution issued on March 25, 1893, which should be considered. On an examination of the execution, we find that it recites that George E. Dovey is the plaintiff, and the same Thomas defendant, but it purports to be issued on a judgment obtained on December 31, 1892, for the sum of $1,308.47. It is obvious that this execution was not issued on the judgment involved in this controversy. Among the requisites of a valid execution, as laid down by Mr. Herman, section 55, are that it must state the name of the court from which it was issued, the name of the county wherein the judgment was rendered, the amount of the judgment, and the time of its rendition. But however this may be, the record shows that more than five years had elapsed from the date of this execution at the time of the revivor. The judgment lien is created by statute, and is destroyed by statute if an execution thereon is not taken out within five years from the date of the judgment, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of taking out of another execution thereon. If execution is not taken out in the time limited by the statute, the judgment becomes dormant, and the judgment lien is destroyed. This dormant judgment may be revived, but when so revived it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor. Hence we conclude that the lands of Peter Halmes, as set forth in this petition, are not subject to a judgment lien, and are not holden for the payment of this judgment, and that the decree of the court below is clearly right and should be affirmed.

We recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALLEN H. CARPENTER V. CITY OF RED CLOUD.

FILED MARCH 5, 1902. No. 11,314.

Commissioner's opinion, Department No. 2.

1. **Damages:** INADEQUATE VERDICT. In an action for damages for injuries to the person and property of the plaintiff, where the testimony clearly shows that plaintiff has sustained substantial damages to both person and property, a judgment for $1 damages will be set aside as grossly inadequate.
2. **New Trial:** SMALLNESS OF DAMAGES: QUÆRE. Whether, in an action for injuries to the person, a new trial may not be granted on account of the "smallness of damages," where the testimony clearly shows that the damages awarded are grossly inadequate as compensation for the pecuniary injuries actually sustained, *quære.*
3. **Instructions:** ADMISSION OF TESTIMONY: CRITICISM. Conduct of the court in the giving of instructions and the admission of testimony criticised.

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

P. A. Wells and *S. A. Searle,* for plaintiff in error.

George R. Chaney and *J. R. Mercer; contra.*

OLDHAM, C.

This was an action by the plaintiff against the defendant, the city of Red Cloud, Nebraska, for injuries to the person and property of the plaintiff. The injuries are alleged to have been occasioned by the negligence of the de-

fendant city in digging a ditch across one of its streets, and leaving it entirely unprotected so that, as the petition alleges, the plaintiff, while driving with his team and buggy along defendant's street, drove into the ditch, and, as a result of the accident, killed one of his horses, crippled the other by breaking its foreleg, thereby entirely destroying its value, injured his buggy materially, and was himself thrown violently to the ground and received serious and permanent bodily injuries. Defendant answered this petition by alleging that the injury was occasioned by the contributory negligence of the plaintiff. The testimony on the part of plaintiff clearly showed that he had actually received serious and permanent bodily injuries as a result of the accident. It also showed that before the injury he was an able-bodied man, thirty-nine years of age, and was earning by his labor $1.50 per day, and that as a result of the injury he had been for about a year unable to earn anything by manual labor. The evidence also showed that he had expended about $30 for medical services and attendance on account of his injuries. The testimony as to the extent of plaintiff's injuries was not seriously disputed by the defendant. The only direct effort made to discredit the extent of his injury was an attempt to show that plaintiff owned only a one-half interest in the team that was destroyed. The jury returned a verdict for the plaintiff, and assessed his damages at one dollar. There was judgment on the verdict, and plaintiff brings error to this court.

Numerous errors are alleged in the proceedings of the court in the trial below, both in the admission of testimony and in the giving of instructions; and, while we think that most of the allegations of error are well assigned, yet, in view of the conclusion which we shall reach, it will be necessary to examine only one of these allegations, and that is that the judgment is contrary to the evidence and that the damages assessed are grossly inadequate.

It is urged by counsel for defendant that in view of section 315 of the Code of Civil Procedure, which provides

that "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained," we are precluded from granting a new trial in this case on account of the "smallness of damages." The first clause of this section of the statute applies only to actions for an injury to the person or reputation, and in the case at bar the action was for injuries to both person and property, and the testimony as to the injury to the property alone in this case shows a damage far in excess of the amount awarded. We are aware of the fact that in the case of *Shoff v. Wells*, 1 Nebr., 168, section 315, *supra*, was held to effectually prohibit a new trial in an action for injuries to the person on account of the "smallness of the damages," even though the damages assessed did not equal the actual pecuniary injury sustained. But in the later case of *Ellsworth v. City of Fairbury*, 41 Nebr., 881, this court, while not specifically referring to the above case, either modified, overruled or ignored its construction of section 315, *supra*, and set aside a judgment for $100 in an action for personal injuries, because under the testimony, it was grossly inadequate as compensation for the actual pecuniary loss sustained by the plaintiff. In view of the rule announced in this later case, even though the case at bar had been an action for injuries to the person alone, under the undisputed testimony as to the actual pecuniary injuries sustained we would still feel it our duty to set aside this judgment as grossly inadequate. If the reasonable, humane and liberal interpretation given to section 315 of the Code of Civil Procedure in *Ellsworth v. City of Fairbury, supra*, is to be followed as an established rule of construction by this court, why should not so much of the opinion in *Shoff v. Wells* as is in conflict with this doctrine be overruled?

As this case must be tried again, we think it well to suggest that paragraphs 3 and 4 of instructions given at the request of the defendant city at the former hearing are

each misleading and properly subject to criticism. We also think that the original method by which the testimony of defendant's witness Judson was procured outside of court during the progress of the trial, and without any notice, as required by law, having been served on the plaintiff, should not be followed during the next trial of this cause. We would also suggest that an instruction should be given on the proper measure of plaintiff's damage in case he should prevail. This was not done at the former trial, and while the court was not wholly at fault in this matter because no such instruction was requested by plaintiff's counsel, yet it seems reasonably certain that, if a proper instruction had been given on the measure of damages, it would, perhaps, have prevented the return of a verdict by the jury which was nothing less than a comic caricature of the damages actually proved.

We recommend that the judgment of the district court be reversed and the cause remanded.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

JOHN A. HORBACH, REVIVED IN THE NAME OF MARY A. BOURKE, V. MATILDA J. BOYD ET AL.

FILED MARCH 5, 1902. No. 11,105.

Commissioner's opinion, Department No. 2.

1. **Rejecting Evidence:** DIRECTING VERDICT. Where the trial court rejects all the evidence offered by a party and directs a verdict for his adversary, in determining the admissibility of the evidence offered, a reviewing court will give such party the benefit of all inferences that might be drawn reasonably from the testimony received.

2. **Tender of Proof: CONSTRUCTION.** An offer of proof, not put in a deceptive manner nor in language calculated to mislead, which is fairly susceptible of a construction rendering the evidence admissible, should be so construed, although a different construction might be put upon it, where it clearly appears from the record that the trial court did not proceed upon a correct theory in rejecting it.

3. **Vacant Lands: HOLDER OF LEGAL TITLE: POSSESSION.** The holder of the legal title to vacant lands is deemed to be in possession thereof.

4. **Grantor: POSSESSION: PRESUMPTION.** Where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee.

5. **Quaere.** In such case, *quære* whether he can claim that his continued possession was adverse without showing actual notice to the grantee.

6. **Deed: GRANTOR: COVENANT OF WARRANTY: SUBSEQUENT ADVERSE TITLE: ESTOPPEL.** A grantor in a deed with covenant of warranty may acquire a new title, adverse to that of his grantee, by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant.

7. **Entry: ADVERSE POSSESSION: PRESUMPTION.** If the grantor subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee, and a new title may be established by open and notorious adverse possession as in other cases.

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

Hamilton & Maxwell, for plaintiff in error.

Baldrige & De Bord and *Connell & Ives, contra.*

POUND, C.

This is an action in ejectment by the heirs of Joseph L. Boyd, deceased, to recover certain lots in the city of Omaha. The answer is a general denial and a plea of adverse possession and the statute of limitations. The plaintiffs' case is that in 1857 their ancestor purchased the lots in controversy of John A. Horbach, whose grantee is plaintiff in error; that the purchaser left Omaha soon after, and

died in 1862; and that a warranty deed was duly executed by Horbach, and by him placed of record in the proper office, pursuant to an arrangement or understanding at the time of the purchase. The defendant sought to prove that in 1861 Horbach inclosed the lots and other property with a substantial fence and from that date until 1887 he or his grantee continuously, openly and notoriously were in adverse possession, using the land for a garden; that in 1876 he sold and conveyed it to one Abraham Horbach by warranty deed duly executed, delivered and recorded; that said Abraham Horbach took possession thereunder, and himself or his grantees have been in the continuous, open, notorious and exclusive adverse possession thereof as owners ever since; and that in 1887 such grantees of Abraham Horbach or occupants under them placed a number of buildings upon the premises. All of defendant's offers to prove these facts were rejected by the trial court on the ground that Horbach and those claiming under him were estopped by his deed and covenant and that no actual notice of Horbach's possession and claim of ownership was brought home to said Boyd or his heirs, and a verdict for the plaintiff was directed.

We think it manifest that, in passing upon the admissibility of the evidence offered, this court should give the defendant the benefit of all inferences that may be drawn reasonably from the testimony received. We think, also, that as the offers of proof are not put in a deceptive manner nor in language calculated to mislead, and are fairly susceptible of a construction rendering the evidence proffered admissible, they should be so construed, although a different construction might be put upon them, since the trial judge, in his reasons, expressly stated in the record repeatedly, failed to make an important distinction, and rejected them upon an unsound theory. Ordinarily, every presumption is in favor of the rulings of the trial court, and the record will be so read as to sustain its action, if possible. But where a party is prevented from presenting his case all inferences are to be drawn in his favor that

the record will reasonably permit, and this should be the more true where it is evident that the offers to prove his case would have been rejected, under the theory taken by the trial court, had counsel phrased his offers so as to bring them unmistakably within the view taken by this court. While no one says, in so many words, that the land was vacant at the time of the conveyance, in 1857, such is the fair and almost necessary inference from the evidence admitted. One witness, who went over and surveyed the tract of which the property is a part in 1863, says that he found nothing but a fence, which defendant offered to prove was put there by Horbach in 1861. Several other witnesses testify that the whole tract was "open" as late as 1877, and used as a garden. Moreover, defendant's offer to prove that Horbach inclosed these lots in 1861 and has since occupied them continuously as owner, implies that they were previously vacant. We think, also, that the fair construction of defendant's offers of proof is not that Horbach remained in possession after the deed to Boyd continuously, and seeks to make such possession adverse, but that in 1861, four years after the conveyance, Horbach entered on the land, inclosed it and occupied it, and that he and his grantees have occupied it adversely and claimed to own it, ever since. It must follow that the evidence should have been received.

The holder of the legal title to vacant lands is deemed to be in possession thereof. *Troxell v. Johnson*, 52 Nebr., 46. Hence, when Horbach executed and delivered a deed to Boyd which conveyed the legal title, posession went with it. The land being vacant, the same act that divested Horbach's title and created a title in Boyd, terminated Horbach's possession, and put Boyd in possession. Such possession, as we understand defendant's claim, continued for four years. Then, in 1861, as defendant offered to prove, Horbach inclosed the land and other tracts with a substantial fence; he and his lessees cultivated it; he publicly and notoriously claimed to own it, and was named as owner on maps and plats in general circulation; the land

was assessed as his; he conveyed it, and he and his grantees and lessees put houses upon it. This is not a continuance of the possession existing prior to the conveyance. It is a subsequent entry, creating a new and independent possession, and giving rise to a new and original title. We have no doubt that, where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee. *Humphrey v. Hurd,* 29 Mich., 44; *Schwallback v. Chicago, M. & St. P. R. Co.,* 69 Wis., 292, 34 N. W. Rep., 128. In such case, in order that the possession be treated as adverse to the grantee, there must be strong proof to overcome this presumption. It has been said, generally, that the grantor who continues in possession must make an "explicit disclaimer" of subserviency to the grantee; that this disclaimer must be "clear, unequivocal and notorious"; and that his possession becomes adverse only upon a "notorious assertion of right in himself." *McCormick v. Herndon,* 86 Wis., 449, 56 N. W. Rep., 1097, 1098; *Sherman v. Kane,* 86 N. Y., 57, 68; *Burhans v. Van Zandt,* 7 Barb. [N. Y.], 91. In any ordinary case, the acts of Horbach in conveying the land, causing himself to be named as owner upon maps and plats, and openly and publicly claiming it as his own, would amply suffice. Even in case of a deed absolute by way of mortgage, where there is a certain fiduciary relation, this court has held that acts of ownership after payment of the debt secured, of themselves, justify a finding that the possession of the creditor is adverse. *Stall v. Jones,* 47 Nebr., 706. Counsel have argued, however, that between grantor and grantee, where the grantor continues in possession, the same rule applies as in cases of landlord and tenant, tenants in common, and the like, in which cases the possession does not become adverse until notice of the adverse claim is brought home to the other party. *Shields v. Horbach,* 49 Nebr., 262; *Ross v. McManigal,* 61 Nebr., 90; *Smith v. Hitchcock,* 38 Nebr., 104. There is much to be found in the books in support of this contention. But we do not find it necessary

to pass on the question in this case, nor to decide whether a long continued course of open, notorious and unequivocal acts of ownership, such as the defendant offered to show in the case at bar, would not suffice to rebut the presumption of a permissive occupancy, without proof of further actual notice to the grantee in person. For if the defendant's case is that a new entry was made four years after the conveyance, and a new possession began from that entry, an entirely different case is presented, to which the rules relied upon by the trial judge, assuming them to govern a case of continued possession after the conveyance in all the stringency contended for, have no application. It can not be doubted that a grantor who has conveyed by deed with convenant of warranty, may acquire a new title adverse to that of his grantee by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant. *Stearns v. Hendersass,* 9 Cush. [Mass.], 497; *Sherman v. Kane,* 86 N. Y., 57; *Eddleman v. Carpenter,* 7 Jones Law [N. Car.],616; *Hines v. Robinson,* 57 Me., 324; *Cramer v. Benton,* 64 Barb. [N. Y.], 522. It must be evident that, if the grantor subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee. This would be the more obvious where several years intervene between the grant and the entry. Whatever the rule may be where the possession of the grantor continues after the conveyance, in such a case the new title may be established by proof of open and notorious adverse possession, as in other cases.

We are of opinion, therefore, that the court should have received the evidence offered, and that a new trial should be had, at which the condition of the land when conveyed and the date when Horbach took actual possession will doubtless be shown fully and explicitly. To that end we recommend that the judgment be reversed and the cause remanded.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SAMUEL DOANE, APPELLANT, V. ELLEN DUNHAM ET AL., APPELLEES.

FILED MARCH 5, 1902. No. 11,273.

Commissioner's opinion, Department No. 2.

1. **Preponderance of Evidence.** While proof by a preponderance of the evidence is all that is required of the plaintiff in any civil action, when a plaintiff seeks to overcome the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, by parol evidence, much more certainty and conclusiveness are required than in ordinary cases.
2. **Parol Evidence: RESULTING TRUST.** Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing.
3. **Husband and Wife: GIFT: PRESUMPTION.** Where a husband places the title to lands in his wife without consideration, whether by conveyance directly or by procuring conveyance to her by others, a gift is presumed.

APPEAL from the district court for Nuckolls county. Heard below before HASTINGS, J. *Affirmed.*

W. A. Bergstresser, Jefferson H. Broady and *Isham Reavis,* for appellant.

S. W. Christy and *Cole & Brown, contra.*

POUND, C.

This action was brought to declare a resulting trust in certain lands alleged to have been purchased by appellant and conveyed by his direction to Sylvia A. Doane, his wife, now deceased, whose heirs at law are defendants and ap-

pellees. The district court found for the defendants as to the subject-matter of the present appeal, and decreed accordingly.

In our view, but one question is presented, namely, whether the decree is sustained by the evidence. Counsel have argued that the pleadings make a narrower issue than the existence or non-existence of a trust, and merely raise the question whether appellant or his wife paid the purchase money. But although the answer alleges that the wife furnished the funds, there is also a general denial, under which the court might properly find an absolute gift by the husband. It is undoubtedly true that proof of an issue by a preponderance of the evidence is all that is required of a plaintiff in any civil action. *Stall v. Jones,* 47 Nebr., 706; *Wylie v. Charlton,* 43 Nebr., 840; *Southard v. Curley,* 134 N. Y., 148. But this is not a fixed or unvarying standard. What would be sufficient to constitute a preponderance of the evidence and to sustain a judgment in an ordinary case might not suffice in another, where, in addition to the burden resting upon the plaintiff in any case, particular presumptions are to be overcome. This is especially true where a plaintiff seeks by parol evidence to overcome the presumptions arising from the express terms of a conveyance, or from the relations of the parties concerned therein. It is obvious that what would ordinarily suffice may fall far short of the requisite *quantum* of proof in such a case, without in any degree infringing the general rule that only a preponderance of the evidence is demanded. In consequence, while we we may not admit the statements often to be seen in the books, that more than a preponderance of the evidence is required to establish a trust, contrary to the purport of a written instrument, by parol, and that the trust in such cases must be proved beyond doubt, there is no occasion to repudiate or to qualify what has become a commonplace of the books, that the proof in such cases must be clear, unequivocal and convincing. 2 Pomeroy, Equity Jurisprudence, sec. 1040; 1 Beach, Trusts, sec. 172; *Schade v. Bessinger,* 3

Nebr., 141, 144; *Deroin v. Jennings,* 4 Nebr., 97; *Names v. Names,* 48 Nebr., 701; *Klamp v. Klamp,* 51 Nebr., 17; *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Nebr., 892. The very terms of the conveyance are evidence, and must be overcome. Hence much more certainty and conclusiveness are requisite than in ordinary cases. Indeed, it has been said that "Proof of trusts by parol is not regarded with favor by the courts." 2 Jones, Evidence, sec. 425. In the case at bar, moreover, appellant's burden was increased by the presumption which arises in any case where a husband places the title to lands in his wife without consideration. Whether this is done by direct conveyance, or by procuring a conveyance to her by others, can make no difference. In either event a gift is presumed. *Kobary v. Greeder,* 51 Nebr., 365; *Veeder v. McKinley-Lanning Loan & Trust Co., supra.* The district court found that appellant intended his wife to take the full beneficial interest. If, as there is much to indicate, he acted under a mistake of law in supposing that on his wife's death the property would pass to his daughter by a former wife, and not to collateral relations of the grantee, yet such mistake did not and does not constitute any legal ground for withdrawing his completed gift. Neither does it authorize us to impress the property with a trust which the parties themselves did not create.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

M. H. HOUSTON ET AL. V. FARMERS & MERCHANTS' INSURANCE COMPANY.

FILED MARCH 5, 1902. No. 11,266.

Commissioner's opinion, Department No. 3.

1. **Insurance**: PREMIUM: CREDIT: SUSPENSION OF POLICY. Where credit is extended and a note taken for the premium to be paid for a policy of insurance, and both the note and the insurance policy provide that in case the note is not paid at maturity the policy shall be suspended, inoperative and of no force or effect so long as the note or any part thereof remains due and unpaid, the insurance company can not be held liable for a loss occurring after the maturity of the note and while the same is unpaid.

2. ———: CONDITION IN POLICY. The policy contained a further provision to the effect that "in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remains due and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same for the remainder of the term." *Held*, that the collection of the premium after a loss by the insured, which occurred after the maturity of the note, and while the same was unpaid, while it would reinstate the policy for the remainder of the term, would not constitute a waiver on the part of the company such as to make it liable for the loss.

ERROR from the district court for Pawnee county. Tried below before LETTON, J. *Affirmed.*

Story & Story, for plaintiffs in error.

Halleck F. Rose and *Frank A. Barton, contra.*

DUFFIE, C.

January 10, 1895, the defendant in error issued to the plaintiff in error a policy of insurance to run five years, taking a note maturing December 1, 1895, for the premium.

The policy insured the plaintiff on his dwelling-house in the sum of $500 and on his barn in the sum of $1,000 against loss by fire and tornadoes. The note contained the following provision: "And it is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note, or any part thereof, shall be overdue and unpaid." The policy also contained these conditions: "If a note be given for the premium on this policy, or any part thereof, it is mutually agreed and understood by and between the assured and this company, that in case said note, or any part thereof, be not paid at maturity, this policy shall be suspended, inoperative, and of no force or effect so long as such note, or any part thereof, remains overdue and unpaid. And in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remained overdue and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same for the remainder of its term only." On May 17, 1896, after the maturity of the note, which was still wholly unpaid, the plaintiff's barn was injured by a wind-storm to the amount of $600. The company was informed of this loss, but no proof of loss was made, and no further action taken in relation thereto. After the loss the company demanded payment of the premium note, and on September 23, 1897, brought suit thereon before the county judge of Pawnee county. After suit brought, the plaintiff in error offered to confess judgment for $26 and costs, that amount being, as plaintiff in error claims, the customary short-rate premium on the policy up to the time that his barn was injured by a wind-storm, which offer was refused by the company. Plaintiff in error thereupon filed his bill of

particulars, claiming $575, being the amount he claimed due him on account of damage to his barn after giving the company credit for the full amount of the premium note. The company moved to strike this answer from the files for the reason that the court was without jurisdiction, whereupon the plaintiff in error amended by reducing the amount of his claim to $200, and the motion to strike was thereupon overruled. On a trial in the county court, judgment went against the insured for $37.63, the full amount due upon the premium note, and he thereupon appealed to the district court. In the district court the insured filed an answer setting up his policy and the loss thereunder, and asking judgment against the company for $565, the amount of his loss less the amount of the premium note which he admitted as an offset to his claim for damages. This answer was stricken from the files on the ground that the jurisdiction of the court below was limited to $200; whereupon, the insured filed an amended answer asking for judgment on the policy in the sum of $200 only, and attorney's fees and costs. The company demurred to so much of the answer as set out a claim for damage under the policy, and this demurrer was sustained by the court and judgment entered against the insured dismissing his counter-claim, and thereupon the court gave judgment against the insured for the amount of the note and interest and cost of suit, and from this judgment he has taken error to this court.

There is no doubt of the right of an insured to have his policy canceled upon the terms provided by section 42, chapter 43, of the Compiled Statutes, which is as follows: "Any person, company, association or corporation transacting the business of fire, or fire, wind, storm, and tornado insurance, in this state, shall cancel any policy of insurance hereafter issued or renewed, at any time, by request of the party insured, or his legal representative, and shall return to the said party, or his representative, as aforesaid, the net amount of premium received by the company, after deducting the actual compensation of the

agent or solicitor for securing the issue of said policy, and also deducting the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed, anything in the policy to the contrary notwithstanding."

The transcript from the county court recites the following in relation to the offer to confess judgment: "October 15, 1897, ten A. M., case called, plaintiff and defendant M. E. Houston present, and thereupon the defendant, M. E. Houston, filed her offer to permit judgment to be entered in favor of plaintiff for $26 and costs to this date, and the plaintiff refusing to accept said offer, this cause came on for hearing on the pleadings and the evidence." There is nothing in this record from which we can determine whether the offer to confess judgment included, in addition to the customary short-rates, the actual compensation paid to the agent or solicitor for securing the issue of the policy, and, this being so, the presumption obtains that the offer was not sufficient. But, even if it did, we are entirely certain that an offer to confess judgment for the amount does not comply with the provisions of our statute in relation to the cancelation of policies. By the wording of the statute, the legislature seemed to have had in mind the cancelation of policies that had been paid for in cash only, but we are inclined to believe that a policy issued upon a credit where a note is taken for the premium is fairly within its meaning. In such cases, however, the insured can not claim a cancelation of his policy by confessing judgment for the amount of the premium computed at the customary short-rate, but he must actually pay or tender such sum to the company, when he will be entitled to a return of his note. No offer of payment being made in this case, the plaintiff in error was not entitled to have his policy canceled and note returned.

It is insisted in a very excellent brief filed by the plaintiff in error that the company, by refusing to accept judgment for what was earned upon the note, and by insisting upon payment of the full amount thereof, waived the suspension of the policy by reason of the default in payment

of the note and became liable for the loss which occurred during such default. There are many cases holding that, where the company insists upon the payment of the premium after loss has occurred, such collection is based upon an implied waiver of the forfeiture. These are cases, however, where the policy provides that it shall become void if the premium be not paid when due. In such cases, the non-payment of the premium at the stipulated time voids the policy at the option of the company, and it is the duty of the company to declare this option when the default occurs, and it waives the forfeiture in case it receives or enforces payment after the default. It can not occupy the attitude of demanding or receiving pay upon a contract, and at the same time insist that the contract is not in force and of no validity. The case under consideration is of a different character. It is nowhere stipulated that the policy shall become void on account of a failure to pay the premium note at maturity. The parties have contracted in this case that a failure to pay the premium note when due merely suspended the policy during such default, and that it may be reinstated at any time within the life of the policy by payment being made. In *Phenix Ins. Co. v. Bachelder*, 32 Nebr., 490, Judge NORVAL, in discussing a contract similar to the one now under consideration, remarked: "It is obvious that the failure to pay the premium note, at maturity, suspended the policy until payment was made. It could have been revived, for the balance of the term, by making full payment at any time before the loss. This, as we have seen, he failed to do. True, after maturity of the note, he paid $15 thereon, but this did not give him the right to avail himself of the benefits of the contract of insurance. Nothing short of full payment, or a waiver of the stipulation in the policy, could have the effect to remove the suspension caused by the failure to pay the note. The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his note, the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to en-

force the one they have made. To hold that the policy was in force, at the time of the fire, would be to set aside and disregard the plain stipulation of the parties." It is true that in that case no waiver on the part of the company was pleaded or shown, but the parties in this case have stipulated that: "In case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remained overdue and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application." The parties have made their own contract. The amount of the premium was undoubtedly based upon the terms and conditions contained in the policy. There is no complaint that it was not fully understood by the insured, and it contains nothing, so far as we are able to discover, that is contrary to the provisions of our statute, or that contravenes public policy. The plaintiff in error knew that a default in the payment of his premium note suspended the policy. He provided that it might again be reinstated when payment was made. Whether that payment be voluntary or enforced, the policy is revived from the date of payment. This is the contract of the parties, and we have neither the right nor the power to change it or amend it in any form. That notes made upon the conditions of the one in suit may be enforced is held in *Phenix Ins. Co. v. Rollins*, 44 Nebr., 745, and *McEvoy v. Nebraska & Iowa Ins. Co.*, 46 Nebr., 782.

We discover no error in the record, and recommend that the judgment be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY C. KITCHEN ET AL. V. WILLIAM G. CHAPIN.

FILED MARCH 5, 1902. No. 11,316.

Commissioner's opinion, Department No. 3.

Married Woman: PROMISSORY NOTE: GUARANTY: LIABILITY. A married woman is liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such a note is not driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

John P. Maule and *Morning Bros.*, for plaintiffs in error.

John S. Kirkpatrick, contra.

DUFFIE, C.

William G. Chapin brought this action in the district court of Lancaster county against Mary C. Kitchen and A. D. Kitchen, alleging as his cause of action that he was the owner of a promissory note for $500, made by James H. O'Neill and payable to the order of Mary C. Kitchen; that after the execution and delivery of said note, and before the maturity thereof, the said Mary C. Kitchen sold, assigned and delivered the note to him, and for that purpose the said Mary C. Kitchen and A. D. Kitchen indorsed on the back of said note the following:

"For value received, I hereby assign the within note unto William G. Chapin and hereby guarantee payment of the same and waive demand and notice of protest on same when due. MARY C. KITCHEN,
"A. D. KITCHEN."

It is alleged that the note is due and unpaid, and judgment is asked against the defendants. Mary C. Kitchen filed the following answer: "Now comes Mary C. Kitchen and for her answer to the petition of the plaintiff says at

the time the note sued on was executed and the indorsements of assignment and guaranty made, she was a married woman, the wife of her codefendant, A. D. Kitchen, and living with him; that previous to this time she owned some city lots in Lincoln of uncertain value. Her said husband was engaged in the erection of some brick buildings in said city and was needing money. This defendant said to him if he could sell some of her lots she would make a deed to the purchaser and he, her said husband, could have the money realized from said sales to use in the erection of the said buildings he was erecting. Later he represented to her that he had negotiated a sale for certain lots, and asked her to execute a deed to the same to the defendants O'Neill, which she did. Later he brought to her the note and mortgage in suit and asked her to write her name on the back of it so he could use it in his business, which she did. The defendant alleges that she had no business dealings with the plaintiff whatever, that she has never been engaged in any trade or business and did not get or receive any benefit or consideration for the sale of said lots or for the execution of the deed she executed thereto or for the transfer of said note to the plaintiff or for said assignment and guaranty. She alleges that she did not enter into said contract of guaranty for the purpose of binding her separate estate or with reference thereto, but only for the purpose of passing the title of said note so her husband could get money to use in his own business and enterprises. Wherefore she prays that she may go hence without day and recover her costs." The reply is a practical admission of all the facts set out in the answer, except that she did not indorse the note for the purpose of binding her separate estate, or with reference thereto. The case was tried to the court without a jury, and judgment entered for the plaintiff below, and Mrs. Kitchen has taken error to this court.

The only question presented by the record is whether the plaintiff in error, a married woman, is liable upon her guaranty, under the admitted facts in this case. In order

to assist her husband in some building operation in which he was engaged, she sold certain lots which she owned in her own right, taking this note as a part of the purchase price. For the purpose of negotiating the note and obtaining money thereon for her husband's use, she guaranteed payment of the note, in the form above shown. Was this a contract relating to her separate estate, and did she intend thereby to bind her separate estate? In *Grand Island Banking Co. v. Wright,* 53 Nebr., 574, Judge NORVAL, in speaking of the liabilities of a married woman under our enabling act, remarks (page 578): "But this statute does not expressly, nor by implication, enlarge a wife's capacity to contract generally. She can buy and sell property in her own name and upon her own account, and enter into valid contracts with reference to her separate estate the same as if she were a *feme sole,* or as a married man may in relation to his property." It is undisputed that the note in suit was taken by Mrs. Kitchen on a sale of her separate property, and that the note itself was her separate property. She had the same right to hold and collect it or sell and negotiate it that a married man would have, and in the sale and transfer of the note she could undoubtedly bind herself by any contract of indorsement or guaranty that is usual or customary in the sale and transfer of such instruments. The contract was one relating wholly to her separate estate, in relation to which the statute empowers her to contract with the same freedom and to the same extent as though she were unmarried. The fact that the proceeds of the sale of the note were to go into her husband's business would not in the least affect her power to guarantee the payment of the note, and to bind herself by such guaranty. The third finding of the court is as follows: "That before the purchase of said note by the plaintiff, Mary C. Kitchen had given said note to the defendant A. D. Kitchen, to be used by him in his business, but that before said purchase said Mary C. Kitchen signed the guaranty hereinbefore found, and authorized her husband to put said note in circulation with

said guaranty thereon." It is insisted that this finding shows that Mrs. Kitchen had parted with all interest in the note, and had given the same to her husband prior to indorsing the same, and that she is therefore no more liable upon her indorsement than she would be by indorsing the note of her husband or of some third party. This third finding of the court is inconsistent with the admitted facts, and we think it is not to be considered. It is undoubtedly true that Mrs. Kitchen agreed with her husband, prior to a sale of this note to the defendant in error, that he might sell some of her lots and use the proceeds in his business. As before stated, the note in question was taken as part consideration on the sale of some of her lots; and, in the sense that she had agreed with her husband to give him the proceeds of these lots, she had given him this note. The record and her own answer make it plain, however, that she never transferred to her husband the legal title to the note by indorsing the same to him; and her answer admits that she indorsed the note at the request of her husband in order that it might be sold and the proceeds used in his business. We think that she is bound by the allegations of her answer, and that, fairly construed, admits that she indorsed the note in its present form for the sole purpose of negotiating the same and transferring the title.

Our attention has been called to some cases from other states, and particular attention directed to *Russel v. People's Savings Bank,* 39 Mich., 671. It appears from the statement of facts made by Judge Cooley in that case that Mrs. Russell, a married woman, was the owner of a note made to her by the Hamtramck Iron Works. She was also a stockholder in the Detroit Car Works. The latter company was indebted to the People's Savings Bank, which threatened suit for the collection of its claim. To prevent suit, Mrs. Russell indorsed the note given her by the Hamtramck Iron Works, and gave it to the bank as collateral security for the debt due it from the car company. The note not being paid at maturity, the bank brought suit

against Mrs. Russell upon her indorsement. Judgment went against her in the superior court, which was reversed in the supreme court upon the ground that her contract of indorsement was made for the benefit of the bank, and that she could not bind herself as surety for another. The statement of the case shows that she indorsed this note, not for any purpose of her own, but as security for the payment of a debt due the bank from the car company, and the fact that she was a stockholder in the company could not enlarge her liability on the contract. Judge Cooley disposes of such a claim in the following apt words: "But it is said that in this case the suretyship was for the benefit of a corporation in which Mrs. Russell was a stockholder, and therefore she must be supposed to have had in view in making it her own interest in the corporation. Mrs. Russell, however, was not identified with the corporation otherwise than as having an interest in it; the legal identity of each was distinct, and contracts for the benefit of the corporate estate were in no sense contracts for the benefit of the estate of one of its corporators. * * * The test of competency to make the contract is to be found in this: that it does or does not deal with the woman's individual estate; possible incidental benefits can not support it. Tested by this criterion this contract of indorsement, so far as it involves a personal responsibility, must fail. Mrs. Russell has contracted for the advantage, not of her own estate, but of a corporation with which she is no more identified in law than she is with her husband or any third person. * * * But there is no occasion to indulge in presumptions one way or the other; it is sufficient that the contract is one of suretyship merely, and as such is not one the statute empowers a married woman to make." In the case we are now considering, the note was made payable to Mrs. Kitchen. She offered it on the market with her indorsement in the form above set out; and, while the purchaser of negotiable paper takes it with constructive notice of the disability of the maker or the indorser, we do not think he is driven to the inquiry of the use to which

a married woman intends to devote the proceeds of a note payable to her order, and which she indorses to give it currency. Concededly, the law is that she would be liable on this contract of indorsement, had she invested the proceeds of the sale in the improvement of her separate estate or to her own personal use; and we can not bring ourselves to think that because she may invest it in presents made to her friends, or turns it over to her husband to be used by him in his business, that her liability is lessened in the slightest degree. A married woman in this state may engage in trade. Of necessity, she may take notes and bills in the conduct of her business, and having taken them, she may dispose of them like other traders. As a trader, she gives an implied warranty of her title to every article which she sells; and, in case the property is lost to the purchaser because she had no title when she sold to him, there can be no doubt of his right to maintain an action against her on her implied warranty of title. This being so, why can she not make an express warranty of the quality of the goods she offers for sale,—a warranty that is valid and may be enforced against her? If she has not that power, then the statute which gives her leave to engage in trade places her at a disadvantage with other traders, who can make a valid warranty upon which their customers may rely as affording them protection. So, too, in the disposal of the notes and bills taken in the conduct of her business, if she can not sell and dispose of them when the necessities of her business demand ready money, and make an indorsement upon which she may be held liable personally,—if she can indorse, so as to transfer the legal title only,—then she is again at a disadvantage, and may be compelled to dispose of the notes and bills taken in the course of her business at a large discount, to a purchaser who would be willing to pay their full face value, if he could rely upon her indorsement, rather than on the solvency of the maker, who is perhaps unknown to him. These considerations lead us to believe that it was the intent of the legislature to give to a married woman the same rights

as a married man possesses, and to impose on her the same liabilities in all transactions connected with her separate estate or trade or business, and that a person dealing with her in relation to her separate property need make no inquiry as to her intention in the disposition of the proceeds realized by her from a sale made either of notes or bills or of other property held by her in her own right.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRANK MCCOY, JR. v. MARY ANN CONRAD ET AL.

FILED MARCH 5, 1902. No. 10,608.

Commissioner's opinion, Department No. 3.

1. **Probate of Will: DISQUALIFICATION OF WITNESS: HEIRS AT LAW.** In a contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified by the statute as witnesses to transactions and conversations with the deceased.

2. ———: **TESTATOR'S SIGNATURE AFFIXED BY ANOTHER: BURDEN ON PROPONENT.** When in a contested proceeding for the probate of a will, it is disclosed that the name of the alleged testator was affixed to the instrument in controversy by some person other than himself, it is incumbent upon the proponent to establish by unequivocal evidence that the deceased gave direction to such person for writing his name, consciously and explicitly, and in the free and voluntary exercise of his faculties.

ERROR from the district court for Saunders county. Tried below before SEDGWICK, J. *Affirmed.*

Good & Good, Enos F. Gray and *Charles H. Slama*, for plaintiff in error.

G. W. Simpson, contra.

AMES, C.

This is a contest about the admission to probate of an alleged will, said to have been executed on the 9th day of September, 1896, in Saunders county in this state, where the purported testator resided then and at the time of his death. The grounds of contest are that the alleged testator was without testamentary capacity, and that the instrument in controversy was obtained from him through the exercise of undue influence, and without his conscious volition. At the time the document was made he was very old, and infirm in health, and at his death he left surviving him, as his sole heir at law, a married daughter, Mary Ann Conrad, who is the contestant in this proceeding. By the alleged will his estate is divided between this daughter and one Frank McCoy, his nephew, who is the proponent in the contest. The probate of the instrument was refused both by the county court and, upon appeal, by the district court, and the case is now brought here by the proponent by proceedings in error.

On the trial before Judge Sedgwick and a jury, the daughter was permitted, over the objection of the proponent, to testify concerning certain conduct and conversations of the deceased indicative of his mental condition at and about the time of the alleged execution of the proposed will. The first and one of the most important questions presented, is whether she was a competent witness for the purpose. The statute provides (Code, sec. 329) that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless," etc. If the statute is to be so construed as to exclude heirs at law as witnesses in cases of contest about the probate of alleged wills of the deceased, it is manifest that such persons will be put at great disadvantage in litigations of that kind. The execution of the will might be extorted by threatened

or actual physical violence in their very presence, and, their lips being sealed, they would be helpless to prevent, or even effectually to protest against, the consummation of the outrage. And so it would turn out that, to repeat an often quoted phrase, that which was evidently intended as a shield for the protection of the testator's estate would be converted into a sword for its destruction. We do not think that such an interpretation of the statute can be adopted, or, to continue the figure of speech, that the shield ought at any time or under any circumstances to be discarded or lowered. After the will of a decedent has been established, the devisees and legatees are properly regarded as within the protection of the statute, but, so long as they are merely the proponents of a contested alleged will of the deceased, their interests are as clearly adverse to those of the heirs at law or other acknowledged representatives of the decedent as are those of other litigants seeking to recover against his estate on account of any other transaction had with him in his lifetime. In such litigation the plaintiffs or proponents, being named as devisees or legatees, as the case may be, are assailing the estate with the view of the appropriation of it, or of a part of it, to their own uses. Any such assailants are, therefore, clearly excluded by the statute, and so, of course, is an executor in the proposed will. If, in a case like the one at bar, the heirs at law are also excluded, we reach the surprising conclusion that the interests of all the parties, being mutually adverse, the deceased has no representative not disqualified as a witness concerning any transaction or communication touching the matter in controversy. To so hold would, as it seems to us, be a trifle absurd. But the court is not driven to so impotent a conclusion. The case was tried below with great care and deliberation, and the district judge took the unusual pains of preparing and filing a written opinion in support of his order overruling a motion for a new trial. Inasmuch as that document meets with our full approval, and, as respects the point under discussion, we can add nothing to it by way either of argument or of illustration, we reproduce it, as follows:

"In this motion for a new trial it is urged, first, that it was error to allow Mrs. Conrad, the contestant, as against the proponent of the will, to testify in regard to transactions and conversations had between the testator and herself. In order to justify excluding this testimony three things must concur: First, the witness offered must have a direct, legal interest in the result of the litigation; second, the evidence offered must relate to transactions and conversations had between the witness and deceased; third, the evidence must be offered against one who is a representative of the deceased person. If these things concur, the evidence must be excluded, unless it comes within the exception named in the statute.

"On the hearing of this motion it was earnestly contended on the one side that the evidence offered related to transactions and conversations between the witness and the deceased, and as earnestly contested on the other side. At the trial the evidence was admitted on the ground that the proponent of the will was not the representative of the deceased, within the meaning of the statute, and the other ground of objection was not much discussed or considered. Of course, if the proponent of the will is not the representative of the deceased, within the meaning of our statute, then the ruling complained of is correct. The word 'representative,' as used in section 329 of the statute, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent or by operation of law. *Kroh v. Heins,* 48 Nebr., 691. Of course the question is whether he represents the deceased in the litigation in which the evidence is offered. The fact that he may be the general representative of the deceased will make no difference, unless he represents him in the question which is in dispute in the litigation. If an executor or an administrator is engaged in litigating some matter which is entirely foreign to the interests of the estate which he represents, the statute, of course, has no application. The statutes of the different states are so varied, and the decisions under them so numerous, that we must 'solve the

question presented without much reference to adjudications based on other statutes.' *Wylie v. Charlton*, 43 Nebr., 840, 850. The Michigan statute [Howell's Annotated Statutes, sec. 7545] provides that 'when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person.' In construing this statute in an action contesting a will, the court says: 'The contest is not between the estate, or the representative of the estate, and the proponent. The statute applies only when the estate is in some way one of the parties, and the heirs, assigns, devisees, or legatees are the others. * * * The only questions involved in this application are: Did the deceased in his lifetime make this will, and was he of sound mind and memory at the time? * * * The will does not increase or decrease the estate. The object of this statute is to prevent fraud and false swearing whereby estates become unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate, when unjust claims are attempted to be enforced against it, and we see no occasion for extending the scope of the statute by judicial construction. It is limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place.' *Brown v. Bell*, 24 N. W. Rep. [Mich.], 824.

"I think this reasoning applies to our statute. If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and

make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is, where the right of the deceased himself, at the time of his death, is not in any way involved), and the question is, not what was the right of the deceased at the time of his death, but, merely to whom has that right descended, in such a contest neither party can be said to represent the deceased. Our statute differs from the statutes of other states, in that it uses the word 'representative' only, and I think its purpose is manifest. The intent is not to allow a party who is interested in litigation to testify to statements or actions of a deceased person in derogation of the right of the deceased person, and the reason is because the deceased person, who alone might contradict him, can not now be heard. That is, in the language of the Michigan court, the statute is 'limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place.'

"I think the cases cited by the proponent in his brief are not in point. In *Re Eysaman's Will,* 20 N. E. Rep., 613, the evidence of a legatee under the will was offered. The heirs and the next of kin were contesting. The statute did not allow one interested to testify in his own behalf, 'against one claiming under a person deceased at the time of the trial.' There can be no doubt that the legatee was interested, and was offering to testify in his own behalf, and that the heirs and next of kin were, at the time of the trial, claiming under a person deceased. The other

New York case cited (*In re Dunham's Will,* 24 N. E. Rep., 932) is precisely similar and is decided upon the authority of the case *In re Eysaman's Will.* In *Re Goldthrop's Estate,* 62 N. W. Rep. [Ia.], 845, the court places its decision upon the words of the Iowa statute [Code, 1882, sec. 3639], which contains the words, 'against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee,' etc.; and the court says: 'The case of *Brown v. Bell* was decided under the statute of Michigan, which is materially different from our own.' This difference between the statutes is apparent, but not more so than the difference between our statute and that of Iowa, so I think the Iowa case is plainly distinguishable from the one at bar; and I can not refrain from saying that the reasoning in the Iowa case is not satisfactory to my mind, and that the thought is suggested that perhaps the court was influenced by the decisions in *Blake v. Rourke,* 38 N. W. Rep. [Ia.], 392 and *Smith v. James,* 34 N. W. Rep. [Ia.], 309, both of which cases seem to have been under a very different statute. In the Wisconsin case (*In re Goerke's Will,* 50 N. W. Rep., 345), it was held that proponent and beneficiary could not testify as to what took place between him and the testator at the time the will was executed, under a statute which provides that no person in interest shall be a witness respecting any transaction or communication by him with the decedent. The discussion in the opinion is as to whether the matters testified to related to transactions or communications, and the point involved in the case at bar is not discussed. Indeed, it would not seem that this point could arise under their statute. These observations will apply, also, in *Re Valentine's Will,* 67 N. W. Rep. [Wis.], 12. The Indiana statute is so radically different from ours that authorities construing that statute are of no assistance whatever in determining the point under consideration. I think that the decisions of our court are in harmony with the ruling complained of, as shown in the contestant's brief. In *Clark v. Turner,* 50 Nebr., 290, it is said that the proponent of a will which

has been denied probate is not a person charged with the duties or powers of a personal representative of the deceased. I think that the evidence complained of was properly admitted, without regard to the question of whether or not it involved any transaction or conversation, within the meaning of the provision of the statute."

There are a great number of errors assigned, both with respect to the giving and the refusal of instructions by the court, and with respect to the rulings of the court upon the admission and rejection of testimony, which we do not think it necessary to decide or discuss, because we think that the decisive point is raised by an exception to the eighth instruction given by the court of its own motion, which is as follows: "If, after the paper in question had been prepared, Frank McCoy, deceased, being then illiterate and unable to write his name, at the request of some other person, assented to the signing of his name to the paper by Mr. Frick, and, while Mr. Frick held the pen in his hand, the said Frank McCoy, deceased, put his hand also upon the penholder while Mr. Frick made a cross or mark, and said Frank McCoy, deceased, so acted and assented without understanding the nature of the transaction, and without intending thereby to sign and execute the will, this would not be a sufficient signing to comply with the law." The statute enacts (Compiled Statutes, 1901, ch. 23, sec. 127): "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effective to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator or by some person in his presence and by his express direction," etc. Construing this statute in *Murry v. Hennessey*, 48 Nebr., 608, this court say: "Thus it will be observed that the legislature, in unequivocal language, has made it imperative that a will, other than a nuncupative, when not signed by the testator himself, must, in addition to other requirements, be signed by some person in his presence and by his express direction, or the instrument will be in-

valid. Mere knowledge of the testator that his name is being signed by another, or that the signing was acquiesced in, or assented to, by the testator will not be sufficient. The statute exacts more than this. It requires that the signing of a will by another must be done in pursuance of the previously expressed direction of the testator. The statute is meaningless if this is not its scope and purpose. The same construction has been placed upon similar statutes in other states. *Waite v. Frisbie,* 45 Minn., 361; *Greenough v. Greenough,* 11 Pa. St., 489; *Asay v. Hoover,* 45 Am. Dec. [Pa.], 714; *Grabill v. Barr,* 47 Am. Dec. [Pa.], 420; *Snyder v. Bull,* 17 Pa. St., 60. In the Minnesota case the testatrix's name was signed by another person without her express direction, and on being requested to make her mark, she placed her hand on that of the one who signed her name, and he made the mark. The court, in construing the statute of that state which declares that a will shall 'be signed at the end thereof by the testator, or by some person in his presence, and by his express direction,' held that the will was invalid for want of proper execution. The case at bar is quite analogous to that. The will was prepared by Mr. Hockenberger, at the request and suggestion of Mr. Murry, the beneficiary. The person who drew the will signed Bridget Murry's name thereto, without being directed by her to do so. It is true her mark was made, but the evidence shows that it was made by Mr. Hockenberger, and that Mrs. Murry merely, at his suggestion, touched the pen while the mark was being affixed to the instrument. The signing not being at her express direction, the will was not executed as the law requires, and it is for that reason alone invalid." Now, as has already been said, it is undisputed that the supposed testator in this case was, at the time of the alleged execution of the instrument in controversy, very old, and extremely infirm, both in body and mind. It will be observed that the putting of the hand upon the pen while a cross-mark is being made is of no importance. All that such an act would indicate would be an assent to or recognition of or, at most, a

ratification of, the signature after it had been written. But this would not satisfy the statute, which requires a previous express direction to write the name. There are three witnesses who testified as to what took place with respect to writing it. The first is Frick, the attorney who wrote the instrument and supervised its execution. His testimony is as follows:

"Int. 35. You may state how it was that you came to sign the will, and place thereon the words 'Testator's name written by J. E. Frick at request of testator.'"

"Ans. to Int. 35. It occurred in this way: When the will was ready to be signed, I spoke to Frank about signing, and Tom spoke up and said that, owing to Frank's paralyzed condition, he didn't think he could write his name. I said that any one could sign his name at his request, and then Tom asked Frank whether Frank wanted me to sign his name to the will; and, after repeating it to him several times, Frank nodded his head, and I wrote his name to the will, with the statement as it appears."

"Int. 37. I will ask you (state fully) whether or not Frank McCoy requested you to sign his name to the will; that is, you may state what he said regarding it."

"Ans. to Int. 37. The matter occurred as I have detailed in the last question. Frank made no request of me in words, and in no other way, except as explained in the previous question."

The only two other persons present were the witnesses to the will,—Thomas McCoy, the father of the proponent, and one Mercer. The examination of McCoy in reference to this matter is as follows:

A. He signed it or made his mark when the will was finished.

Q. Who made his mark?

A. Mr. Frick.

Q. How did he come to do that?

A. With my brother's permission.

Q. How did he come to do that?

A. Frick says, "Can you write?" and he says, "No." He

says, "With your permission," he says, "can I write your name?" and he says, "Yes; write it."

Q. Who said to write it?

A. My brother.

Q. Then what did Frick do?

A. He did write it.

The testimony of Mercer upon the point is as follows:

Q. Whose signature was first attached to the will?

A. Mr. McCoy's, deceased.

Q. Just explain to the jury how that was done.

A. Mr. McCoy could not write, if my memory is right, and he asked Frick to write for him; and he took the pen and made a cross, and Frick held his hand while he made the cross, like that (indicating).

This last witness attempted only to give his memory, which was evidently very vague, about a transaction in which he was not pecuniarily interested, and he is clearly mistaken. Neither Frick nor McCoy testified that the decedent made an express or formal request that the former should write his name, or, in the language of this witness, "asked Frick to write for him." The most that can be made out from the testimony of either or both is that McCoy solicited and obtained from the deceased passive permission for Frick to write it; and the testimony of the former, taken alone, is so far from establishing that such consent was intelligently or consciously given, that it very forcibly supports the contrary inference. At all events, if Frick is to be believed, the consent, if any, was hesitatingly and reluctantly given after repeated solicitation. That, in the then physical and mental condition of the decedent, such repeated solicitation by the brother, who, as the testimony shows, had practically dictated the contents of the instrument, and in the presence of the attorney who had drawn it, operated as a restraint upon will, is a reasonable presumption. This presumption, we think, is not overcome by the offhand and too little qualified testimony of the witness McCoy, who, however, does not deny the solicitation, but puts into the mouth of the deceased

words which Frick, whose business it was to attend to the matter, evidently did not hear. In other words, a verdict in favor of the proponent could, in our opinion, have been successfully assailed as not being supported by sufficient evidence. The burden was upon the proponent to show by a preponderance of evidence that the instrument in suit was the free and conscious will of the decedent. That the deceased was under the constant guidance of his brother during all the time that the preparation of the document was in progress is undisputed, and it was the brother who was prompt to suggest the inability of the deceased to sign his name, and to take the last detail of the business out of his hands by procuring his consent to the writing of his name by the attorney. According to his testimony, his own solicitations were supplemented by Frick, and between them the hesitation of the deceased was overcome so far as to permit the writing of his name, but Frick says that he made no request in words, and signified his assent, if at all, only by nodding his head,—an act which, done by a feeble and paralytic old man, is of little significance. We think there is a very wide difference between the "express direction" of the statute, and a reluctant, passive and hesitating consent, such as this evidence discloses. We are not unmindful of the rule that a conclusion of fact drawn by a jury from conflicting evidence will not be disturbed, although even this rule must have its limitations and qualifications, if not its exceptions. Neither do we wish to be understood as saying that a direction for writing his name, given by a testator to another, is necessarily invalidated by such direction having been suggested to, or even requested of, the decedent. But we are of the opinion that the word "express" is used in the statute, not only in contrast to the word "implied," but, to some extent, by way of emphasis, and that, in a contest such as is now under consideration, it is incumbent upon the proponent to show by unequivocal evidence that the testator gave direction for writing his name consciously and explicitly, and in the free and voluntary exercise of his faculties; and

we think that the above-quoted testimony, which is all the evidence upon the subject disclosed by the record, falls short of this measure. If this conclusion is correct, none of the matters assigned for error are material, because the verdict rendered is the only one that could have been upheld by the record.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MODERN WOODMEN OF AMERICA V. ASA COLMAN ET AL.*

FILED MARCH 5, 1902. No. 11,294.

Commissioner's opinion, Department No. 3.

Insurance: WAIVER. It is a settled law of this state that if a beneficiary insurance association, like the plaintiff in error in this action, continues to collect dues and mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making such assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers.

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

J. W. White, C. A. Atkinson, Jesse L. Root and *J. G. Johnson* for plaintiff in error.

Samuel Chapman and *Matthew Gering, contra.*

AMES, C.

Early in May, 1898, Varro H. Colman, who was, and for some years had been, a member in good standing of the

*Rehearing allowed. Reaffirmed. Opinion filed denying second rehearing.

plaintiff in error association, whose general character is too well known to require particular description, accepted service as locomotive fireman for the Wheeling & Lake Erie Railway Company. His certificate of membership named as beneficiaries his father and mother, the defendants in error in this action. The certificate contains the following clauses:

"Subject to all the conditions of this certificate and fundamental laws of this order and liable to forfeiture if said member shall not comply with said conditions, laws and such by-laws and rules as are or may be adopted by the head camp of this order from time to time, or the local camp of which he is a member.

"If, after a person has become a member of this fraternity, he engages in any of the employments or occupations enumerated in section A, division I, of the fundamental laws, his certificate thereupon shall be forfeited by such act, and the same shall be null and void. *Provided, however,* that a neighbor may, after becoming such member, without invalidating his certificate, be employed as railway brakeman, engineer, fireman, switchman, miner, plow-grinder, or employed in a gunpowder factory, or on the lakes or seas, or as a soldier in the regular army while in active service, if he shall, before entering upon any of the above mentioned occupations, file with the head clerk a written waiver of any liability of this order under his certificate of membership, for loss by death as the direct result of his being engaged in such prohibited occupation."

By one of the laws of the association it was enacted that, if a member should engage in the employment of locomotive engineer, his rights under his certificate should be forfeited, unless he should file with the head clerk of the company "a written waiver of any liability of this order upon his benefit certificate founded upon the death of such neighbor either as result of accident occurring in, or disease directly traceable to, his employment in such prohibited occupation." It was further enacted that no officer of the order was authorized or permitted to waive the fore-

going provisions, and that the clerk of the local camp should be regarded as an agent of that camp only, and not of the head camp, and that no act or omission on his part should have the effect of creating a liability on the part of the society, or of waiving any right or immunity belonging to it. It is undisputed that at the time of entering upon the prohibited occupation, or afterwards, Colman did not file the written waiver called for by the above-mentioned by-law, although the requirement for his so doing was called to his attention by the clerk of the local camp. There is no question that the clerk and his subordinates knew of the fact that the insured had accepted of, and was engaged in, the employment aforesaid, or that with that knowledge they continued to collect his monthly assessments and remit them to the head clerk for a period of three months, and until he was run over and killed by the engine upon which he was in service. There are a large number of errors assigned in the motion for a new trial and in the petition in error, but the only real question of importance is whether, upon this state of facts, the defendants in error, the beneficiaries named in the decedent's indemnity certificate, are entitled to recover upon that instrument. We think that this court, in *Modern Woodmen of America v. Lane,* 62 Nebr., 89, and in the series of decisions therein cited and approved, have definitely and finally answered this question in the affirmative. It would serve no useful purpose to engage so soon in another review of the authorities and of the principles involved. Notwithstanding the cunningly devised by-laws and stipulations of beneficiary associations like the plaintiff in error, the clerks of local camps are, in the matters of collecting and remitting assessments and the waiver of forfeitures, the agents of the societies and not of the local camps or of their members. As is pointed out by Sanborn, J., speaking for the United States court of appeals for this circuit in *Modern Woodmen of America v. Tevis,* 111 Fed. Rep., 113 (quoting from the syllabus): "The actual legal relations of parties to each other, their acts and transac-

tions, prevail over previous written stipulations, which were subsequently disregarded, and condition their rights. Where a beneficiary association empowers the clerk of a local camp to collect, receipt for, remit and report upon its benefit assessments, and the clerk acts under this authority with the knowledge and consent of all parties, the relation of principal and agent for this purpose exists, and conditions the rights of the parties, notwithstanding the fact that the by-laws and certificates of membership contain a uniformly disregarded stipulation that the clerk of the local camp shall not be the agent of the association, but shall be the agent of the local camp, which has no interest in the benefit assessments, and that the acts or omissions of the clerk shall not affect the liability or waive any of the rights of the association." It ought now to be regarded as the settled law of this state that if a beneficiary insurance association, like the plaintiff in error, continues to collect dues or mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making such collections, it will be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers. It can not be regarded as material upon what ground or for what reason such forfeiture was incurred. The underlying principle is in all cases the same, namely, that the association, with full notice or knowledge, through its accredited agents, of the facts by reason of which the contract of insurance might have been avoided, has chosen to treat it as valid and in force, and to receive a consideration for so doing. It is no answer to say that such a rule renders the business of the association extremely hazardous, on account of the character of the persons who are necessarily chosen to represent it as officers of the local camps, and of the local influences to which such persons may be subjected. This is one of the hazards voluntarily assumed by those who engage in a business

from which they may retire at will, and it furnishes no reason for relieving them from such obligations to the holders of their beneficiary certificates as are imposed upon those in other like enterprises, and as considerations of honesty and fair dealing demand.

It is unnecessary to consider the other errors assigned because, upon the admitted facts, no other verdict than that returned could have been upheld.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

MCCORMICK HARVESTING MACHINE COMPANY v. JOHN MILLS.

FILED MARCH 5, 1902. No. 11,131.

Commissioner's opinion, Department No. 3.

1. **Penal Statute.** A penal statute should not be extended beyond the plain import of its terms.
2. ———. The penal provisions of section 15, chapter 32, Compiled Statutes, have no application to the instruments enumerated in section 26 of said chapter.

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

E. A. Cook and *O'Neill & Gilbert,* for plaintiff in error.

N. R. Greenfield, contra.

ALBERT, C.

This action was brought to recover the statutory penalty for failure to discharge a chattel mortgage of record, after

its conditions had been performed. The case was tried to the court without a jury. The court found for the plaintiff, and rendered judgment accordingly. The defendant brings the case here on error.

This action is based on section 15, chapter 32, Compiled Statutes, which, so far as is material at present, is as follows: "Such mortgage when satisfied shall be discharged by an entry by the mortgagee, his agent or assignee on the margin of such index, which shall be attested by the clerk without fee; *Provided, also,* That the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mortgagee thereof and attested by a justice of the peace or some officer with a seal. Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who for the space of ten (10) days after being requested shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty ($50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action." It will be observed that the section just quoted applies exclusively to chattel mortgages. In view of the assignment that the finding of the trial court is not sustained by sufficient evidence, and the questions discussed by counsel, we can not ignore one question, which we regard as decisive of the case, although not directly argued; and that is whether the instrument which it is alleged defendant failed to discharge of record, is a chattel mortgage, within the meaning of section 15 of the recording act. The instrument referred to is as follows:

"$35.00. LEXINGTON, NEB., Aug. 8, 1896.

"On or before the 1st day of November, 1897, for value received, I promise to pay to the McCormick Harvesting Machine Company, (a corporation organized and existing under the laws of the state of Illinois, and having its chief office and place of business in the city of Chicago, county

of Cook, state of Illinois,) or order, at 1st Nat. Bank, Lex., Nebraska, thirty-five dollars, with interest at seven per cent. per annum from date until due; ten per cent. per annum thereafter until paid. The express condition of the sale and purchase of the Big 4 mowing machine, for which this note is given is such that the title, ownership or possession does not pass from the McCormick Harvesting Machine Company until this note and interest is paid in full, and the said McCormick Harvesting Machine Company, have full power to declare this note due and take possession of the said machine, whenever they deem themselves insecure, even before the maturity of this note, and sell the same at public or private sale, without notice. The proceeds (after expenses and interest are paid), to be applied on the note, and any balance then unpaid shall, in consideration of the use and rent of said property, be a valid and subsisting claim against the vendee."

One characteristic of a chattel mortgage is that it is a transfer of personal property, or of some interest therein, by the mortgagor to the mortgagee as security. In *Bedford v. Van Cott*, 42 Nebr., 229, this court says: "The mortgagee under a chattel mortgage acquires not the legal title to the property, but merely a lien thereon, the legal title remaining in the mortgagor." The instrument under consideration is not a transfer of property, nor of any interest therein by the alleged mortgagor to the defendant; nor does it operate to create a mere lien in favor of the defendant, while the legal title remains in such mortgagor. When it was made, so far as the property therein described is concerned, the alleged mortgagor had no title or interest therein to transfer. It belonged to the defendant. It was transferred to the plaintiff, by the defendant conditionally. One of the conditions was that the title should remain in the vendor until the purchase price was fully paid. That being true, it would be absurd to say that, under the instrument in question, the defendant acquired a mere lien on the property, the legal title remaining in the alleged mort-

gagor, because, as the greater includes the less, the vendor, at the time having absolute title, acquired no title to the property by virtue of such instrument, and, as the vendee did not hold the legal title, which was expressly reserved by his vendor, the legal title could not remain in the alleged mortgagor. The recording act itself clearly distinguishes between chattel mortgages and instruments of this character. Section 14, chapter 32, Compiled Statutes, is as follows: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent purchasers and mortgagees, in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid, as if the same were fully spread at large upon the records of the county," etc. Then follows the section providing a penalty hereinbefore set out. Then comes section 26, which is as follows: "That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in actual possession, obtained in pursuance of such sale, contract, or lease without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county, within which such vendee or lessee resides; said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney,

which shall set forth the names of the vendor and vendee or lessor and lessee, or description of the property transferred and the full and true interest of the vendor or lessor therein," etc. There is no question, we think, that, had a contest arisen between the defendant and a creditor or subsequent purchaser of the plaintiff in regard to the sufficiency of the notice imparted by the record of the instrument in question, their rights would have been measured, not by the provisions of section 14, but those of section 26 of the recording act. Section 15 is penal in character, and should not be extended beyond the plain import of its terms. In our opinion, it has no application to instruments which, like the one in question, are enumerated in section 26. As the instrument in question is not a chattel mortgage, this action is unfounded and must fail.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

EMANUEL HUBENKA V. JOHN VACH.

FILED MARCH 19, 1902. No. 11,330.

1. **Amendment of Pleading During Progress of Trial:** ABUSE OF DISCRETION. The denial of an application for leave to amend a pleading during the progress of the trial, is not reversible error, unless, under the circumstances disclosed, the action of the court amounted to an abuse of discretion.

2. **Farm Lease:** CASH RENT: WHEN DUE. A farm lease providing for the payment of cash rent, but not fixing in express terms the time when the rent should become due, contained a clause binding the landlord, in case of a crop failure, or a decline in

the prices of farm products, "to settle the payments of said rent as it becomes due to the best advantage for both parties concerned." *Held*, That, in contemplation of the parties, the rent was not to be due or payable before the crops had matured and were ready for market.

3. **Possession of Property**: PRESENT RIGHT: GENERAL OR SPECIAL. The plaintiff having failed to show a present right to the possession of the property in dispute, under either a general or special ownership, the court did not err in directing the jury to return a verdict in favor of the defendant.

ERROR from the district court for Cuming county. Tried below before EVANS, J. *Affirmed.*

Thomas M. Franse, for plaintiff in error.

Milton McLaughlin, contra.

SULLIVAN, C. J.

This action was brought to recover possession of certain crops raised by John Vach upon the farm of Emanuel Hubenka in Cuming county in the year 1898. The petition was in the usual form, alleging absolute ownership of the property in the plaintiff. The answer was a general denial. At the conclusion of the evidence the court was of opinion that the plaintiff had failed to make a case, and directed the jury to return a verdict against him.

Of the numerous errors assigned, only two have been thought worthy of discussion by counsel. The first contention is that the court erred in refusing to permit the plaintiff to amend his petition by alleging a special, instead of a general, ownership of the property; the second is that the court erred in directing the jury to return a verdict in favor of Vach. The material facts are not in controversy. Hubenka rented his farm to Vach for a period of three years from March 1, 1897. The lease gave the landlord a lien on the crops, with the right to enforce it in the manner provided for the foreclosure of chattel mortgages. The stipulation for the payment of rent was in these words: "The first year's rent will be $300 cash. The

second year's rent will be $350 cash. The third year's rent will be $375 cash. Provided further that in case of a failure of the crops, or a decline in prices of the crops, the party of the first part agrees to settle the payments of said rent as it becomes due to the best advantage for both parties concerned." In the month of September, 1898, while the crops raised by the tenant were yet in the stack, the plaintiff attempted to foreclose his lien by advertising the property for sale and selling it to himself. Upon this sale and purchase is based his claim of general ownership. It developed at the trial that, owing to a hostile demonstration on the part of the tenant and his friends, the sale was not made where the property was situate, but at the apex of an adjacent hill, where the plaintiff and those assisting him paused for a moment in their precipitate flight from the farm. Whether the sale thus made vested in the purchaser an absolute title seems to have been questioned at the trial, and the plaintiff, at the conclusion of his evidence, determined to change front and rely upon his lien rather than upon his claim of general ownership. But the court denied his application for leave to amend the petition and this ruling is alleged as error. The application was addressed to the sound legal discretion of the court and was, under the circumstances, properly refused. All the facts of the case were well known to the plaintiff when the action was commenced, and if he had any just excuse for not alleging his special interest at the appropriate time he should have presented it to the court, by affidavit or otherwise. *Commercial Nat. Bank v. Gibson,* 37 Nebr., 750; *Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co.,* 54 Nebr., 241; 1 Ency. Pl. & Pr., 637. But even if the petition had been amended the plaintiff could not have succeeded. In no view of the case was he entitled to a verdict. The rent was not due when the foreclosure proceeding was instituted nor when the action to recover possession was begun. It is clear from the provisions of the lease above quoted that the cash rent was not payable before the crops were ready for the market. The amount of the rent could not be

definitely fixed until the crops were assured and the prices known. The theory of the plaintiff was that the rent was to be paid in two instalments, and that the defendant should have given a note for the first instalment maturing January 1, 1899, and a note for the second instalment maturing March 1, 1899. But the lease did not require the defendant to give notes, and he did not violate any of its provisions in refusing to give them.

The plaintiff claims that the defendant voluntarily surrendered the property in payment of the rent, but we find no evidence in the record tending to sustain this claim.

The judgment is AFFIRMED.

HENRY H. COLLINS, APPELLEE, V. WILLIAM J. BROWN ET AL., APPELLANTS.

FILED MARCH 19, 1902. No. 11,352.

Foreclosure: ERROR: SUPERSEDEAS: UNDERTAKING: USE AND OCCUPATION. In an error proceeding from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a supersedeas.

APPEAL from the district court for Lancaster county. Heard below before FROST, J. *Affirmed.*

Burr & Burr, for appellants.

Stephen L. Geisthardt, contra.

SULLIVAN, C. J.

The district court of Lancaster county rendered a decree of foreclosure in an action brought by Henry H. Collins, the appellee herein, against William J. Brown and others. The defendants at once gave notice of their intention to appeal, and obtained an order fixing the amount of the supersedeas bond at $500. In due time an undertaking conditioned as required by section 677 of the Code of Civil

Procedure was given and approved. Afterwards a transcript of the proceedings in the district court, together with a petition in error, was filed in this court, and a summons in error was issued, served and returned. While the cause was pending in this court the decree of foreclosure was executed by a sale of the mortgaged property. When the motion for confirmation came on to be heard, it was resisted by defendants, on the ground that the decree had been superseded. The trial court, however, held that the sale was valid, and entered an order affirming it. This decision was, in our judgment, entirely right. Defendants sought to obtain a review of the proceedings of the district court by prosecuting error to this court. They might have brought the case here by appeal, but they did not do so; and they might have changed the character of the proceeding in this court by dismissing the petition in error, but this they did not do. The remedy first chosen was adhered to. This is the only inference warranted by the record. *Monroe v. Reid,* 46 Nebr., 316; *Chicago, B. & Q. R. Co. v. Cass County,* 51 Nebr., 369. The undertaking given by the defendants contained no provision binding them and their surety to pay "the value of the use and occupation of the property" affected by the decree. It failed therefore to comply with one of the substantial requirements of section 588 of the Code of Civil Procedure, and consequently did not operate as a supersedeas. *State v. Thiele,* 19 Nebr., 220.

The order of confirmation is

AFFIRMED.

NOTE.—The bond or undertaking is not a condition precedent to obtaining a review, but is essential to obtaining a supersedeas. *Creighton v. Keith,* 50 Nebr., 810; *State v. Ramsey,* 50 Nebr., 166. The bond or undertaking does not supersede unless conditioned according to law. *State v. Ramsey, supra; O'Chander v. State,* 46 Nebr., 10. To supersede a confirmation, on appeal, the bond need not be in double the amount of the deficiency judgment. A bond to cover waste is sufficient. *Kountze v. Erck,* 45 Nebr., 288, 293.—REPORTER.

WILLIAM H. BABBY V. JOHN B. MUSSER.

FILED MARCH 19, 1902. No. 11,387.

1. **Forcible Entry and Detention: APPEAL.** In 1899 there was no valid statute authorizing an appeal to the district court in actions of forcible entry and detention, or forcible detention only, of real property.

2. **Derivative Jurisdiction: CONSENT OF PARTIES.** The jurisdiction of the district court in such actions, being derivative only, is not aided by consent of parties.

ERROR from the district court for Sheridan county. Tried below before KINKAID, J. *Reversed.*

Frank J. Kelley and *J. H. Edmonds,* for plaintiff in error.

C. Patterson, contra.

SULLIVAN, C. J.

This was an action of forcible detainer. It was commenced in the county court of Sheridan county, and was tried and decided on April 4, 1899. The judgment was in favor of the plaintiff, John B. Musser. The defendant, William H. Babby, attempted to remove the cause by appeal to the district court. Both parties assumed that the appeal was valid, and the defendant, without challenging the jurisdiction of the court, entered a voluntary appearance, and participated in a trial which resulted in the judgment of which he is now complaining. The decision of the district court can not be approved. At the time of the trial in the county court, there was no valid statute authorizing an appeal in this class of cases. The statute which professed to give that right was not adopted in accordance with constitutional procedure, and in *Armstrong v. Mayer,* 60 Nebr., 423, was held to be void. The appeal was therefore a nullity; it did not vacate the judgment of the county court, and that judgment has always been, and

is now, in full force and effect. The case in the district court was, in substance, a new action. Jurisdiction of the parties was acquired by their voluntary appearance; but original jurisdiction of the subject-matter was not given by law, and hence the judgment rendered by the court and brought here for review was, and is, absolutely void.

The decision is reversed and the action dismissed.

REVERSED AND DISMISSED.

NOTE.—The principle underlying the question of jurisdiction by consent is, that one may waive a personal privilege in all cases where public policy is not contravened thereby. Wells, Jurisdiction of Courts, sec. 86. On an appeal from the judgment of a justice of the peace, the appellate court acquires no jurisdiction if the subject of the action was beyond the jurisdiction of the justice. *Cooban v. Bryant*, 36 Wis., 605, 612.—REPORTER.

CHICAGO LUMBER COMPANY, APPELLEE, V. FLORENCE M. BANCROFT ET AL., APPELLEES, IMPLEADED WITH LEXINGTON BANK, APPELLANT.

FILED MARCH 19, 1902. No. 10,928.

1. **Unchallenged Finding of Fact.** The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party against whom they operate, and from the legal consequences flowing therefrom he can not escape.
2. **Usury.** Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender, by agreement, retains the note and mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is, by force of the statute, forfeited.

APPEAL from the district court for Dawson county. Heard below before SULLIVAN, J. *Affirmed.*

Henry D. Rhea, for appellant.

E. A. Cook and *Warrington & Stewart, contra.*

HOLCOMB, J.

A plaintiff instituted a suit to foreclose a mechanic's lien on real estate, making the appellant, the Lexington Bank, and appellees Bancroft parties defendant in the action. Defendants Bancroft were the fee owners of the property involved in the suit, and defendant bank claimed a lien thereon by virtue of a mortgage in its favor executed by the Bancrofts. The bank appeared in the action, and, by way of cross-petition, pleaded that the Bancrofts were indebted to it on a promissory note for the sum of $1,122, executed by them to the bank, and that said note was secured by a real estate mortgage on the premises described in the petition, and prayed a finding of the amount due on the note and mortgage, and that the same might be adjudged a valid lien on said premises, and that the real estate be sold in satisfaction of the amount due, if the same were not paid at a short date, to be fixed by the court. To this cross-petition of the bank the Bancrofts filed an answer, in which the giving of the note and mortgage was admitted, and, as a defense, it was pleaded that the contract evidenced thereby was usurious, in that by the agreement of the parties thereto a greater rate of interest was charged for the loan and forbearance of money than the rate of $10 per annum on the hundred dollars, the answer setting forth in detail the particulars of the transaction and the different items entering into the consideration of the note, and the amount of unlawful interest included therein. It was also pleaded that, after the maturity of the note and mortgage mentioned in the cross-petition, a new contract was entered into between the parties for a further extension of the indebtedness, and that said contract was likewise usurious; the answer stating in detail the facts constituting the alleged usury. Further renewal contracts were also pleaded, each of which, it was al-

leged, was usurious, and that at the time of filing the cross-petition the defendant bank held two notes of defendants Bancroft, other than the one declared on, as evidencing the usurious contract so pleaded, one being for the sum of $1,400 and the other for the sum of $200, giving the dates and maturity thereof. The answer prayed for an accounting, and the ascertainment of the amount actually due the bank, after allowing credits and payments claimed to exist in favor of the mortgagors, and for general equitable relief. There were other issues tendered by the answer, as to certain collaterals alleged to have been given to secure the debt, for the proceeds and value of which the Bancrofts claimed they were entitled to credit; but, as all such matters are eliminated from the questions presented for our consideration by this appeal, we need not further notice them. A reply was filed, denying the usury alleged in each and all of the transactions mentioned in the answer; the reply stating in detail the items entering into each of the notes executed by the Bancrofts, and the amount of interest charged in each, which, it was alleged, did not exceed ten per cent. per annum, and on the issues thus framed the parties went to trial. A referee was appointed to take the testimony and report to the court the evidence, with its findings of fact, and conclusions of law. We will only notice such portion of the report of the referee and the action of the trial court thereon on exceptions by the defendants Bancroft as seems necessary to an intelligent understanding of the points involved in the consideration of the case on appeal. We are not favored with a brief on the part of the appellees Bancroft, and are compelled to decide the controversy upon the record and a brief by appellant's counsel, with such independent research as we have had time for at our command.

The referee made several findings of fact, those material to the question now under consideration being as follows:

"6. I find that neither upon the note for $1,122 made by the defendants Bancroft, to the defendant, Lexington Bank, and by them delivered to it, which note is set forth

in the defendant Lexington Bank's cross-petition and answer, nor upon any of the notes of which it is a renewal nor upon any of the items which are included in said note of which it is a renewal was there contracted for, received or reserved a rate of interest exceeding ten per cent. per annum, said note being the one secured by the mortgage set out in said cross-petition.

"7. I find that no part of said $1,122 note has been paid, and there is now due thereon the sum of $1,865.88 according to the terms thereof.

"8. I find that on the 12th day of April, 1893, a new note for the sum of $1,299 was made and delivered by the defendants Florence M. Bancroft and William M. Bancroft, to the defendant Lexington Bank, as a renewal of the said $1,122 note, and for the purpose of keeping the obligation created by said $1,122 note in bankable shape, the said $1,122 note being retained by the defendant bank, and marked "collateral" as shown by indorsement thereon, and said mortgage was also retained by said bank; that from time to time after the making and delivery of said renewal other renewals were made and delivered by the defendants, Florence M. Bancroft and William M. Bancroft, to the defendant Lexington Bank, for the same purpose, said $1,222 note and said mortgage still being retained by said bank.

"9. I find that in these renewals and on them a greater rate of interest than ten per cent. per annum was contracted for, by and between the parties and by the defendant bank, and by it charged and included in said notes.

"10. I find that all of these renewals have been canceled and surrendered by the defendant bank to the defendants Bancroft, excepting the last two given, one of which two is for the sum of $1,400 dated January 14, 1895, and signed by Florence M. Bancroft, and William Bancroft, and the other is for the sum of $200 dated January 9, 1897, and made by William M. Bancroft, into which two notes all of the other renewals were merged; and the said $200 note is the one in these findings mentioned in which said taxes

and said interest found to have been paid by William M. Bancroft were included, together with other items of indebtedness of said William M. Bancroft to said bank."

As a conclusion of law the referee found that the bank had a valid lien on the premises mortgaged for the amount found due by the seventh finding of fact, and was entitled to a decree of foreclosure as prayed, and a sale of the premises in satisfaction of the amount found due. On objections and exceptions by the defendants Bancroft, the trial court set aside the seventh finding of fact, and approved and confirmed the remainder. The court construed the referee's ninth finding to be and mean that at the time the indebtedness was renewed, April 12, 1893, a new and original contract was entered into, and the note and mortgage sued on were, by agreement of the parties, retained as collateral security to the contract then entered into, and so found, in effect, that such contract was tainted with the vice of usury, as was found by the referee, and that the amount then due on the indebtedness was the sum of $1,238.13, to which sum the cross-petitioner was limited in its recovery, by reason of the usurious character of the contract, less credits which should be applied thereon, and regarding which there is no controversy, and entered a decree of foreclosure accordingly. The bank appeals.

It is argued in substance that, the note sued on being free from the vice of usury, and retained by the payee, the renewal contract did not discharge the indebtedness evidenced thereby; and that the agreement to take usury, even though made, could not affect such note and mortgage, and that the bank was entitled to recover the full amount due thereon, including interest, according to its terms; that the contracts of renewal can only be regarded in their character as collateral to the principal indebtedness, which is unaffected by any subsequent usurious agreement. It is also contended that the evidence will not support the finding of the referee that usury was contracted for in all or either of the renewal notes given after the maturity of the note for $1,122, which was made the

foundation of the bank's cause of action, as stated in its cross-petition. As the bank did not challenge the findings of the referee, which were, with the exception noted, confirmed by the court, we think it is now bound by such findings, and can not be heard to dispute their truthfulness, or escape the legal consequences flowing therefrom.

This, therefore, leaves but one question to be determined, and that is, what is the legal effect with respect to the rights of the contesting parties, because of the contract of renewal entered into between them, whereby it was agreed that usurious interest should be charged for the further loaning of the money for which the notes were given, which indebtedness prior to the time of the first renewal had been evidenced by the note and mortgage pleaded in the bank's cross-petition, and which was found to be free from the taint of usury? Was it an extension of the time of payment under the old contract, which was free from usury, or was the nature of the transaction such as to give it the character of a new contract affected with the vice of usury? The finding of the referee, though somewhat obscure, was, we think, as construed and found by the trial court, a finding that the original indebtedness was satisfied by the execution of the new note then given providing for the payment of the sum for which made payable, at a stated time in the future, and the retention of the note and mortgage originally given, as collateral security for the fulfillment of the contract last entered into. The evidence as to the course of dealings between the parties fully justifies this inference. It was as though the parties had canceled the evidence of the old indebtedness, and, as security to the new, executed a note and mortgage on the debtor's real estate and delivered the same as collateral to the unsecured notes, evidencing the usurious contract. This is, in effect, what was in fact done. The note and mortgage were satisfied for the purpose for which they were executed and retained by the creditor as further security to the notes evidencing the new contract. The transaction by which the first renewal was accomplished,

and which was tainted with usury, as well as all subsequent transactions relating to the extension of the time of the payment of the debt, falls, we think, within the principle of the rule stated in *McDonald v. Beer,* 42 Nebr., 437, in which it is held: "Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury." In the opinion it is said: "The judge who tried the case in the district court evidently adopted the view that the transaction was an illegal one or tainted with usury from the date January 16, 1885, when the first renewal notes were given in part for the interest figured at a usurious rate, and rendered judgment for the amounts loaned with legal interest from the dates of inception to January 16, 1885, deducting therefrom the several sums paid, and this we think was right and according to the correct rule of law as applied to such transactions. Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury. Tyler, Usury, 352; *Webb v. Bishop,* 7 S. E. Rep. [N. Car.], 698, and cases cited." Applying the rule above stated to the case at bar, the bank would be entitled to recover the amount of the original indebtedness evidenced by the $1,122 note, with all lawful interest accrued thereon to the date of the renewal contract, when usury was charged and contracted for, after which, by reason of the force of the statute on usury, the creditor must lose all interest which would otherwise accrue; and all payments made, whether as interest or as a part of the principal, would apply in extinguishment of

the principal and lawful interest accrued to that time. The decree of the district court based on the findings of the referee conformed to the rule stated; and this, we think, adjusted the differences between the parties in harmony with the law. The note and mortgage sued on were held as a pledge to the payment of the valid demands owing by the makers to the payee, and nothing more. Whatever sum was justly due the bank on the principal indebtedness, to which the mortgage was held as collateral security, the bank had the right to subject the property mortgaged to its satisfaction; but it could not claim or recover a greater sum, or establish a lien for a greater amount, than was actually due on the principal indebtedness. To the extent that the principal notes evidencing the indebtedness existing between the parties fail, because of their usurious character, to the same extent would the collateral security fail. Webb, Usury, sec. 296; *Bell v. Lent,* 24 Wend. [N. Y.], 230; *Moncure v. Dermott,* 13 Pet. [U. S.], 345; *Kellogg v. Adams,* 39 N. Y., 28, and authorities therein cited.

The decree of the district court gave to each of the parties their lawful dues, and is accordingly

AFFIRMED.

SULLIVAN, C. J., concurring.

I agree fully with the views expressed in the foregoing opinion. It is the business of the courts to ascertain the agreements of parties, not to make agreements for them by presuming the existence of mutual intentions which in truth never existed. It is entirely clear from the indorsement on the original note that it was to be held by the bank as collateral security; in other words, it became, by the express contract of the parties, a mere incident or accessory of the renewal notes. This contract was supported by a valuable consideration, and I can conceive of no sound legal reason why it is not enforceable. The amount due upon the original note could not be made the measure of the bank's recovery without violating the agreement under which the renewal notes were given. The parties having,

by a valid contract, made the original note collateral, it is collateral, and must be dealt with as such. If the renewal notes were wholly void, the case would be different, for then there would be no consideration for the agreement making the original note a mere adjunct of the renewals.

SEDGWICK, J., dissenting.

The proposition that the giving of the renewal note, by which it was agreed to pay an illegal rate of interest upon the loan, operated to make the original note and mortgage usurious, seems to me unsound. In *Burnhisel v. Firman,* 22 Wall. [U. S.], 170, 22 Law. Ed., 766, it is said: "If a security founded upon a prior one be fatally tainted with that vice [usury] and the prior one were free from it but given up and canceled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given." In *Rountree v. Brinson,* 3 S. E. Rep. [N. Car.], 747, it is held: "When a note or bond taken for a valid debt, or to renew a valid note, is void for usury, the creditor may, in an action thereon, recover judgment for the valid debt, when the complaint alleges the facts constituting that debt; and an assignee of the note or bond has the same rights as the original creditor." To the same effect are *Cook v. Barnes,* 36 N. Y., 520; *Farmers & Mechanics' Bank v. Joslyn,* 37 N. Y., 353; *Rice v. Welling,* 5 Wend. [N. Y.], 595; *Russell v. Nelson,* 99 N. Y., 119, 1 N. E. Rep., 314. In *Farmers & Mechanics' Bank v. Joslyn, supra,* it was said: "The infected contract did not absolve the mortgagor from his antecedent obligations, nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act as a ground for reinstating an old security; but it is equally true that a party, who claims to be the victim of exaction, can not avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice. (*Brown v. Dewey,* 1 Sandf. Ch. [N. Y.], 57; *Swartwout v.*

Payne, 19 Johns. [N. Y.], 294; *Billington v. Wagoner,* 33 N. Y., 31; *La Farge v. Herter,* 9 Seld. [N. Y.], 241; *Crane v. Hubbel,* 7 Pai. Ch. [N. Y.], 413.)" Some of the cases were decided under statutes providing that a usurious note is void, and the fact is mentioned that the giving of such a contract would furnish no consideration for the surrendering of the former valid one, but I do not see any reason for making a distinction in this case. The finding of the referee was that all of the renewals which were usurious had been canceled and surrendered by the bank to the defendants Bancroft, excepting the last two given, and that when the first usurious renewal was given the original note, which was not usurious, was marked "Collateral," and it, with the mortgage securing it, was retained by the bank. It was upon this note and mortgage that this action was brought. There was then no agreement on the part of the bank to surrender or cancel the note and mortgage in suit. On the other hand, it was expressly agreed that it should remain a valid obligation, and be held as collateral to the subsequently executed renewal notes. It may be admitted that these transactions amounted to new agreements to pay an illegal rate of interest on the original principal, but this would not affect the liability on the note and mortgage in suit. In *Richards v. Kountze,* 4 Nebr., 200, after the original notes, which were not tainted with usury, became due, a contract was indorsed thereon, by which it was agreed to extend the time of payment of the principal of the indebtedness, and to pay usurious interest for such extension. Justice GANTT, delivering the opinion of the court, said: "If the original contract is bona fide, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or an usurious premium upon the debt, will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury, or prevent the collection of the debt with its legal interest. And this proposition, I think, is well founded in principle and just in equity, for, if there was once a valid subsisting debt,

bearing interest, the contract creating such debt can not be impaired or destroyed by a subsequent void agreement. Such agreement would be a mere nullity, and could not impair or destroy rights acquired under a valid subsisting contract. *Stewart v. Petree*, 55 N. Y., 623; *Rice v. Welling*, 5 Wend. [N. Y.], 597; *Rogers v. Rathbun*, 1 Johns. Ch. [N. Y.], 367; *Early v. Mahon*, 19 Johns. [N. Y.], 150." This case was approved and followed in *Dell v. Oppenheimer*, 9 Nebr., 454. If in giving the renewal notes it had been expressly agreed that they should take the place of the former note, and if the former note had thereupon been canceled and surrendered to the maker, and the mortgage released of record, it might be questioned whether, under our statute, the illegal renewals could be rejected, and an action maintained to reinstate the former securities which had been surrendered and canceled for the sole consideration of an illegal agreement; but the facts in this case, as found by the referee, do not present that question. Here it was agreed that the original valid note and mortgage should continue as a liability against the makers thereof, and it seems to me clear that the holder of the valid note and mortgage can maintain this action thereon, unaffected by the subsequent illegal agreement. *McDonald v. Beer*, 42 Nebr., 437, does not seem to be in point, because in that case the action was on the renewal note, which was affected with usury, and in this case the action is upon the original note and mortgage, in which there was no usury.

I think a decree should be entered for the amount of the note sued on and interest, as reported by the referee.

ALBERT E. HILL, APPELLEE, V. WILLIAM F. MCGINNIS ET AL., APPELLANTS.

FILED MARCH 19, 1902. No. 11,414.

1. **Highway: PRESCRIPTION: PUBLIC USER: MANIFEST CLAIM OF RIGHT.** To establish a highway by prescription, there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land. *Lewis v. City of Lincoln*, 55 Nebr., 1.

2. **Public Highway: PRESCRIPTIVE RIGHT.** A prescriptive right to a strip of land as a public highway can not be acquired by lapse of time where the roadway is through the inclosed premises of the owner, and the use thereof permissive only, and the roadway is changed from time to time to suit the convenience of the owner, and no act of control or dominion over it is exercised or asserted by the public authorities.

APPEAL from the district court for Lincoln county. Heard below before GRIMES, J. *Affirmed.*

H. S. Ridgely, for appellants.

Beeler & Muldoon, contra.

HOLCOMB, J.

Plaintiff, appellee, began an action to restrain the defendants, as county commissioners and road superivisors, from opening and maintaining a public highway across his premises as described in his petition. Issues were joined, and a trial had, resulting in a judgment perpetually enjoining the defendants from in any way interfering with the plaintiff in the possession of the real estate over which it is sought to maintain such highway. Defendants appeal.

Plaintiff, it is conceded, resides on and is the owner of the real estate described in his petition, over which the roadway is claimed to exist, and has the same inclosed with a wire fence, and uses it for farming and pasturage purposes. The right to maintain a roadway across the

land is based on the following order, made by the county commissioners: "The petition of residents of Cotton Wood, Gaslin, Fox Creek, Deer Creek, and Walker precincts to declare a public highway open by user was taken up and granted and the said route is hereby a public highway and open as follows: the route traveled by the public from the station of Ingham on the B. & M. R. R. section 30 town 9 north range 26 W. northwesterly up Deer creek to the head of said canon over the divide into the east fork of Snell canon thence down the east fork of Snell to where it unites with the main canon connecting at this point with county road 240." The sole and only question presented for determination by the record is whether the public has acquired a prescriptive right to the use of the strip of land, along which is a traveled road, as a public highway by adverse user for a period beyond the statute of limitations concerning title to real property. It is contended by the defendants that by user for more than ten years the public has acquired an easement over the land for a public road, and therefore their right to maintain it as such, and destroy the plaintiff's gates and fencing inclosing the same with his other land; and *Graham v. Hartnett,* 10 Nebr., 517, *Shaffer v. Stull,* 32 Nebr., 94, and *Rube v. Sullivan,* 23 Nebr., 779, are cited in support of such contention. The undisputed facts show, we think, more or less travel by the public across the land, not at the same place, but varying from four to eight rods at different places, for more than ten years before the order quoted was made by the county commissioners. The evidence is also conclusive that at no time prior to the entry of the order have the authorities of the county or road district exercised or attempted to exercise any control or other acts of dominion over the strip in question used for travel by the public. It is shown that the plaintiff entered the land as a timber claim in 1889, that he has been in control and possession of it ever since, and for several years prior to the commencement of the action had maintained an inclosure around his land, the traveling public being permitted to gain ingress and

egress through the inclosure and along the traveled way by means of gates constructed for that purpose and for the owner's convenience. Some little work to make the road more passable had been done by individuals, but never by the public authorities. It also appears that some tiling belonging to the county was at one time used by the owner to construct a culvert across the road through which to drain surface water. The owner would make improvements on his land and change the traveled roadway at will, so as not to interfere with his use of the land for the purpose for which occupied. He did not acquire the legal title from the government until 1899, and could not have done so under the law under which he entered the same until 1897. Under such circumstances, we think it altogether free from doubt that the public acquired no right by adverse user for the time required for the running of the statute, and that the trial court correctly decided that the injunction should be made perpetual. In *Engle v. Hunt*, 50 Nebr., 358, it is held: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land"; and in *Lewis v. City of Lincoln*, 55 Nebr., 1, on the same point, it is stated: "There must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land." Says the author of that opinion: "The principle to be deduced from the authorities seems to be that a highway may be established by continuous adverse user by the public for a period equal to that required to bar an action for the recovery of title to land; but the use by the public must be under a claim of right distinctly manifested by some appropriate action on the part of the public authorities. If the use was by the express or implied permission of the owner of the land,

and the public authorities have not improved or repaired it as a highway or exercised any control or dominion over it, a road by prescription is not established,"—citing a number of authorities sustaining the principle thus stated. In *Ward v. Cochran,* 150 U. S., 597, it is said: "A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title." See, also, *Larwell v. Stevens,* 12 Fed. Rep., 559. *Huffman v. Hall,* 102 Cal., 26, a case in principle the same as the one at bar, holds that, when land has been inclosed by a fence, this would of itself show that the use of it by the public for a way was only permissive and could not be regarded as an adverse user which would set the statute of limitations running. In the case at bar, the user exercised by the public was not adverse to the plaintiff, but in conjunction with his use and possession of the land for farming and grazing purposes. It was not inconsistent, but consistent, with his ownership and control over it. The roadway was changed by him from time to time to suit his convenience, and at no time can it be said from the evidence that he abandoned or surrendered his possession and ownership to the use of the public.

The order appealed from should be, and accordingly is,

AFFIRMED.

ROBERT LUCAS, APPELLEE, V. FRIENDLY LUCAS, APPELLANT.

FILED MARCH 19, 1902. NO. 11,451.

1. **Parol Contract: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS.** Plaintiff brought an action for specific performance of a parol contract for the sale of real estate. The evidence disclosed full performance of its conditions by the vendee, and partial performance by the vendor, who had executed a conveyance of a part of the real estate included in the contract, but refused to convey the whole of it because of an alleged failure of a part of the consideration, to support which there was no evidence. ***Held,*** That the statute of frauds would not prevent a court of equity from decreeing specific performance.

2. —— —: ——: COURT OF EQUITY. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its non-fulfillment on the one hand would amount to a fraud on the party who has fully performed it. *Kofka v. Rosicky*, 41 Nebr., 328.

APPEAL from the district court for Pierce county. Tried below before ALLEN, J. *Affirmed.*

O. J. Frost, for appellant.

B. F. Barnhart, contra.

HOLCOMB, J.

The appellant, defendant below, was the owner in fee of three certain lots located in the town of Pierce, Pierce county, Nebraska. The plaintiff, appellee, brought an action in equity to compel specific performance of an alleged oral contract for the sale of said lots entered into between him and the defendant prior thereto in Council Bluffs, in the state of Iowa, where the defendant was then living. The lots appear to be of little value and unimproved. The petition alleged, in substance, the contract of sale, giving the terms thereof; that the plaintiff had fully complied with and performed all the conditions thereof to be by him performed, and had fully paid the purchase price, and that the defendant had conveyed by warranty deed two of said lots; and that, although demanded so to do, she had neglected, failed and refused to convey, as by said contract she agreed to do, the other of said three lots. The answer admitted the receipt of the amount as alleged in the petition as the purchase price, the conveyance of the two lots and the refusal to convey the third one, because, as alleged, an account against a third party, which was to be assigned to vendor as a part of the consideration, was for a less sum than represented by the plaintiff. The reply was a general denial. All the evidence introduced was in behalf of the plaintiff and in support of his cause of action; the defend-

ant offering no evidence. The trial court decreed specific performance as prayed, and defendant appeals.

The only question presented is whether the pleadings and the evidence will support the decree rendered. This, we think, must be answered in the affirmative. The evidence shows conclusively that the full consideration agreed upon was paid by the vendee and received by the vendor, who was his sister. She conveyed two of the lots in pursuance of the agreement, and then arbitrarily refused to convey the third because, as alleged, but not proved, the account of the third party was for a less sum than represented. She has, under the evidence, received the full compensation agreed upon, and has undertaken on her part to execute the contract, to the extent of conveying two of the lots included in its terms, and, without lawful excuse, refusing to convey the other one because of the alleged misrepresentation. This she can not do. The contract is an entirety, and, having been performed to the extent stated, a court of equity would be warranted in compelling its complete execution, although it be not in writing. Not to do so would work a fraud on the vendee. He has in good faith executed the contract, and paid the full purchase price. The vendor has partially performed the agreement, and then undertakes to recoup herself for the alleged damage on account of misrepresentation by retaining title to a part of the property agreed to be conveyed, and interposes as a defense the statute of frauds to protect her in her claim, and avoid a complete execution according to the terms of the agreement. Equity and good conscience will not permit her to do this, and the trial court was justified, under the evidence, in directing specific performance of the oral contract as one partially performed, and to a degree which would except it from the operation of the statute of frauds. *Kofka v. Rosicky,* 41 Nebr., 328.

The decree of the district court is accordingly

AFFIRMED.

CHRISTOPHER FRERKING, REVIVED IN THE NAME OF FRANK W. BARTOS, ADMINISTRATOR, APPELLANT, V. ALBERT THOMAS ET AL., APPELLEES.

FILED MARCH 19, 1902. NO. 11,453.

1. **Mortgage:** LAND PRIMARY DEBTOR. Where land is sold subject to a mortgage existing thereon, as between the parties to the transaction, the land is the primary debtor, and a sale thereof may be resorted to for the satisfaction of the incumbrance.

2. ———: INCIDENT TO DEBT: PURCHASERS OF TITLE IN GOOD FAITH. A mortgage on real estate is an incident to the debt evidenced by the notes it secures, and passes with an assignment of the debt, and an unauthorized release of the mortgage would not prevent the enforcement of the rights of the holder of the notes to a sale of the property in satisfaction of the debt as to any save those who in good faith and without notice have obtained title to such property, relying on the record which disclosed the apparent satisfaction of the incumbrance.

3. ———: FRAUDULENT ASSIGNMENT: RELEASE. A grantee of land subject to a mortgage thereon fraudulently obtained an assignment of the mortgage and released the same, the notes secured thereby being unsatisfied. *Held*, as against an indorser of the notes, who was compelled to take up the same because of his liability as such, that the release was unavailing to deprive him of his lien thereon, and a sale of the property could be had to satisfy the debt.

4. **Suit to Reinstate Mortgage:** ALLEGATA. In a suit to reinstate a mortgage on real estate fraudulently released and enforce the lien created thereby, it was alleged that after the fraudulent release of the mortgage the notes secured by the same were transferred to a third party, and suit caused to be instituted against the payee on his liability as indorser, and that he was compelled because of such liability to pay for and take up such notes, which he did, giving the amount thereof. The answer alleged that, if any money was paid thereon, it was paid to some other and different person, without the knowledge or procurement in any manner of the defendants. *Held*, in the face of such an allegation, the defendants could not be heard to say and prove that the payment so made was in compromise of the plaintiff's liability as indorser, and for their benefit, in that it was agreed that no action should thereafter be maintained against the maker of the notes, or to enforce the security pledged to the payment of the debt.

5. **Third Party:** ACTION: DEFENSE: INTENT. While a third party

may maintain an action or a defense under an agreement between others made for his benefit, it must appear that there was an intent by the promisee or person with whom the agreement was made to secure some benefit to such third party, and also that there existed some privity between the promisee and the party to be benefited.

6. ———: PURCHASER: KNOWLEDGE: NOTICE. Where a person purchases real estate with knowledge of a third party's equitable lien thereon, or with notice of such facts as would put an ordinarily prudent man on inquiry which, if pursued, would lead to such knowledge, such person can not be said to be a good-faith purchaser without notice and entitled to protection as such.

7. **Review**: DECREE: CONSTRUCTION OF TESTIMONY. In reviewing a cause on appeal, where the findings and decree of the trial court can not be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence.

APPEAL from the district court for Saline county. Heard below before STUBBS, J. *Reversed.*

William G. Hastings, Neal & Quackenbush and *J. A. Wild,* for appellant.

A. S. Sands, contra.

HOLCOMB, J.

Appellant, plaintiff below, brings this case here by appeal from a finding and decree adverse to him in the trial court. The action is one in equity, brought to reinstate a real estate mortgage alleged to have been fraudulently released, and to enforce a lien on the property described therein in favor of the plaintiff. The petition is grounded on alleged fraudulent acts and practices of the defendants committed to defraud the plaintiff out of his lawful rights. In substance it alleges that in 1892 the plaintiff, being the owner of a certain town lot in DeWitt, Saline county, which is the real estate in controversy, conveyed the same by warranty deed to defendant, Carrie Chesney, now Carrie Crane, and that she, to secure the purchase consideration, executed back to the plaintiff a mortgage thereon, securing thirteen promissory notes, for the sum of $40 each, the

first payable April 14, 1893, and one maturing every four months thereafter, and drawing interest at ten per cent. per annum from maturity; that thereafter, on September 27, 1894, plaintiff sold and assigned the said notes and mortgage securing the same to one Mary Cobel, the notes being indorsed in blank, and the assignment of the mortgage being duly recorded; that on April 23, 1894, Carrie Chesney, the mortgagor, conveyed the premises to Lelia Chesney, subject to the mortgage, and with the intent to defraud the plaintiff; that on June 26, 1895, Mary Cobel sold the notes and mortgage to defendant, James Chesney, said notes being delivered with a blank assignment of the mortgage, and that this transaction on the part of Chesney was had with the intent to defraud plaintiff; that on July 10, 1895, Lelia Chesney, in collusion with James Chesney and Carrie Chesney to defraud plaintiff, made a release of the mortgage, which release was withheld from the records until after the commission of the acts thereafter complained of; that plaintiff was seventy-eight years old, a German ignorant of English, and incapacitated on account of ill health to do business, and that the Chesneys, by falsely and fraudulently representing that his indorsement of the notes was in full force and effect, and the mortgage unreleased, induced him to pay their agents, attorneys or assigns $396 on said notes, and that suit was caused to be instituted to accomplish such wrongful purpose. It is alleged that the notes have been destroyed; that defendant Thomas, conspiring with the other defendants, and with full knowledge of plaintiff's rights, took a warranty deed of said premises dated December 24, 1897; and that all of the defendants except Thomas are insolvent, and that plaintiff is without remedy except by the enforcement of his rights under said mortgage, and prays for the ascertainment of the amount due him on said notes, and a foreclosure of the mortgage lien, and general equitable relief. The defendants Chesney in their answer deny the fraud charged, or the receipt of any money paid by plaintiff on the notes, and allege that, if any money was paid

thereon, it was paid to some other and different person, and without their knowledge or procurement in any manner. It is also alleged that if any money was paid to obtain his release as indorser it was long after the release of the mortgage, and with knowledge that it had been released, and for the purpose of releasing plaintiff as indorser on the notes, and not in payment of the notes or any part thereof. Defendant Thomas answered separately, denying the alleged fraud, and alleges that he received a warranty deed for the premises, paying $360 therefor, and denies that he had any notice or knowledge of plaintiff's claim; says that he bought the premises in good faith, and without any intention to defraud the plaintiff, and asks to have the title to said premises quieted in him, free of any incumbrance in favor of the plaintiff. The reply denies the allegation of new matter contained in both answers.

The badges and ear-marks of fraud and overreaching are discernible throughout the entire records, so far as the defendants Chesney are concerned; not that any fraudulent act may be directly imputed to the two defendants Carrie and Lelia Chesney, sisters of the defendant James Chesney, for, by the transactions in which their names appear, they are seemingly nominal parties only, the moving spirit and actor in all instances being the brother, who, it appears, being insolvent, carried on and did his business in the name of one or the other of the two sisters made defendants in the action. Whether he was the principal in the several transactions complained of or acted as the agent of his sisters is for the purposes of this case immaterial. In either instance, the legal consequences would be the same, and the plaintiff's rights in nowise changed thereby. It was he that negotiated the purchase of the property, although the deed was taken in the name of his sister, who, in turn, executed the notes and mortgage mentioned in the pleadings to secure the purchase price thereof. He purchased the notes from the transferee, Cobel, and obtained an assignment of the mortgage in blank. He negotiated the sale of the premises to the defendant

Thomas, and we may assume, in the absence of any evidence to the contrary, that he was the principal in all the transactions had, his sisters being only the intermediary for the conveyance of the property, and nominally holding title thereto, while he was in fact the beneficial owner, although it is unnecessary to determine this question. It is disclosed by the evidence that after the procurement of the notes given for the purchase of the lot from the indorsee, Mrs. Cobel, an assignment of the mortgage was obtained, the name of the assignee being left blank and afterwards filled in by inserting the name of his sister, Lelia Chesney, who was then the holder of the legal title to said property. The deed from Carrie to Lelia Chesney bears date April 23, 1894, and was not recorded until February 19, 1897. The assignment of the mortgage in blank from Mrs. Cobel was obtained June 26, 1895. Lelia Chesney, it appears, as assignee of the mortgage, and whose name was afterwards inserted therein, executed a formal release thereof July 10, 1895, the consideration, as given, being the payment of the debt; the release, however, not being recorded until December 31, 1897. Soon after obtaining the notes and mortgage from Mrs. Cobel, June 26, 1895, several of the notes were transferred, evidently by defendant James Chesney, to one Chaloupka, who, it appears, was a creditor of his, although the amount of the indebtedness is uncertain. Chaloupka at once instituted suit on the matured notes against the plaintiff on his indorsement. The notes then past due and unpaid were dishonored, and no notice thereof had been given to plaintiff such as would bind him as an indorser. He was visited by Chaloupka's attorney, and told that he would have to pay the notes sued on, and was liable therefor. No effort appears to have been made to collect of the maker, and no summons was served on her. The plaintiff then procured the assistance of the cashier of a local bank, in which he had a deposit of something over $2,000, to pay whatever was necessary to relieve him from the litigation. Plaintiff's agent visited the county-seat, where the suit was

pending, for that purpose, paid for the notes and they were turned over to him. After returning home, on his statement that they were of no further use, the notes were destroyed. It is altogether clear that the plaintiff did not intend to release any of his rights as the owner of the notes by his purchase of them from Chaloupka, because of his liability as indorser, nor release the property given to secure the debt. The amount paid Chaloupka is uncertain. It is, however, clear that the indorser was not liable for the past-due notes, because no notice of their dishonor had been given him and in the settlement this seems to have been conceded. He was, however, liable for the unmatured paper, of which there were six notes, aggregating $240, and this sum, at least, was no doubt paid in the settlement of the litigation, and to get the notes on which he was liable back into the hands of the plaintiff. It is quite obvious that the attempt under the manipulations of defendant James Chesney to secure the release of the property from the lien created by the mortgage, and at the same time put the notes again in circulation, was for the sole purpose of enforcing payment against the plaintiff as indorser, and thereby deprive him of such security, he being the only responsible party against whom an action would lie for a personal judgment. Whether Chaloupka was a participant in this transaction, having knowledge of the object sought to be accomplished by the person from whom he received the paper, is not altogether clear; nor is it essential to plaintiff's right to relief that such should be the case. His action in immediately undertaking enforcement of payment against plaintiff as indorser, and the after transaction culminating in plaintiff's paying him the amount agreed upon, would indicate that he allowed himself to become a party to the questionable transaction. The property had been transferred by the mortgagor, Carrie Chesney, to Lelia Chesney, subject to the mortgage, and the latter, when she obtained the assignment of the mortgage in the manner she did, could no more deprive the plaintiff of the security pledged to pay the debt than

she could her sister, as maker of the notes, had she been compelled to pay them. As between the parties the land was the primary debtor, and its sale could be required in satisfaction of the incumbrance thereon, and subject to which the grantee, Lelia Chesney, obtained title thereto. *McNaughton v. Burke,* 63 Nebr., 704. The mortgage itself had no independent existence. It was an incident to the debt evidenced by the notes, and passed with their assignment to whomsoever might obtain them with the right to enforce their collection, notwithstanding the attempted release of the mortgage lien; and this right would exist in favor of the holder of the notes, and against every one holding title to the property, save those who in good faith and without notice had obtained title relying on the record disclosing the apparent satisfaction of the incumbrance existing thereon. *Webb v. Hoselton,* 4 Nebr., 308; *Daniels v. Densmore,* 32 Nebr., 40; *Todd v. Cremer,* 36 Nebr., 430; *Whipple v. Fowler,* 41 Nebr., 675; *Mathews v. Jones,* 47 Nebr., 616.

It is, as has been noted, alleged that this settlement was had as a compromise, and for the purpose of releasing the plaintiff as an indorser, and that he did not thereby become the purchaser and owner of the notes with a right to enforce payment by a resort to the mortgage security. It is drawn out on cross-examination of the cashier of the bank that at the time the notes were given up he agreed that it was not "for the purpose of enforcement or of holding against the maker." If, as alleged, this transaction between the agent of plaintiff and the holder of the notes was with third parties, whom the defendants had no relation to, nor connection with, we can not understand why the attempt is made to show that the contract of settlement was made in their interest and for their benefit. If they had nothing to do with the transaction, and were in no way related to it, nor in privity with Chaloupka, it would seem to be an immaterial matter as to them whether in fact, as alleged, the payment was made "for the release of said plaintiff as indorser upon said notes and not in

payment thereof, or any part thereof." Why should Chaloupka be so greatly concerned about releasing the maker of the notes or the security given therefor if the transaction was "entirely without said defendant's knowledge or procurement in any manner"? They no doubt were aware that if the action thus taken, and the payment of the defendant's obligation thus obtained, was with their procurement, knowledge or consent, then it is apparent that the fraud practiced on the plaintiff would vitiate the agreement relied on to release them and the property from further liability; but if, as is alleged, they had no part in the transaction, nor procured it to be done, then we are unable to appreciate how the defendants may invoke the agreement claimed to have been made for the purpose of relieving the property of the incumbrance which was specially pledged as a guaranty of the ultimate payment of the debt. Surely Chaloupka could have enforced the mortgage lien had he so desired; and, if so, it is difficult to understand what tenable objection there is to the plaintiff, who has succeeded to his rights, from likewise enforcing the lien. While it is true that an agreement may be made for the benefit of a third person and enforced by the latter, though not a party to the consideration (*Morrill v. Skinner,* 57 Nebr., 164, and authorities there cited), the rule does not, however, extend to entire strangers, who are not in privity with, nor in anywise related to, the parties to the transaction so had. Says the supreme court of New York in *Vrooman v. Turner,* 69 N. Y., 280, 283: "To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." See, also, *Embler v. Hartford Steam Boiler Ins. Co.,* 158 N. Y., 431, 44 L. R. A., 512; *Klemer v. Sheffield,* 80 N. W.

Rep. [Minn.], 1055. As to the defendants Chesney, it is difficult to conceive of any theory of the case as presented by the record which would deny to the plaintiff the right to enforce the lien upon the property created expressly for the purpose of securing the payment of the debt.

We assume that the finding of the trial court, and the decree resulting therefrom, arose from conclusions arrived at with respect to the rights of the defendant Thomas, who claims the property free from any lien by virtue of the mortgage, as an innocent purchaser in good faith, and without notice of the equities of the plaintiff therein. This is practically conceded to be the situation by the appellees, whose counsel say in their brief: "The plaintiffs, in addition to other things which they have failed to prove, have failed to show that the assignment of the property was kept off the records by Thomas, or by any one else at the request or desire of Thomas for the purpose of defrauding the plaintiff in this action. They have also failed to show that he had any notice whatever of any fraudulent intent on the part of any one or that he in any way participated in any fraud." It is then argued that the finding of the trial court generally for the defendants is supported by sufficient evidence, and should not, under the rules respecting findings of fact by a trial court, be disturbed on appeal. We are disposed to think likewise that this question is the only one of a substantial character regarding which there can be any doubt, or cause for hesitancy and investigation in arriving at a correct determination. If Thomas, as is claimed, is a bona-fide purchaser of the property without notice, whatever may have been the fraud practiced by the other defendants, he would escape its consequences, and hold the property purchased free from the lien sought to be enforced thereon. Thomas lived in the same town where all the parties resided, which is a small village in Saline county. He, it is clear, was intimately acquainted with the plaintiff and the other defendants. The transaction by which the plaintiff paid for and obtained the unmatured notes and settled the litigation

began against him occurred in July, 1895. He admits the transaction had created a great deal of talk, and, as he expressed it, was the talk of the town for more than a year before he bought the property. It is also entirely clear that because thereof he was in doubt as to the title he would secure were he to purchase the property. He consulted a lawyer and an abstracter as to the title he was securing, and it is evident that this was not merely a precautionary measure, which is commendable in any intended purchaser, and as a prudent person would ordinarily do, but, rather, in view of the current talk as to the plaintiff having been defrauded out of his property and the security given for its purchase price, would he be safe in purchasing the property because the record title appeared clear, notwithstanding the acts which had transpired and of which he had general knowledge, and as a result of which the plaintiff had apparently lost his security.

Throughout the entire testimony it is disclosed that he relied exclusively on the fact that the records exhibited a clear title, and that he closed his eyes and ears to the many statements brought directly home to him impeaching the title of his grantor because of the fraudulent acts of the defendant James Chesney. Several witnesses testify to statements made to, by, and in the presence of Thomas regarding the state of title to the property before he had purchased, and that he had ample notice so that he might have learned to the minutest detail all the facts surrounding the transactions heretofore spoken of. He does not, only in an indirect way, deny having such notice. He testifies in general terms that he had no knowledge of any fraudulent acts of his grantor or the other defendants. In giving his testimony, after speaking of some inquiries he had made after he had purchased the property, he was asked:

Q. That was the first you knew of anything concerning a claim or interest on the part of Mr. Frerking, was it?

A. Oh, I don't know as I could say that, because that had been a matter of talk for years, I should say; I don't know when it was.

Q. What had been a matter of talk for years?

A. This matter of swindling Frerking out of the property.

Q. Have you in any way aided or assisted in a conspiracy in this matter?

A. No, sir; I will say that I had rented the place before, and Mr. Chesney did not feel like fixing it up for me; the location suited me for my business. The location of the lot was all right, and he told me I had better buy it, and I knew nothing, personally, about the other deals that had been made. I suppose I had heard of them, like any man who has been in DeWitt,—everybody had heard about it.

The abstracter, who was called as a witness for defendant, testified: "I told Mr. Thomas that the deed made by Carrie S. Chesney to Lelia Chesney was made subject to a mortgage of $380, and that there was no such mortgage shown of record; that he had better get a statement from Miss Chesney showing that there was no mortgage of record, or no mortgage recorded; that it might possibly be that the mortgage referred to in that deed was the Frerking mortgage, and with a part unpaid."

Different witnesses for plaintiff testified to conversations with and in the presence of defendant Thomas before he purchased the property, pointing unmistakably to the fact that he was forewarned of the plaintiff's equities in the property. We can not, nor would it serve any useful purpose to set forth *in extenso* the testimony bearing on this point, and must content ourselves with conclusions proper to be drawn therefrom. That the defendant Thomas, at the time of purchasing the property, had direct knowledge of the plaintiff's claim, can hardly be doubted by one reading the record; that he had such notice of the plaintiff's claim as would put an ordinarily prudent man on inquiry, which, if followed up, would lead to actual knowledge of his rights in the premises, is beyond all reasonable doubt; and this is all that is required in order to charge him with such notice as would preclude him from claiming the protection and rights of a good-faith purchaser, who takes the prop-

erty freed from any equities existing against the same, and in reliance on the public records showing a perfect chain of title. *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Nebr., 892.

While it is the well-established rule of this court that a finding of fact based on the evidence will not be disturbed unless clearly wrong, the present case, we think, is an exception to the general rule, and in no rational view of the record, construing the testimony as favorably to the defendant as it is fairly susceptible of, can it be said that the evidence will support a finding that the defendant Thomas was a good-faith purchaser of the property without knowledge of plaintiff's rights or notice of facts which would put an ordinarily prudent person on inquiry, which, if followed up, would lead to such knowledge. As between him and the plaintiff, the equities are all in favor of the latter; and Thomas, rather than the plaintiff, should suffer the loss.

From the evidence we are unable to say that plaintiff, in the transaction by which he took up the notes he had formerly indorsed, acquired title to only those which at the time were unmatured, and on which he was liable as indorser, which aggregated $240, and interest from the maturity of each, respectively, and therefore conclude the amount to which he is entitled to a lien, is limited to that sum. The decree of the district court is reversed and the cause is remanded, with directions to the district court to award plaintiff a lien on the mortgaged premises for the principal sum stated, with accruing interest thereon, and directing a sale of the property in satisfaction thereof.

JUDGMENT ACCORDINGLY.

CODDINGTON SAVINGS BANK, APPELLANT, v. JOHN G. ANDERSON, APPELLEE.

FILED MARCH 19, 1902. No. 10,280.

1. **Promissory Note:** INDORSEMENT: NEGOTIABILITY. An indorsement upon a promissory note as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse," signed by the payee in the note, does not destroy the negotiability of the note.

2. ———: PAYMENT: ELECTION: BURDEN OF PROOF. If the maker elects to pay a negotiable promissory note to one who can not and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized by the owner to receive the money for him.

APPEAL from the district court for Harlan county. Heard below before BEALL, J. *Reversed.*

James McNeny, for appellant.

Riley L. Keester, contra.

SEDGWICK, J.

In December, 1885, the defendant, John G. Anderson, executed a note for $500, with ten interest coupons of $20 each, and a mortgage securing the same, to one James H. Tallman. Mr. Anderson transacted this business with the Nebraska & Kansas Farm Loan Company, of Harlan county, Nebraska, and the securities were upon land in that county. Mr. Tallman was a member of the firm of Moore & Co., of Hartford, Connecticut, and it appears from the evidence that the note and mortgage were taken in his name at the request of Moore & Co. Immediately after the papers were taken they were forwarded by the Nebraska & Kansas Farm Loan Company to Moore & Co. at Hartford, Connecticut, and were thereupon sold by Moore & Co. to this plaintiff. Afterwards the amount of

the interest coupons, as they became due, was paid by Anderson to the Nebraska & Kansas Farm Loan Company, and the money forwarded to Moore & Co., and by them paid to the plaintiff bank. A few days before the principal became due, Anderson sent the amount of the principal and the last interest payment, $520, to the Nebraska & Kansas Farm Loan Company, which company acknowledged receipt of the money, and promised to forward Mr. Anderson the papers as soon as they could be obtained from the east.

1. The first question presented is as to the negotiability of the note. The indorsement thereon is as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse. James H. Tallman." And it is insisted, under the authority of *Aniba v. Yeomans,* 39 Mich., 171, that by such indorsement the negotiable character of a promissory note is destroyed. In that case the indorsement was: "I hereby transfer my right, title and interest of the within note to S. A. Yeomans." It did not purport to transfer the entire note, as does the indorsement in this case. We think that the indorsement in this case does not destroy the negotiability of the note, and this objection is not well taken.

2. If it is admitted, as claimed by the defendant, that the evidence in the case is sufficient to establish the fact that the money loaned to the defendant was the money of George W. Moore & Co., and that the Nebraska & Kansas Farm Loan Company was the agent of Moore & Co. in negotiating the loan, the next question then is as to the authority of the Nebraska & Kansas Farm Loan Company or Moore & Co. to receive the money from the defendant on behalf of the plaintiff, the Coddington Savings Bank. There is no doubt, under this evidence, that the Coddington Savings Bank bought this note in good faith in the regular course of business, and was entitled to receive the proceeds thereof. It is also made clear that the Nebraska

& Kansas Farm Loan Company, having failed in business soon after the receipt of the money from the defendant, never paid the same to the plaintiff, nor to Moore & Co. The evidence in regard to the authority of the Nebraska & Kansas Farm Loan Company to receive this money on behalf of the plaintiff is very similar to, in fact almost identical with, the evidence in the case of *Richards v. Waller,* 49 Nebr., 639, and it was there held, quoting from *Bull v. Mitchell,* 47 Nebr., 647: "Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager, and such payment was never forwarded to the party to whom such note had been transferred, held, that the mere fact that antecedent payments made in like manner had been made to be forwarded to the transferee of such note, and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded, it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent." This was also approved, upon a similar state of facts, in *City Missionary Society v. Reams,* 51 Nebr., 225. We are satisfied with these decisions, and no good purpose could be served by reviewing the evidence further in this case.

There is no reason for holding the plaintiff to have ratified the action of the Nebraska & Kansas Farm Loan Company, since there is no evidence that the plaintiff ever knew of that action, and, although the plaintiff delayed something over three years after the maturity of the paper before beginning this suit, and did not in the meantime notify Mr. Anderson that it had not received the money, still this is no ground of estoppel against the plaintiff, since it is not shown that Mr. Anderson ever transacted any business directly with the plaintiff, but always paid his money to some other parties, who forwarded it to the plaintiff; and these parties to whom Mr. Anderson paid his money, and who paid it for him to plaintiff, had full knowledge of all the facts. The plaintiff had no notice of this payment by Mr. Anderson until shortly before the

action was begun, when it was notified by Moore & Co. that Mr. Anderson claimed that he had paid the mortgage. Plaintiff immediately forwarded the mortgage for foreclosure. The rule of law by which to determine which of these innocent parties must suffer this loss is well settled. The note being negotiable in form, if the maker elects to pay it to some one who can not and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized to receive the money. This he failed to prove, and the decree of the district court is therefore reversed, and the cause remanded, with instructions to enter decree in favor of the plaintiff for the amount due upon the note and mortgage.

REVERSED AND REMANDED.

JAMES MORTENSON ET AL., REVIVED IN THE NAME OF JOHN MEISTER, ADMINISTRATOR, V. MARTHA BERGTHOLD.

FILED MARCH 19, 1902. No. 11,331.

Commissioner's opinion, Department No. 1.

1. **Administrator:** FINAL SETTLEMENT: ORDER OF COURT: FAILURE TO COMPLY: CONDITION OF BOND: BREACH. Failure to comply with a decree of the county court requiring an administrator to pay in money found on his final settlement to be due the estate, is a breach of the conditions of his bond under the statute.

2. ———: ———: ———: ———: ———: ———: STATUTE OF LIMITATIONS. The statute of limitations does not begin to run against an action for such breach of the conditions of the bond till the final decree directing payment is entered.

3. ———: ———: ———: ———: ———: ———: ———: IMMATERIAL EVIDENCE: RES ADJUDICATA. In an action for such a breach of the bond, evidence of matter relating to the conduct of the administration, prior to the decree, *held* properly rejected, as immaterial and *res adjudicata*.

ERROR from the district court for Cuming county. Tried below before EVANS, J. *Affirmed.*

Thomas M. Franse, for plaintiffs in error.

Timothy J. Mahoney and *J. A. C. Kennedy, contra.*

HASTINGS, C.

There are thirteen assignments of error in this case, but in reality the errors complained of are three: First, error of the trial court in instructing a verdict for plaintiff below, defendant here; second, error of the trial court in rejecting as evidence Exhibit 10 of defendants at the trial, the record of a so-called final settlement of the defendant administrator, Schmela, in 1887; and, third, error in overruling defendant's objection to any evidence in the court below, because the petition showed an action barred by the statute of limitations. Unless the record discloses error in one or the other of these three particulars, the judgment must be affirmed. Errors are alleged in rejecting evidence "which would have shown" various things, but what the evidence was, at which this complaint was directed, we have no means of knowing. The defendant Ferdinand Schmela was, in September, 1878, appointed administrator of the estate of Andrew Bergthold, in Cuming county, Nebraska, and the other defendants were sureties on his bond in the sum of $1,500. The petition alleges that Schmela entered upon his duties as administrator, and continued to exercise the office until April, 1887, when he ceased to be administrator, but without any final settlement; that in December, 1897, upon a hearing on his final report, a decree was entered by the county court for Cuming county that Schmela pay to the heirs at law of Andrew Bergthold, three in number, the sum of $1,642.88 each; that two of the heirs assigned their interest to the third, who was plaintiff below; that Schmela did not pay any part of the sums decreed; that plaintiff demanded them. She asked judgment for the whole amount,

$4,980.10, and interest from December 31, 1897, when the decree was entered by the county court. The answer of Schmela admits his appointment and qualification as administrator, and the demand for the payment by plaintiff, and denies the remaining allegations. The answer also alleges that Amelia Bergthold, the widow, served as administratrix of the estate of Andrew Bergthold for about a year, and received the personal property, but made no report; alleges that Schmela in April, 1885, accounted for all property in his hands as administrator, and that all the items that constituted the $4,980.10 claimed by the plaintiff are proceeds of real estate sold by Schmela as agent, and for rents received by him as agent for the real estate of the deceased, and none of it was received as administrator. The answer also pleads the statute of limitations, and that plaintiff could not prosecute the action, because the matter of the final report of Ferdinand Schmela as administrator was pending in the district court of Cuming county on error from the order of the county court. Schmela's sureties, Mortenson and Bley, each filed substantially the same answer. The court, at the trial, instructed the jury to find for the plaintiff against Schmela in the sum of $4,980.10, and against the sureties in the sum of $1,500, and entered judgment upon the verdict. Motions for a new trial in substantially the terms of the petition in error were entered separately by the defendants, and were overruled. The judgment against the sureties was superseded, and this action is to reverse the judgment against them. Their bond is conditioned as follows: "Now if the said Ferdinand Schmela shall make and return to the county court within three months a true and perfect inventory of all the goods, chattels, credits, rights, and estate of the deceased which shall come into his possession or to the possession of any other person for him, and out of the same pay and discharge all debts, legacies and charges chargeable on the same, or such dividend thereon as shall be ordered and decreed by the court: to render a true and

just account of his administration to the county court, within one year, and at any other time when required by said court, and to perform all orders and decrees of the county court by the administrator to be performed in the premises, then this obligation to be void, otherwise to remain in full force and effect in law." It will be seen that the action was upon the last clause of the condition in the bond, viz., that the principal should perform all orders and decrees of the county court. This condition of the bond is in accordance with the requirements of the statute. Compiled Statutes, ch. 23, secs. 164, 179.

The instruction of the trial court for a verdict was evidently based upon the proposition that the decree of the county court requiring these payments was valid; that the failure to make them was a breach of the condition of the bond, and the principal was liable for the amount of such payments, and the sureties to the extent of the penalty. Under this view of the law nearly all the allegations of the answers, except the denial of the decree of December 31, 1897, became unimportant. If the foundation of the action was a valid decree of the county court, dated December 31, 1897, manifestly the objection that this action, which was begun December 31, 1898, was barred by the statute of limitations, would have no weight.

An examination of the record shows that due proof was made of the county court's decree, as alleged by the plaintiff. The demand for payment under it, and the refusal, are admitted, as are also the execution of the bond and the assignments to plaintiff by her co-heirs. This would seem sufficient to make out a prima-facie case for the plaintiff. The various matters tendered in evidence by the defense principally related to matters leading up to the decree of the county court of December 31, 1897, and the objection that they were *res adjudicata* seems to have been well taken and properly sustained.

The complaint because Exhibit 10, which is claimed to be a final discharge of defendant Schmela, as administrator, and its confirmation by the district court of Cuming

county, was rejected when offered as evidence, is not well founded. It is quite possible that a previous final discharge of Schmela as administrator would operate as a discharge of his sureties, notwithstanding that he was a party to subsequent proceedings, and in such subsequent proceedings the decree on which this action is based was obtained. But an examination of the pleadings wholly fails to show anything in the answers by way of alleging any such previous final discharge. If there were such allegations, the evidence itself is of such a character that it would be difficult to say that it would amount to a final settlement and discharge. Indeed, this court in the case of *Bachelor v. Schmela*, 49 Nebr., 37, examined nearly all this evidence, and held that it did not show a final discharge. Whether it did or not, there is no pleading of any such method of release by either the principal or the sureties on this bond. The evidence was rightly rejected.

With the prima-facie case made out by plaintiff, and the evidence of defendant properly refused, there was nothing for the court to do but to instruct for a verdict as it did. It appears, therefore, that there was no error, either in instructing for the verdict, in rejecting the evidence of the so-called final settlement in 1887, or in holding that the action was not barred by the statute of limitations.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SULLIVAN HOWARD, APPELLEE, V. REIN RAYMERS ET AL., APPELLANTS.

FILED MARCH 19, 1902. No. 11,408.

Commissioner's opinion, Department No. 1.

1. **Execution: LEVY: NULLA BONA: FRAUDULENT CONVEYANCE: LIEN OF EXECUTION.** Where an execution has been levied upon a fraudulently alienated piece of real estate after a failure to find goods and chattels, the execution creditor is entitled to proceed at once in equity to set aside the fraudulent conveyance and enforce the lien of the execution.

2. **Homestead: RIGHT: CONTIGUOUS PREMISES: NECESSARY SHOWING.** Where premises are claimed to constitute a part of the homestead of a debtor because adjoining premises are occupied as a residence of debtor's family, it is necessary to show a homestead right in the premises on which the family live.

3. ———: ———: **PERMISSIVE RESIDENCE WITH FATHER-IN-LAW.** A mere permissive residence in the family of one's father-in-law, however long continued, will establish no homestead rights in the father-in-law's land.

APPEAL from the district court for Hamilton county. Heard below before SEDGWICK, J. *Affirmed.*

Othman A. Abbott, for appellants.

Hainer & Smith, contra.

HASTINGS, C.

Two questions seem to be presented in this case. The first one relates to the levy and return of an execution on which the creditors' bill which constitutes the action is based. The plaintiffs, having recovered a judgment in the Hamilton-county court, and filed transcript in the district court, procured an execution on which the sheriff indorsed, "After diligent search, I can find no goods or chattels whereon to levy and collect this writ or any part thereof," and then levied it on the premises in question in this action. No return seems to have been made to the execution, but the creditor's suit to set aside a deed of the

land levied upon was commenced before a return was due. Pending the trial, leave was obtained to make a return to the execution and to file a supplemental petition showing the same. A demurrer to the petition had been previously overruled, and an answer filed. Appellants claim now that these proceedings did not constitute a sufficient foundation for equitable proceedings to set aside the conveyance which is attacked in this action, and cite New York cases, and *Weaver v. Cressman,* 21 Nebr., 675, and *Jones v. Green,* 1 Wall. [U. S.], 330, in support of their position. *Weaver v. Cressman* merely goes to the extent of holding that a non-resident creditor may not proceed to appropriate funds of a non-resident debtor in the hands of the clerk of a court without first showing that the debtor had no attachable property in this state. *Jones v. Green* is simply a holding that, before equity would intervene, an attempt at collection by process of law must have been made, but it also holds that, where the execution has been levied upon property fraudulently conveyed, equity will intervene to make such levy effectual on the ground of vindicating the lien acquired by the execution. The same doctrine is asserted in 3 Freeman, Executions [3d ed.], p. 2316, sec. 430. This was the precise position taken by the trial court in this case, and there seems to have been no error in overruling the appellants' demurrer, or in permitting the supplementary petition.

The other question relates to the merits of the case. It is admitted in appellants' brief that the conveyance was voluntary. It is not disputed that the indebtedness to plaintiff had been incurred before it was made. The conveyance attacked is to be deemed fraudulent, unless the premises covered by it are held to have been exempt as the homestead of defendant Rein Raymers. The land in question appears to have been owned for upwards of twenty years by Rein Raymers, and to have been conveyed by this voluntary conveyance just before plaintiffs' claim against him ripened into a judgment. During all of these years there was no dwelling house on the land in question;

the residence of Raymers and his wife being during all that time with the latter's parents, on an adjoining eighty acres of land. The evidence fails to disclose any right or ownership on the part of Raymers and his wife in the adjoining eighty on which they lived. It seems to have been a mutual arrangement made for the convenience of the parties, and terminable at the will of either. It is tolerably clear from the evidence that there was no legal estate in this adjoining piece of land held by the appellants, Raymers and wife. The claim sought to be made in the answer is that Raymers and wife held some estate in the land on which they lived with the latter's parents, and that, the other adjoining it, their homestead rights extended to the whole. The sole basis for such claim is the fact that Raymers and wife lived with the latter's parents on this adjoining land during all this time; that they seem to have jointly contributed to the expenses of the joint family, and Raymers controlled his own eighty acres of land, and sometimes farmed, under a rental agreement, some part of that on which he lived with his father-in-law, Zingscheim. But it is impossible to conclude from this evidence that Raymers had any such interest in the Zingscheim land as attached any homestead rights in it on his own part. Of course, if he had no homestead interest in the land on which he lived, no such homestead right would extend to his own property, which adjoined that on which he lived.

No error is discovered in the judgment of the trial court, and it is recommended that it be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY J. FOXWORTHY V. LUCY C. COLBY.

FILED MARCH 19, 1902. No. 10,915.

Commissioner's opinion, Department No. 1.

Material Alteration of Instrument. The unauthorized insertion of the word "gold" before the word "dollars" in an instrument, after its execution and delivery, is a material alteration.

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

Charles L. Burr and *Lionel C. Burr,* for plaintiff in error.

Flansburg & Williams, contra.

DAY, C.

Lucy C. Colby brought this suit in the district court for Lancaster county against Mary J. Foxworthy to foreclose a real estate mortgage executed by her in favor of the Lombard Investment Company, and by that company assigned to the plaintiff. The answer of the defendant alleged that after the execution and delivery of the bond and mortgage they were, without the knowledge or consent of the defendant, fraudulently altered and changed by inserting therein the word "gold" before the word "dollars." The reply was a general denial, and also a plea that defendant had paid nine of the coupons as they became due, and that each of them contained the word "gold" before the word "dollars"; that no protest or objection was ever made by the defendant, but that at all times she expressed a willingness to pay the note and coupons and discharge the debt; by reason of which fact it is alleged the defendant is estopped from interposing the defense sought to be pleaded by the answer. Upon the trial a judgment of foreclosure was rendered, to review which the defendant has brought the case to this court by proceedings in error.

Upon the request of the defendant, a jury was called to

determine disputed questions of fact. In response to a special interrogatory the jury found that the note and mortgage in controversy had been wrongfully altered and changed without the knowledge or consent of the defendant, by inserting therein the word "gold" before the word "dollars." The jury also returned a general verdict for the defendant. We deem the finding of the jury unimportant, as, in an equity case, it is only advisory. *Bank of Stockham v. Alter,* 61 Nebr., 359. Besides, the finding of the court with respect to the alterations in the bond and mortgage was in accord with the finding of the jury. The court found that the defendant had paid the semi-annual coupons, which had likewise been altered, and that all of said coupons had been delivered to the defendant, and that she "might have had knowledge of the change and alteration in said bond and mortgage by exercising due care and diligence," but made no complaint thereof, but continued to pay said coupons in manner and form as therein written. This latter finding constitutes the basis for the judgment of the court. One of the errors assigned is that this finding is not supported by sufficient evidence and is contrary to the evidence. The record is clear that defendant had no knowledge that the coupons had been altered or changed. She swears positively that she never examined them when they were returned to her, except casually to ascertain that they had been stamped paid. The finding of the court was not that she did know of the alteration, but that by exercising due care and diligence she might have known it. We do not think the defendant owed any duty to the plaintiff to examine the coupons as they were returned to her after payment; and, if not, she could not be charged with negligence in failing to examine them. Granting that an estoppel is properly pleaded, the facts proved do not sustain it.

It is practically conceded by counsel for the plaintiff that the reasons assigned in the judgment are hardly sufficient to sustain it, but it is insisted that the ultimate decree awarding a foreclosure was right, and should,

therefore, be affirmed. It is contended by plaintiff that the alteration of the instruments by the insertion of the word "gold" is an immaterial alteration. We can not assent to this. A material alteration of an instrument is any alteration which causes it to speak a language different in legal effect from that which it originally spoke. *Bridges v. Winters,* 42 Miss., 135, 97 Am. Dec., 443; *Murray v. Klinzing,* 64 Conn., 78; *Wheelock v. Freeman,* 13 Pick. [Mass.], 165, 168; *Oliver v. Hawley,* 5 Nebr., 439; *Fisherdick v. Hutton,* 44 Nebr., 122. By the terms of the contract as it was originally made, it could have been satisfied and discharged by the payment of the sum named in any currency which was lawful money at the time of the payment. The contract, as modified, could only be discharged by the payment of a specific kind of money. The defendant was by this change deprived of a legal privilege which she enjoyed under the contract she had made. By this alteration the legal effect of her contract was changed. The rule is well settled in this state that a material alteration of a promissory note renders it void, even in the hands of a bona-fide purchaser. *Brown v. Straw,* 6 Nebr., 536; *Savings Bank v. Shaffer,* 9 Nebr., 1; *Hurlbut v. Hall,* 39 Nebr., 889; *Erickson v. First Nat. Bank,* 44 Nebr., 622. The plaintiff cites the case of *Bridges v. Winters,* 42 Miss., 135, to the point that the insertion of the words "in gold" in a promissory note is not a material alteration. An examination of the reasons announced by the court in the case does not support the contention made for it. In the course of the opinion the court says: "The legal liability of the plaintiffs in error on the note in question seems to us the same without the words 'in gold' inserted as with them. The law at the date of this note fixes the legal liability of the plaintiffs in error as to the kind of funds or money this note should be paid in. * * * Could Harris legally discharge or pay money due on the note on the 25th day of May, 1860, in any other currency than gold? He could not." It thus appears that in that case the alteration was held to be immaterial, because

it did not change the legal effect of the note as it was originally made. The rule is well established that contracts to pay a certain number of dollars in gold are enforceable. In *Bronson v. Kimpton,* 75 U. S., 444, it was held that a mortgage given to secure a bond payable in gold was not satisfied by a tender of United States notes equal in nominal amount to the sum named in the bond. *Hittson v. Davenport,* 4 Colo., 169; *McGoon v. Shirk,* 54 Ill., 408; *Phillips v. Dugan,* 21 Ohio St., 466; *Walkup v. Houston,* 65 N. Car., 501. It is urged by plaintiff's counsel that, conceding the alteration in the instruments to be material, still it is not shown that the change was made by any party to the transaction, or by any person in privity with him, or by his consent. And it is argued that if the alteration was done by a stranger, it is a mere spoliation, and the rights of the parties are not affected thereby. There is no doubt that if an instrument is changed by a stranger, without the consent of the parties to it, that the rights of the holder will not be affected thereby. *Walton Plow Co. v. Campbell,* 35 Nebr., 173. We fail to see the application of the rule here invoked to the case under consideration. Not only was the contract as changed sought to be enforced, but proof was taken of the officers and employees of the Lombard Investment Company for the purpose of showing that the word "gold" was in the contracts at the time the instruments were executed. One of the witnesses testified that the word "gold" was stamped before the word "dollars" upon all the blanks and forms used by the company at the time the loan was made, and the form of the coupon and mortgage in suit was the form in use at that time. The disputed question in the court below was whether the word "gold" was in the note and mortgage when the instruments were signed and delivered.

We therefore recommend that the judgment be reversed and the cause remanded to the district court for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

THOMAS GANNON V. J. R. PHELAN, ADMINISTRATOR, ET AL.

FILED MARCH 19, 1902. No. 11,241.

Commissioner's opinion, Department No. 1.

1. **Appeal Bond:** OBLIGEE. A bond given for the purpose of taking an appeal under the provisions of section 311 of chapter 23, Compiled Statutes, which runs to "the state of Nebraska" as obligee, instead of to the judge of the probate court, as required by said section, is not by reason thereof void.

2. ———: ———: AMENDMENT: NISI-ORDER: DISMISSAL. If the appellee is dissatisfied with the form of the bond, the appropriate practice is to move in the appellate court for an order requiring a new bond to be filed within a time designated by the court, and in default thereof that the appeal be dismissed.

3. **Peremptory Dismissal:** ERROR. In such case it is error to peremptorily dismiss the appeal without giving to appellant the opportunity to give a new bond.

4. **Right of Appeal.** By section 42, chapter 20, Compiled Statutes, a right of appeal is given to any person affected by any final order, judgment or decree of the county court in all matters of probate jurisdiction.

5. **Sufficient Facts.** Sufficient facts are shown in the record to authorize the appellant to appeal.

6. **Quaere.** Whether Thomas Gannon, as administrator, has the right to appeal, not determined.

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

Francis A. Brogan and *William L. McLaughlin*, for plaintiff in error.

Nathan K. Griggs, contra.

DAY, C.

This is a proceeding in error to review a judgment of the district court for Box Butte county, dismissing an appeal from a judgment of the county court of said county, in the estate of Maggie Gannon, deceased. The record shows that Thomas Langan filed a petition in the county court for Box Butte county, alleging that on October 4, 1898, Maggie Gannon died in Deadwood, Lawrence county, South Dakota, leaving no last will and testament; that she was possessed of certain real and personal property in Box Butte county; that petitioner was the father of the deceased; that Thomas Gannon was her surviving husband, and that there were no other heirs or representatives; and praying that an administrator be appointed. Upon this application J. R. Phelan was appointed administrator of said estate, and duly qualified and acted as such. On July 15, 1899, an order was entered approving the final account of said administrator, and directing the distribution of the personal assets, and ordering all of them to be delivered to Thomas Langan. An order was also entered as to certain real estate belonging to the estate. On July 17, 1899, Thomas Gannon applied to the court for an order fixing the amount of a bond for an appeal to the district court, and, upon hearing, the amount of such bond was fixed at $300, which was duly executed and approved by the court within the time allowed by law. This bond was signed by Thomas Gannon personally, and also by him as administrator of the estate of Maggie Gannon, deceased, appointed by the county court for Lawrence county, South Dakota, and also by the proper sureties. The obligee named in the bond was "the state of Nebraska." A duly certified transcript of the proceedings in the county court was filed in the district court on August 5, 1899, within the time prescribed by law. J. R. Phelan, as administrator, thereupon filed a motion to dismiss the appeal on the following grounds: "(1) That said appeal has not been had nor taken in the manner required by law; (2) that

no bond upon or for such appeal has been given or executed by appellants as required by law; (3) that appellants are not authorized by law to unite in the appeal of said cause to this court; (4) that the appellants are not and were not aggrieved by the order or decree appealed from, had and rendered by the court below; (5) that Thomas Gannon, as administrator, under appointment in the state of South Dakota, is not entitled to appeal this matter to this court, it appearing that appellee herein has been appointed as administrator of the estate of said deceased within the state of Nebraska, nor are said two appellants entitled jointly to have or maintain this appeal to this court." This motion was sustained and the appeal dismissed. To reverse this order Thomas Gannon prosecutes error.

The first and second subdivisions of the motion can be considered together, as they relate to objections based upon the form of the undertaking for appeal. The record shows that the appeal bond was filed within the time prescribed by law, and was duly approved by the judge of the probate court. This bond, however, ran to "the state of Nebraska" as obligee, instead of to the judge of the probate court, as required by section 311 of chapter 23 of the Compiled Statutes of 1901. It is urged that this defect is fatal to its validity, and that the district court acquired no jurisdiction of the case, and hence a dismissal of the appeal was the proper order to be made. The undertaking, although informal and irregular, is not, in our opinion, void, and was sufficient to invest the district court with jurisdiction. In bonds of this character the obligee is only a nominal party, and under our practice a suit upon it would be brought, not in the name of the obligee, but in the name of the party entitled to the protection of the bond. Cases involving questions of similar import have been considered by this court, and bonds running to an obligee other than the obligee designated by the statute have been held to be good. In the case of *Huffman v. Koppelkom*, 8 Nebr., 344, it was held: "The official bond of a sheriff is not void by

reason of its being given to the state, instead of the proper county, as obligee. This is but an irregularity which in nowise affects the liability of the sheriff or his sureties, in an action thereon for damage occasioned by official misconduct." In *Thomas v. Hinkley,* 19 Nebr., 324, it was held that a liquor dealer's bond, given to the village of Hebron instead of the state of Nebraska, was not therefore invalid, and that an action could be maintained upon it by any person aggrieved. But, conceding that the bond was irregular in form, and open to attack, the proper practice was for the district court to have required an amended bond to be filed within a reasonable time, and then, if not complied with, to enter an order of dismissal. In *Chase v. Omaha Loan & Trust Co.,* 56 Nebr., 358, an appeal bond had been signed by a practicing attorney, who, under the provisions of the statute, is not a proper person to become surety upon an appeal undertaking. On motion, the appeal was dismissed for want of a proper appeal bond. The court said: "If the appellee was dissatisfied with the appeal bond for any reason, the appropriate practice would have been to file a motion in the appellate court for an order requiring a change or renewal of the bond within a time to be fixed by the court, and on a failure to comply with such order enter a dismissal. *Galligher v. Wolf,* 47 Nebr., 589. The district court gave no opportunity to the appellant to give a new bond, but peremptorily dismissed the appeal. This was substantial error." *Rube v. Cedar County,* 35 Nebr., 896. In *Jacobs v. Morrow,* 21 Nebr., 233, it is said: "Where a bond has been duly approved by the officer whose duty it was to approve the same, it will be presumed that it conformed in all respects to the requirements of such officer, and it will not be void, even though some of the formalities of the law have not been complied with, provided the bond is filed within the time fixed by statute. The appellate court may permit or require a new bond to be filed, and will not dismiss an appeal where it is possible by an amendment to correct or replace an erroneous bond."

The other grounds of objection urged by the motion are, we think, without merit and to avoid repetition, will be considered together.

The record shows that Thomas Gannon was the surviving husband of Maggie Gannon, deceased. He was an interested party in the distribution of the assets of the estate. As the husband of the deceased, he was entitled to a life estate in the real estate, and entitled to an accounting from the administrator for the rents collected by him during his incumbency of the office of administrator. The order complained of, approving the final account of the administrator and distributing the assets, was one which affected him, and from which he had the right to appeal. Section 42 of chapter 20 of the Compiled Statutes provides as follows: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." It seems clear that under this section Thomas Gannon had the right to appeal. The mere fact that the bond was also signed by "Thomas Gannon, as administrator of the estate of Maggie Gannon, deceased, duly appointed, qualified and acting in the county court of Lawrence county, South Dakota," does not in any manner affect the rights of Thomas Gannon individually in this appeal. We do not deem it necessary to a determination of the case now before us to decide whether Thomas Gannon, as administrator, was an interested or "aggrieved party," so as to entitle him in his official capacity to take an appeal from the order of the county court. If he was, there is no reason why he might not have joined with Thomas Gannon as an individual in this appeal. If he was not, then that portion of the bond and proceedings in appeal referring to him in his capacity as administrator may be treated as mere surplusage. The appeal brings the entire case up for review. The rule is now firmly established that, when any party or parties affected by a judgment or order file a sufficient bond, and

afterwards file a transcript within the time provided by law, the appellate tribunal is possessed of jurisdiction of the case. *McHugh v. Smiley,* 17 Nebr., 626; *Claflin v. American Nat. Bank,* 46 Nebr., 884. The appeal in this case does not involve any question as to joint or separate proceedings which might arise in a petition in error. Whether the appeal could be properly taken by Thomas Gannon personally, or by him as administrator, or whether he could appeal in both capacities, were not matters to be determined on a motion to dismiss the appeal. The fact that some one who was interested and affected by the order complained of had executed the required undertaking, which was duly approved, and that a transcript was filed in due time in the district court, was sufficient to give the court jurisdiction. In *Bower v. Cassels,* 59 Nebr., 620, it is held that an objection because of an alleged defect of parties "goes to the merits of the case, and can not be disposed of on a motion to summarily dismiss the appeal."

We are convinced that the district court erred in dismissing the appeal. We therefore recommend that the judgment be reversed and the cause reinstated in the district court.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause reinstated for further proceedings.

REVERSED AND REMANDED.

JAMES R. C. FIELD ET AL. V. NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY.

FILED MARCH 19, 1902. No. 11,267.

Commissioner's opinion, Department No. 1.

1. **Insurance**: MUTUAL BENEFIT ASSOCIATION: PAYMENT OF ASSESSMENTS: DEFAULT: SUSPENSION WITHOUT NOTICE: BY-LAWS: SELF-EXECUTING PROVISIONS. By-laws of a mutual benefit association, providing for the payment of assessments made during the month on a certain day, and for suspension, without notice, of members in default, are self-executing, and the suspended member is not entitled to notice.

2. **Local Council**: FINANCIAL SECRETARY: IMPLIED AUTHORITY: PAYMENT OF ASSESSMENTS: WAIVER. The financial secretary of a local council in such an order has no implied authority to waive any of the provisions of the by-laws governing the payment of assessments.

3. **Sick Benefits**: BY-LAWS. In order to obtain sick benefits as provided in the by-laws, a member must bring himself within their terms.

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

F. N. Prout, Griggs, Rinaker & Bibb and *S. D. Killen,* for plaintiffs in error.

George A. Huron and *George A. Murphy, contra.*

DAY, C.

The plaintiffs bring this proceeding in error to review a judgment of the district court of Gage county, based upon a verdict for the defendant returned in obedience to the peremptory direction of the trial court. The defendant is a fraternal mutual benefit association organized under the laws of the state of Kansas, with its head office at Topeka, and licensed to transact business in Nebraska. The defendant organization is founded upon the lodge system, with subordinate councils in various cities, having a ritualistic form of work, and embracing in its scope fraternal

and social features, as well as indemnity in case of disability or death. The insured died April 14, 1897. In her lifetime, Jennie E. Field became a beneficiary member of one of these subordinate councils, located in the city of Beatrice, Nebraska; and on January 14, 1895, there was issued to her a beneficiary certificate, whereby the defendant agreed in case of her death to pay to certain beneficiaries named therein the sum of $3,000, subject to certain conditions and stipulations, one of which was as follows: "This certificate is issued upon the express condition that the said insured shall, in every particular, while a member of the order, comply with all the laws, rules and requirements thereof, and shall at her death be a member in good standing of said order." The by-laws of the association provided for the payment by its beneficiary members of certain fixed assessments upon the death of any member entitled to participate in the beneficiary fund, which sum was to be paid to the local treasurer of the council within a given period, and in default of such payment the beneficiary certificate lapsed and became suspended. The by-laws also contained provisions for suspension of its beneficiary certificates for the non-payment of quarterly dues. The by-laws also contained liberal provisions for the reinstatement of any suspended member within a given period from the date of suspension. These need not be set out, as it is not contended that the insured was reinstated after her suspension. Section 11, article 14, of the by-laws provided as follows: "Any member suspended or expelled from the order for any cause whatever, forfeits all claims to the beneficiary fund during said suspension or expulsion." The record is clear that the insured did not pay the assessment made for the benefit of the beneficiary fund for the month of June, 1895, or for any of the following months during that year, although assessments were made in each month. Neither did she pay her quarterly dues during that period. For the failure to pay the dues and assessments she was suspended by the action of the local council, and her name was stricken

from the rolls of the local council, as well as the national council, in July, 1895. No attempt was made to be reinstated, although her husband, who transacted the business for her, was repeatedly importuned by members of the local council to pay up the arrearages and have her reinstated. The plaintiffs do not deny the failure of the insured to pay the assessments and dues, or that she was suspended for such failure, but seeks to avoid the effect thereof upon three grounds, which will now be considered.

It is first insisted that the insured never had any notice of her suspension from the local council, and therefore she is not bound thereby. A careful examination of the rules respecting the suspension of members indicates that no notice of suspension to its members is required. In this respect the rules are self-executing. Section 3, article 14, of the by-laws refers especially to the subject of suspension for the non-payment of assessments, and, among other things, provides as follows: "The certificate of each member who has not paid such assessment on or before the 28th of said month shall, by the fact of such non-payment, stand suspended, and no action on the part of the council or any officer threeof shall be required as essential to such suspension." These provisions of the by-laws are clear and explicit that no notice of suspension is required.

The next contention of the plaintiffs is based upon the plea of a waiver of the prompt payment of the dues and assessments by an agreement with the financial secretary of the local council, whereby the time of payment of the beneficiary assessments on the certificate was extended to January, 1896. The testimony of the plaintiffs and defendant upon this phase of the case presents the only conflict of evidence in the record. The husband of the insured testified that he paid the dues of his wife owing to the local council up to and including July, 1895, and at that time he had a conversation with the financial secretary of the local council, which is developed by the following questions and answers:

Q. Now just state to the jury what conversation you

had, if any, in July, 1895, with H. S. Woodruff, financial secretary of the defendant, the Knights and Ladies of Security, in relation to the further payment of assessments and local lodge dues for the next ensuing six months.

A. Why, I went to Mr. Woodruff's place of business and he told me that I didn't need to pay the assessment. He said that I could let it run until January, and wouldn't be running any risk whatever.

Q. What, if anything, did he say at that time in relation to paying the local dues?

A. Why, he said if I kept up the local dues, why the others could run six months. That would be January, 1896.

Q. In relation to all other dues and assessments, except the local dues, what did he say in relation to giving time upon them, if anything?

A. Why, he said if I would pay the local dues, why I could have six months' time on the other, and wouldn't be running any risk.

The testimony was received over the objection of the defendant that it was seeking to change the constitution and by-laws of the national council in relation to dues, fees and assessments by the parol evidence of a subordinate officer of the local lodge. While this evidence respecting the extension of time of payment, etc., was denied by Woodruff, the former financial secretary of the local council, still, if it was competent to be considered in evidence, then a disputed question of fact is presented, which, under the well recognized rule in this state, should have been submitted to the jury. We do not think the evidence of Field, above quoted, was admissible. Nowhere in the constitution and by-laws of the defendant society is authority conferred upon the financial secretary of a subordinate council to make the contract claimed to have been made, or to waive the prompt payment of the assessments. It was not sought to be shown that Woodruff had any special authority to make the agreement. His official position as an officer of the local council alone is relied upon as such

authority. The case of *Borgracfe v. Knights of Honor*, 22 Mo. App., 127, is so in point upon the question here presented that we quote therefrom with approval as follows: "The subordinate lodges are no doubt the agents of the supreme lodge in dealings with the members for many purposes, and in those cases where the subordinate lodges act through their ministerial officers, and where the latter act is in conformity with the rules governing the lodges and the order, these officers may become *pro hac vice* the agents of the subordinate lodges. But it is not shown to us that these officers are anywhere endowed with power to set aside the rules of the order, or that the subordinate lodges are endowed with such a faculty. On the other hand, it is perceived by the provisions of the laws of the order above quoted, that no grand lodge has power even to alter or amend the laws governing the subordinate lodges. The doctrine of waiver, which is often appealed to to prevent forfeitures in the case of policies of insurance, has no application to the forfeitures of memberships in these orders. The laws and rules governing the different branches of such an order are in the nature of contracts among all the members, and, considering the widespread extent of these organizations, and the very great extent to which these schemes of benevolence have taken the place of life insurance, especially among the working classes, it is highly important as a principle of public policy that, in cases of this kind, their rules and regulations should be substantially upheld by the judicial courts." *State v. Temperance Benevolent Ass'n*, 42 Mo. App., 485; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass., 368; *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep., 450; *Rood v. Railway, etc., Ass'n*, 31 Fed. Rep., 62.

Lastly it is urged that by reason of the sickness of Jennie E. Field, from which she never recovered, she was not bound to pay her beneficiary assessments, but, under the rules of the society, it was the duty of the subordinate council to pay the same, and keep her in good standing in the order. The constitution contains a provision respect-

ing sick benefits to be paid to those members who are unable to follow their usual business avocations, but only in the manner prescribed by the by-laws. The receipt of these benefits by any member of the order is conditioned upon the member coming before the council and making a statement "that owing to sickness of himself or family, or from lack of employment, that he is unable to pay his assessment." It is then made the duty of the president to appoint a committee of three to look into the matter, and if they find the case as stated, the council shall then keep the member in good standing until such time as the member is able to resume his payments. There is no proof in the record which even tends to show that the insured ever took any of the necessary steps to entitle her to receive sick benefits, or to impose upon the local council the duty of keeping her assessments paid.

There was no competent testimony which raised a disputed question of fact, and it was therefore the duty of the court to direct a verdict. We think the action of the trial court in directing a verdict for the defendant is clearly right.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—The following decision has been rendered by the State Insurance Department:

"LINCOLN, NEBR., Sept. 11, 1902.—*Hon. W. F. Bryant*—DEAR SIR: Replying to your favor in the matter of beneficiary under a certificate issued by a fraternal beneficiary society, or more particularly whether or not an organization known as the Franciscan Sisterhood can under our laws become a legal beneficiary, and if not can payment by such a society be legally made to a grandson of the insured?

"The general rule is that where a statute of a state designates who can become beneficiaries then no others can be made the legal beneficiaries. The laws of this state authorizing such companies to in-

corporate or transact business in the state in section 94, chapter 43. Compiled Statutes, provides that 'payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of or to persons dependent upon the member.' I am of the opinion that as such organizations as the Franciscan Sisterhood or any other organization is not mentioned or contemplated in the law, in case of death of the insured payment under a certificate could not legally be made to such a sisterhood.

"I am also of the opinion that a grandson of insured is not such relationship to insured as is contemplated in the section above recited; consequently could not legally become the beneficiary under a certificate issued by such an order. If the grandson is under age, it might be possible for the insured to adopt him and thereby make him the legal beneficiary. Yours truly,

"CHARLES WESTON, *Auditor.*

"H. A. BABCOCK, *Deputy, Insurance Department.*"

Insurable Interest in the Life of the Assured.—Policy payable to religious society—on the life of one of its members. *Trinity College v. Travelers' Ins. Co.*, 18 N. E. Rep. [N. Car.], 175.

Relatives.—"The natural affection in cases of this kind[,] is considered more powerful—as operating more efficaciously—to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured." *Warnock v. Davis*, 104 U. S., 779. A *sister* has an insurable interest in the life of a *brother* from mere relationship. *Ætna Life Ins. Co. v. France*, 94 U. S., 561; but see *Lord v. Dall*, 12 Mass., 115, 7 Am. Dec., 38. A *brother* has no insurable interest in the life of a *brother*. *Lewis v. Phœnix Mutual Life Ins. Co.*, 39 Conn., 100. A *wife* has an insurable interest in the life of her *husband*. Divorce subsequent to such policy, does not vitiate such policy. *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S., 457; *McKee v. Phœnix Ins. Co.*, 28 Mo., 383. A woman living with a man to whom she is not married, has an insurable interest in his life. *Equitable Life Assurance Society v. Paterson*, 41 Ga., 338. If the beneficiary is the wife of the insured, the fact that she is named in the policy by another name, does not vitiate the policy. *Durian v. Central Verein*, 7 Daly [N. Y.], 168. A *fiancée* has an insurable interest in the life of her *betrothed husband*. *Chisholm v. National Life Ins. Co.*, 52 Mo., 213. Mere relationship does not give the *son* an insurable interest in the life of the *father*. *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill., 35, 22 Am. Rep., 180. A *grandson* has an insurable interest in the life of a *grandfather* who resides with him. *Elkhart Mutual Aid Ass'n v. Houghton*, 103 Ind., 286. A *mother* has an insurable interest in the life of her *son*. *Reef v. Union Life Ins. Co.*, cited 18 Central Law Journal, 347. An *adopted son* has an insurable interest in the life of his *foster father*. *Carpenter v. U. S. Ins. Co.*, 28 Atl. Rep., [Pa.], 943. Mere relationship does not give a *daughter* an insurable interest in the life of her *mother*. *Continental Life Ins. Co. v. Volger*, 89 Ind.,

572. A *grandchild* has no insurable interest in the life of a *grandparent*. *Burton v. Connecticut Mutual Life Ins. Co.*, 119 Ind., 207. An *uncle* has no insurable interest in the life of a *nephew*. *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo., 63, 27 Am. Rep., 321. A *nephew* has no insurable interest in the life of an *aunt* (*Appeal of Corson*, 113 Pa. St., 438); nor a *son-in-law* in the life of a *mother-in-law* (*Rombach v. Piedmont Ins. Co.*, 35 La. Ann., 233). In a number of cases, it has been declared that relationship *ipso facto* gives the *parent* an insurable interest in the life of the *child*, except (as stated in some cases) when the child is of age, and *vice versa*. *Mitchell v. Union Life Ins. Co.*, 45 Me., 104. *Valley Mutual Life Ass'n v. Teewalt*, 79 Va., 421.—REPORTER.

DAVID C. JOHN, APPELLANT, V. WIELIAM J. CONNELL ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 9,373.

Commissioner's opinion, Department No. 1.

1. **Board of Equalization:** MEETING: NOTICE. Where the record discloses that a board of equalization remained in session only a portion of the day provided for in the published notice, when a recess was taken subject to the call of the chairman, and no further meeting held until nearly thirty days thereafter, when, without a new notice, another meeting is held, at which final action is taken, *held*, that such action is not a compliance with the law requiring a meeting of the city council as a board of equalization for at least one day, between the hours of 9 A. M. and 5 P. M., and a special tax depending for its support upon such proceedings is invalid. *Medland v. Linton*, 60 Nebr., 249, followed.

2. **Levy:** SPECIAL TAX: FOOT-FRONTAGE: BENEFITS: EQUAL AND UNIFORM. Under the provisions of section 78, chapter 12*a*, Compiled Statutes 1893, in order to sustain a levy of special taxes according to the foot-frontage of the lots of real estate within the tax district, it must affirmatively appear from the record that the council, sitting as a board of equalization, found that the benefits were equal and uniform as to all the lots and tracts to be affected by the proposed improvement.

3. **Former Opinion Modified.** Former opinion in this case (*John v. Connell*, 61 Nebr., 267) modified so far as it is inconsistent with the views herein expressed.

APPEAL from the district court for Douglas county. Heard below before POWELL, J. Rehearing of case reported in 61 Nebr., 267. *Judgment below affirmed in part.*

Henry P. Leavitt, for appellant.

Connell & Ives, contra.

KIRKPATRICK, C.

This case is again before this court for determination, a rehearing having been allowed. The prior opinion of this court is reported in 61 Nebr., 267. We are asked upon this rehearing to examine only the question concerning the validity of the sewer tax, which the trial court held invalid, and which in the former opinion was held valid. It will not be necessary herein to restate the pleadings, issues and the relations of the several parties to the case. Regarding the question now to be determined, this court, in the former opinion, said: "Our examination of the record has not revealed any vital infirmity in the proceeding which resulted in the levy of the sewer tax, and defendant has not pointed out, or even suggested, the existence of any substantial defect in such proceeding. We conclude, therefore, that the special sewer tax is valid, and that the court erred in not enforcing it." Appellee, in his motion and brief on rehearing, calls attention to the fact, which before was not brought to the notice of the court, that this question was not properly before the court at the former hearing; the decree of the trial court having been that the sewer tax was invalid, and appellant, John, not having filed his brief here upon this question within the time required by the rules, appellee Connell having had no notice that appellant, John, had filed his brief upon this question out of time. In view of these facts, this rehearing has been granted, and the only point, therefore, requiring reexamination, is whether that portion of the decree of the trial court holding the sewer tax invalid, from which appellant,

John, attempted to appeal, was properly reversed, and the special sewer tax held valid.

It is now contended by appellee Connell that the sewer tax was illegal and void for the following reasons: First, that the board of equalization failed to comply with the law in respect to remaining in session for one day, between the hours of 9 A. M. and 5 P. M., to hear complaints regarding the assessment; and that the board of equalization made no finding authorizing the levy by front-footage, and that no final action whatever was taken by the board; second, that no assessment was in existence or had been made at the time the council, sitting as a board of equalization, claimed to have held its meeting; third, that no notice of the meeting of the board of equalization was published as required by law, and that the notice as published was insufficient. These objections, so far as necessary to a correct disposition of the question now before the court, will be taken up in the order named.

The authority to levy the tax complained of is found in section 78, chapter 12*a*, Compiled Statutes, 1893, by the terms of which the city, by its proper officers, is authorized to levy a tax for the construction or reconstruction of sewers or drains within the city limits; the taxes to be assessed against the real estate lying within the sewerage district to the extent of the benefits to such property by reason of the improvement. These benefits are to be determined by the council, sitting as a board of equalization, after notice to property owners, as in the case of other special assessments. Section 85 of the same act provides: "In all cases before any special taxes that may be levied, except for constructing wood sidewalks, shall be finally levied, it shall be the duty of the council to sit as a board of equalization for the purpose of equalizing any such proposed levy of special taxes or assessments and correcting any error therein, giving notice of such sitting in the same manner as above provided in this section, stating in such notice the purpose for which it will sit, and it shall continue such session not less than one day, from nine A. M.

to five P. M., and at such session it shall hear all complaints," etc. It is disclosed by the record in this case that a meeting of the city council of the city of Omaha was held at the office of the city clerk, in the Douglas county court house, on the 13th day of July, 1891, in accordance with the terms of a notice published, which provided that the session should extend from 9 A. M. till 5 P. M. The record discloses that the members of the city council (naming them) met at the clerk's office on the day named, and organized as a board of equalization by electing one of their members as chairman. Some business was transacted, having no connection with the question under consideration, after which the record recites that the board, on motion, took a recess, to meet upon the call of the chairman. No other meeting appears to have been held until August 11, 1891, when the board of equalization was again in session, apparently upon the call of the chairman. Aside from this record, the only evidence is the testimony of one Cochrane, who was interested in some other matter, who appeared before the board on the 13th of July, who testified that the board took the recess mentioned in the minutes of the board prior to noon on that day. Is this a compliance with the plain provisions of the statute, requiring the council to remain continuously in session as a board of equalization for at least one day, from 9 A. M. until 5 P. M.? Clearly it is not. The language is too plain to admit of construction. Beyond question, it is the purpose of this enactment that the taxpayers whose property was to be affected should have an entire day, between the hours named, to appear and show any errors or irregularities that might exist in relation to such taxes. It is contended by appellant that section 78 of the act referred to above is complete in itself, and that no time is fixed therein during which the board of equalization must remain in session. We are unable to find merit in this contention. Section 85 of the same act, a portion of which has been quoted, provides that in all cases, before special taxes can be levied, the board must hold a meeting to hear complaints,

at least one day, between the hours named. This precise question has been before this court in the case of *Medland v. Linton,* 60 Nebr., 249, in which this court, speaking by HOLCOMB, J., held, in reference to a record almost identical with that in the case at bar, that the attempted compliance with this provision was insufficient to sustain a levy of special taxes. In that case it was held to be the settled rule in this state that compliance with the provisions requiring a minimum session of one day between the hours named was a jurisdictional prerequisite to the validity of the assessment sought to be made, and that its observance must appear affirmatively from the record; quoting with approval from *Smith v. City of Omaha,* 49 Nebr., 883. We have no doubt of the correctness of the rule announced in that case. It follows that, the city council having failed to meet as a board of equalization and remain in session for at least one day between the hours named, the attempted special assessment complained of was wholly void.

The next contention for consideration is that the special assessment complained of is illegal and void because the city council, as a board of equalization, in adopting the frontage rule for the purpose of making the levy, failed to make a finding as required by section 78, that the benefits arising from the construction of the improvement contemplated would be equal and uniform. It seems clear, from the plain provisions of the section referred to, that in order to authorize a levy according to the front foot of the lots of real estate within the sewerage district, the council, sitting as a board of equalization, must have found that the benefits would be equal and uniform upon all the lots, tracts and parcels of land in the district. The record wholly fails to disclose that any such finding was made, or that the board took the same under consideration. There can be no question that such a finding is a jurisdictional prerequisite to the levy of a special tax in the manner attempted. *Hayes v. Douglas County,* 65 N. W. Rep. [Wis.], 482, 486; *State v. City of Hudson,* 29 N. J. Law, 104; *Liebermann v. City of Milwaukee,* 89 Wis., 336.

From what has been said, it clearly appears that the judgment of the trial court in holding this special sewer assessment invalid was right. It is therefore recommended that the opinion heretofore rendered in this cause, reported in 61 Nebr., 267, be modified to the extent that it conflicts with the views herein announced, and that the judgment of the trial court, holding the sewer tax invalid, be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is modified and the judgment of the district court holding invalid the special sewer tax affirmed.

JUDGMENT ACCORDINGLY.

NOTE.—The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation, but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment. *Norwood v. Baker*, 172 U. S., 269, opinion by Justice Harlan, Brewer, J., dissenting. In the case just cited, a village corporation by its council condemned certain land for a street extension. In a condemnation proceeding, the jury fixed the damages at $2,000. As the extension of the street passed through the land, the special assessment by front foot was assessed for each side of the street, and amounted to $2,218.58, or $218.58 in excess of verdict for damages. The assessment was perpetually enjoined as in violation of the fourteenth amendment of the constitution of the United States.—REPORTER.

THEODORE F. DECKER, APPELLEE, V. RUDOLPH DECKER, APPELLANT, ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,396.

Commissioner's opinion, Department No. 1.

1. **Deed Absolute in Form:** GIVEN TO SECURE DEBT: PAROL DEFEASANCE. In equity an unrecorded deed absolute in form, given to secure a debt, with parol defeasance, is a mortgage; and when the debt secured thereby is paid, and the deed surrendered to the grantor for destruction, the lien of the mortgagee is extinguished, and the title revests absolutely in the mortgagor if the rights of innocent third parties have not intervened.

2. ———: ———: ———: POSSESSION: RENTS AND PROFITS. In such case, if the grantee in the mortgage deed takes possession of the premises under an agreement with the grantor or mortgagor that the rents and profits shall go to pay taxes and compensate the mortgagee for the trouble in caring for the premises during the mortgagor's absence, the mortgagee can not acquire title by adverse possession.

3. **Essence of Estoppel.** It is of the essence of estoppel that the estoppel asserter has relied to his disadvantage upon the conduct or silence of the other party.

4. **Estoppel:** KNOWLEDGE. Under the facts in this case, *held*, that defendant was not estopped from asserting his title to the land for having received his pro-rata share of rents and profits collected by the administrator who took possession of his land supposing it to be that of the intestate, he being at the time in a distant state, and there being nothing in the record to connect him with knowledge that the rents were derived from land to which he claimed title.

5. **Deed in Fact Mortgage:** FINDING OF TRIAL COURT CAN NOT BE SUSTAINED. Where the uncontradicted evidence shows that a deed, absolute in form, was in fact a mortgage, that the debt secured thereby had been discharged and the deed surrendered and destroyed, a finding by the trial court that the title vested in the grantee absolutely, and at her death descended to her heirs at law, can not be sustained.

6. **Evidence.** Evidence examined, and *held* not to sustain the finding and judgment of the trial court.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Reversed.*

Jefferson H. Broady and *J. E. Douglas,* for appellant.

Matthew Gering and *Beeson & Root, contra.*

KIRKPATRICK, C.

This is a suit brought in the district court for Cass county by Theodore F. Decker against Rudolph Decker and others to quiet title to the southeast quarter of section 7, town 12 north, range 11 east in said county and to have partition of the land. Plaintiff and the principal defendants in this suit are the children of Jefferson Decker and Rosan Decker. Theodore F. Decker, plaintiff, made all of his brothers and sisters defendants in this suit because they declined to join as plaintiffs. The real controversy is between Rudolph Decker, defendant, who was the owner of the land described, and all the other defendants, who were interested in having the land decreed to be a part of the estate of their mother, Rosan Decker, deceased. Some time prior to 1857, Jefferson and Rosan Decker, husband and wife, removed from Pennsylvania to Cass county, this state. Rudolph, their eldest son, patented the land in controversy in 1857, the patent being issued by the government in 1860. Some time in the year 1859 Jefferson Decker died, leaving a will, by which he bequeathed all of his property to Rosan Decker during her lifetime. Rudolph remained with his mother for some seven years after his father's death, helping to work the home farm, as well as improving the land in controversy. In 1864 or 1865 he decided to go to Montana or some other western state, and upon his departure executed to his mother a deed to the land in dispute, which was never recorded. Rosan Decker, the mother, died in 1892. She had been a very thrifty woman, kept and improved all the land owned at the death of her husband, looked after and improved somewhat the land in controversy, and at the time of her death had accumulated property of the value of $50,000, about $15,000 of which was in cash and on deposit in various

banks. Rudolph, after he left home in 1864 or 1865, came back twice, once in 1875 and again in 1884, and came back a third time shortly after the death of his mother. The other children had all married and left home, and for many years prior to her death the mother had lived alone or with her tenants, on the home place. Upon the death of Rosan Decker, an administrator was appointed, who took possession of the land in controversy, known as the "Rudolph Decker Quarter," in all respects the same as all other land belonging to the estate, looked after it, collected the rents, etc., pending the settlement of the estate. At or about the time of the mother's death, it was not known where Rudolph and one or more of the other brothers were, a belief prevailing that Rudolph was dead. J. G. Romine was made a party defendant, and filed a cross-bill setting up a judgment which he had obtained against Jefferson Decker, Jr., one of the heirs, claiming that the land in suit belonged to Rosan Decker, and that his debtor was one of the heirs, and that he was entitled to the payment of the balance due on his judgment from the eighth interest of this heir. Susan Grossclaude, one of the married sisters, filed an answer and cross-bill, setting up, among other things, that the land in controversy had belonged to Jefferson Decker, her father, and that, while Rudolph was permitted to enter the land in his own name, the land in fact belonged to Jefferson Decker during his lifetime, and therefore became the property of the estate. No testimony was offered in support of this answer and cross-bill. All other heirs made default. Trial was had to the district court, which resulted in a finding and decree adjudging the land to be the property of the estate of Rosan Decker, and ordering a partition of the premises. From this decree Rudolph Decker prosecutes appeal to this court.

There seems to be but a single question of fact involved in the case, namely, whether the land in controversy belonged to Rudolph or was the property of Rosan Decker, his mother, and hence that of the heirs at law, share and share alike. Appellant's contention in the trial court was

that the deed by him to his mother for the land, though absolute in form, was in effect a mortgage; was so understood by both parties; and was given to secure money advanced by his mother to him when he left home for the west; that the debt was subsequently paid, and the deed surrendered to him and by him destroyed. The testimony of appellees is that at the time Rudolph left home his mother took possession of the land, collected the rents, and paid all taxes thereon up to the time of her death. All the children of Rosan Decker who testified as witnesses agreed substantially that the mother always referred to this land as Rudolph's. Several of them testified that she had repeatedly said that she was taking care of the land for Rudolph, and that when he came back it should be his land. She said to her tenants frequently that the land belonged to Rudolph, and that she was merely taking care of it for him. To one of her sons, who lived near Ashland, Saunders county, and who was down to see her some time prior to her death, she said that Rudolph had paid her back all the money he had ever borrowed of her, and spoke of the land as Rudolph's. When Rudolph visited his home in 1884 he sought to induce his brother at Ashland to take charge of the land and rent it for him; but this brother declined to do so, saying that he had matters enough to attend to of his own. One of the daughters testified that at the time Rudolph left home it was agreed between him and her mother that the latter should have charge of the land, should pay the taxes, and have all proceeds to be used in taking care of it and helping to support the younger children; that the mother told Rudolph she would do this, and take care of the land for him. Upon Rudolph's return in 1875, she said, in the presence of the daughter last mentioned, that she was glad he had come back home, and that now he could take care of his own land, and that she had enough things to look after without that. When Rudolph came back he assisted in putting down a well on this land, did some other work there, and also took some corn from the place for feeding purposes.

Theodore Decker, plaintiff in the suit, did not appear at the trial, but gave his deposition, the material part of which is as follows:

Q. When did you last see your brother Rudolph?

A. I think it was in 1862 or 1863.

Q. Are you acquainted with the southeast quarter of section 30, town 12, range 11, Cass county, Nebraska, being the land entered by your brother Rudolph?

A. I am.

Q. Who occupied this land from 1857 till you left Nebraska in 1864?

A. My mother, Rosan Decker.

Q. Was it occupied or controlled by your mother?

A. Yes, occupied and used.

Q. Did your brother Rudolph have anything to do with it?

A. Yes, he owned it.

Q. When did your brother leave Nebraska,—before or after you did?

A. I can't say.

Q. Do you know whether or not he ever claimed to own the land?

A. I do. He did own it.

Rudolph swears that at the time he left home he borrowed $300 from his mother, and gave her a deed to the land, to be held by her as a mortgage until such time as he could pay the debt; that his mother was to take care of the land for him as his tenant, and was to have all the proceeds of the farm after paying the taxes; that some years later he repaid this money to his mother, and that thereupon she gave up the deed, which he had given as a mortgage, and that he destroyed it in her presence; that during all of the time his mother had control of the premises she had control and was taking care of them for him; that he had never conveyed to her the title; and that he had always owned the land, and had always claimed it.

It is suggested that the testimony of Rudolph is inadmissible in this case, for the reason that appellees are rep-

resentatives of a deceased person, and that under the statute Rudolph could not give in evidence a transaction between himself and the deceased mother. Upon this question it may be said that the greater part of Rudolph's testimony seems to have been admitted without objection. Counsel for appellees in their cross-examination went over the entire direct testimony of Rudolph, and required him to state several times over the entire transaction between himself and his mother, which consisted in his borrowing $300 and giving his mother a deed for the place, which was intended to be a mortgage, and was to be held as such and was not to be put upon record; his repayment of the amount of money he had borrowed; the surrender to him by his mother of the deed and his destroying it. Appellees having themselves brought out this testimony from Rudolph, they are not now in a position to have the same excluded or to ask this court not to consider it. Again, it may be said, that if the testimony of Rudolph Decker is excluded, there is absolutely no competent evidence that the deed was ever executed and delivered to his mother, and appellees would be in no better position.

At the mother's death there was found in her room more than $5,000 in gold and silver, and the patents for all of her land, and also the patent for Rudolph's land. None of these patents had ever been recorded. But the deed which Rudolph had given her was not found among her papers. This tends to support Rudolph's testimony that it was given up and destroyed. When the administrator of Rosan Decker was appointed and took possession, he assumed charge of this land, as well as the remainder of the estate, the rents collected therefrom being divided among the various heirs the same as proceeds from the estate, and the share belonging to Rudolph, with other moneys due him from the estate, was sent to him in Texas. These facts were shown by appellee for the purpose of estopping Rudolph from now claiming title to the land. His receiving the money can not be said to have such effect. There is nothing in the testimony to show that Rudolph knew what

was being done by the administrator, or that he knew that any part of the money sent him was a part of the rent derived from his own land.

The testimony relied upon by appellees to sustain the finding of the trial court is that of the witness Romine, who testified that it was his understanding from what Rosan Decker told him that she had let Rudolph have some money and that he had deeded to her the land. The witness testified that he had no knowledge whether the instrument was intended as a mortgage or a deed, or whether Rudolph repaid the money to his mother. Concerning this testimony, it may be said, first, that, aside from what is given by way of declarations coming from Rudolph Decker, it has no probative value whatever. The witness claims his memory is poor, and does not attempt to give more than his understanding of the matter. He had seen the deed after Rudolph had left, but he could not say in what year. He said the deed had been acknowledged before some justice of the peace, but he did not remember the name of the justice, and he was unable to say whether or not the deed had been witnessed. Testimony of this character will not support a finding and judgment which deprives a party of his title to real property. All the witness said might be true, and in no way conflict with the testimony of Rudolph and other witnesses, and in no way tends to support the allegations of the petition. The witness does not pretend to testify to statements made by Rosan Decker, but merely gives his understanding derived from such statements. In so far as this testimony purports to give declarations of Rosan Decker, it is clearly inadmissible, as being hearsay. Rosan Decker herself, if living, and the plaintiff in this action, would not have been entitled to have these declarations admitted in her favor, and the rule is equally well settled that after her death such declarations are inadmissible. The rule is that declarations or admissions made by a party when in possession of real estate, and afterwards deceased, are admissible as competent evidence to show the character of his possession, but not for the pur-

pose of building up or destroying the record title. *Sutton v. Casselleggi,* 5 Mo. App., 111. In the case cited it is said: "Declarations by a party in possession are admissible to show the nature of his possession, or under what title he claims to hold, but such declarations can not be made to prove the title itself." The same rule is followed in *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S., 379. In that case it is said: "Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title." The same doctrine is announced in *Mooring v. McBride,* 62 Tex., 309; *Osgood v. Coates,* 1 Allen [Mass.], 77; *Gilbert v. Odum,* 69 Tex., 670, 7 S. W. Rep., 510; *Morrill v. Titcomb,* 90 Mass., 100. The rule is equally well settled and established by authority that declarations of one in possession of land in disparagement of his own title are admissible against him and those claiming under him. *Osgood v. Coates, supra.* On the other hand, the evidence of the plaintiff in the action, to the effect that the title was in Rudolph, it being his property, as well as the testimony of the other children of the deceased mother to the same effect, and that the mother had repeatedly declared that the land belonged to Rudolph, and had always characterized the land as that of her absent son, and that she was merely taking care of it for him, is entitled to great weight, not only because in so testifying they gave evidence against their own interests, but because the declarations of the decedent were against interest, or in disparagement of title. *Potter v. Waite,* 55 Conn., 236, 10 Atl. Rep., 563; *McLeod v. Swain,* 27 Am. St. Rep., 229. Appellees' testimony is in no way inconsistent with or contradictory of the evidence of Rudolph that he owned the land in controversy. All the evidence offered by appellees may be admitted to be true, and yet in no way tend to establish that the land in controversy was the land of Rosan Decker. The evidence of Rudolph alone, even if it had not been corroborated, would be sufficient to establish his title to the land; for the undisputed reasonable testi-

mony of one witness, though a party to the action, is entitled to controlling weight in determining a question of fact. *Burnham v. Norton,* 100 Wis., 8. It follows that the judgment of the trial court is not sustained by sufficient competent evidence. The testimony of Rudolph Decker is clear and convincing that at the time he gave the deed to his mother, it was simply as a mortgage securing a loan, that he had paid the debt, and that the instrument was given up and he destroyed it. This is strongly corroborated by the testimony of the other heirs. This being true, Rosan Decker never had the title, and whatever right she had as mortgagee was divested by the payment of the debt and the surrender and destruction of the deed. *Schade v. Bessinger,* 3 Nebr., 140; *Commonwealth v. Dudley,* 10 Mass., 402; *Farrar v. Farrar,* 4 N. H., 191; *Mussey v. Holt,* 24 N. H., 248, 252. The testimony of Rudolph also shows, and this is corroborated by that of the other heirs, that his mother had possession for him. This being true, the heirs could acquire no right under claim that her possession was adverse. *Johnson v. Butt,* 46 Nebr., 220; *O'Boyle v. McHugh,* 69 N. W. Rep. [Minn.], 37.

It is contended by counsel for appellees that appellant should not have been permitted to introduce any evidence to show that the instrument he gave was in fact a mortgage under an answer which in effect amounted to a denial. The cause was tried upon an amended reply filed and relied on by appellee, a portion of which is as follows: "Further replying to said answer the plaintiff alleges that the deed for the premises in controversy made and executed by defendant Rudolph Decker to the said Rosan Decker, was absolute, and was delivered to her by the said defendant without any conditions whatever attached thereto." This reply squarely puts in issue the question which was really tried, namely, whether the conveyance made by Rudolph was in fact a deed or a mortgage. This is sufficient to dispose of the question suggested by appellees, even if it had other and further merit.

In this case the evidence discloses that Rudolph Decker

pre-empted the land, paid the government price and that the patent therefor was issued to him by the government. His title seems to have been perfect. It is certain that no consideration has ever been paid to him at any time for parting with the title. He was directed by his father, while on his death-bed, to remain with his mother, and work for her support, and to assist her in caring for and rearing the smaller children. This he seems to have done, remaining with his mother and working for her after his father's death for a period of seven years, and when he did leave gave into his mother's possession his land, exacting only, as rent therefor, the payment by her of the taxes. She kept this land with her estate and reaped the benefits from it for twenty-five years. It is inequitable and unjust to deprive him of the title to his land without consideration upon evidence so slight and unsatisfactory as that found in the record. The finding and judgment of the trial court clearly appear to be wrong, and should be reversed and set aside, and a decree entered in this court dismissing the petition of appellee Theodore F. Decker, and the cross-petition of J. G. Romine and Susan Grossclaude, and quieting the title of appellant Rudolph Decker to the premises in controversy.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and decree entered here dismissing the petition and cross-petitions of appellees and quieting title in Rudolph Decker.

JUDGMENT ACCORDINGLY.

KATE BLUMER, APPELLEE, V. EDWIN ALBRIGHT ET AL., APPELLANTS, ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,640.

Commissioner's opinion, Department No. 1.

1. **Homestead: ABANDONMENT.** A departure from the homestead for the purposes of business, pleasure or health, does not constitute an abandonment thereof, unless coupled with such departure is the intention not to return; and the wife can not be deprived of her homestead right unless she participated in the intention not to return.

2. ———: **CONVEYANCE: ACKNOWLEDGMENT.** Under the laws of this state, the acknowledgment of the wife to a deed conveying the homestead is essential to its validity.

3. **Evidence.** Evidence examined, and *held* to sustain the findings of the trial court that the premises in controversy were the homestead of appellee, and that she did not voluntarily execute the deed of conveyance.

APPEAL from the district court for Dodge county. Heard below before ALBERT, J. *Affirmed.*

Brome & Burnett and *A. G. Ellick,* for appellants.

Frank Dolezal, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Dodge county by Kate Blumer against Edwin Albright and Lizzie Albright, his wife, and E. F. Blumer, husband of plaintiff, for the purpose of procuring the cancelation of a deed of conveyance alleged to have been executed by Kate Blumer and her husband to Edwin Albright, defendant, upon certain lots in the village of Scribner, in Dodge county. Plaintiff alleged in her petition that she was a married woman, that her husband, E. F. Blumer, was made a defendant in the action because he refused to join with her as plaintiff; that they are the owners of lots 1 and 2 in block 5 in the village of Scribner, county of Dodge, and

that the same constitute the homestead of herself and husband; that they have two children; and that on or about the 28th day of December, 1897, the defendant Edwin Albright procured the deed in controversy from her by duress and fraud; and that the description of the property in the deed was so fatally defective that it was ineffectual to convey the title. Edwin Albright, appellant herein, filed an answer, which was in effect a general denial. Trial was had, which resulted in a finding and judgment for Kate Blumer, canceling the deed of conveyance, and quieting the title to the premises in her and her husband. From this judgment defendant Albright prosecutes appeal to this court.

Appellant contends, first, that the property in question is not the homestead of appellee and of her husband; second, that the description of the property in the deed is sufficient; and third, that the execution of the deed by appellee was not obtained by fraud or duress. In the view we take of the case, it will only be necessary to consider the first and third contentions of appellant.

It is disclosed by the record that appellee and her husband, with their two children, resided in their home on the lots in question for a number of years prior to 1890 or 1891; that about that time appellant Albright, who was a brother-in-law of appellee's husband, E. F. Blumer, induced the latter to remove to the town of Beemer and go into partnership with him in the grain, coal and live-stock business. About the time this arrangement was entered into, appellee, with her husband and children, removed to Beemer, and resided in that village up to the time of the trial, some six or eight years. While there they occupied a house, the property of the partnership of Blumer & Albright, the rent for which was charged against Blumer on the firm books. The testimony is undisputed that during all this time appellee claimed the property in Scribner, which they rented to other parties, as her homestead. She refused to sell it on that account, and always expressed the expectation of going back to it to live; that she did not

expect to remain in Beemer more than five years. There can be no doubt from the evidence that appellee always regarded this property as her homestead, and at no time entertained an intention of abandoning it as such. The rule is well settled in this state that removing from the homestead and residing elsewhere for the purposes of business, health or pleasure, does not work an abandonment of the homestead unless coupled with such removal is the intention not to return. *Dennis v. Omaha Nat. Bank,* 19 Nebr., 675; *Edwards v. Reid,* 39 Nebr., 645; *Quigley v. McEvony,* 41 Nebr., 73, 85; *Mallard v. First Nat. Bank,* 40 Nebr., 784, 789.

It is contended with much earnestness and ability by counsel for appellant that the husband, being the head of the family, has the right to determine and control the domicile of the family, if he acts in good faith and not fraudulently; that by removing from the homestead, and taking up his abode elsewhere, he can divest both himself and his wife of their homestead right; especially is this true, it is contended, where the wife and family accompany the husband to the new abode. Many cases from other states than our own are cited in support of this doctrine. We are unable to adopt this view. It seems very clear from an examination of the provisions of our statute relating to homesteads that the purpose of the legislature was to secure a home, not for the benefit of the husband alone, or of the wife, but for the family as an entirety; and it is accordingly provided that no conveyance of the homestead can be made except by a deed in the execution of which both husband and wife have freely and voluntarily joined. Thus the husband is wholly deprived of his power of alienation unless with the free consent of his wife. To sustain the contention of appellant would result in permitting a dissolute and worthless husband, whose sense of responsibility for the preservation of the family had been blunted by vice and dissipation, to deprive his wife and family of the benefits of the homestead law by simply abandoning it and taking his family with him elsewhere, without regard

to the wife's wishes, rights or intentions; the husband thus being empowered to accomplish by indirection what the legislature has sought, by express provision, to prevent him from doing directly. It is not an uncommon thing that the wife, particularly in matters affecting the conservation of the home and the protection of offspring, is more prudent, alert and circumspect, and even tactful, than the husband. In view of the rule that after departure from the homestead, the burden is upon those claiming homestead rights to show that the departure was not coupled with the intention not to return (*Conway v. Nichols,* 76 N. W. Rep. [Ia.], 681; *Newman v. Franklin,* 28 N. W. Rep. [Ia.], 579), it is not difficult to conceive how the most grievous injustice might result in confining the inquiry as to intention wholly to the conduct and statements of the husband during the time the family lived elsewhere. The injustice of such a rule could not be better illustrated than in the case at bar. Ed Blumer, the dissipated husband, had grown careless and negligent in his marital obligations, and it is not unlikely that, if he at one time shared in the intention to return to the homestead at Scribner, he had lost all interest in that aspiration; while the wife, on the other hand, would naturally have had her intention in that respect strengthened, and would frequently have expressed that intention to her associates, as it amply appears from the record she did. The better rule, and one more in harmony with our statute and decisions, would seem to be as stated in Waples, Homestead & Exemption, page 582, that the wife "does not abandon her right by doing her conjugal duty in following her husband to another residence. The wife can not be compelled to elect between her husband and her homestead." We have no doubt that under the laws of this state, departure from the homestead can not be construed into an abandonment thereof, unless the intention not to return is shared in by both husband and wife. The testimony in this case clearly shows that the wife never intended to abandon the homestead, and therefore the finding of the trial court that the

property in controversy was the homestead of appellee and her husband is right.

The next question requiring consideration is whether the execution of the deed in question by the wife was procured by fraud and duress. The testimony shows that for some two or three years before the date of the signing of the deed the husband of appellee, E. F. Blumer, was for a considerable portion of his time in a state of intoxication; that on the day the deed was executed he was drunk, and came to the house in that condition, asking appellee whether she was ready to sign away her home, saying that he had been threatened with the penitentiary, to which she replied that she would not sign away her home, that it was the last thing they had, and that she would not give her consent to its going. Later in the day he returned, still intoxicated, in company with appellant Albright, his brother-in-law and partner, to whom the deed for the homestead was made, the attempted transfer appearing to have been undertaken in settlement of an indebtedness from Blumer to him growing out of the dissolution of the partnership. It seems that appellee and her two daughters were greatly excited, and were crying in consequence of the brutal conduct of the husband. The appellant Albright advanced toward appellee with clenched fist, saying, "Sign it, Kate, sign it, or you will sign it for the sheriff to-morrow," or words to that effect. Appellee asked Albright for what purpose she was asked to sign away her home, to which he replied that it was his business. The undisputed testimony discloses that the husband abused and scolded his wife, and that after he and appellant had been there for some time, the wife was finally brought to sign the deed, declaring, however, that she would never acknowledge it. In the evening the husband came with a justice of the peace to take the acknowledgment. They found appellee much excited, and still weeping, and when the justice of the peace asked her if she acknowledged the deed to be her voluntary act and deed, she promptly told him that she did not, and that she never would. It seems that two deeds

had been signed, one covering some lots in the village of Beemer, and appellee said that with reference to these she did not care, but that she never would acknowledge the execution of the deed covering her homestead to be her voluntary act. The justice thereupon said that under such circumstances he could not take the acknowledgment. He then informed her that he had been told that the latter deed was only temporary, and that her husband had the papers to show for it. She asked to see these papers, but the husband did not have them. She repeatedly stated to the justice that she would not acknowledge the deed to be her voluntary act, that she had been forced to sign it by being threatened with the sheriff; but she finally told him that he could go ahead and take the acknowledgment, still persisting that it was not her voluntary act. Under the statutes of this state the conveyance of a homestead without the acknowledgment of the wife is absolutely void. Compiled Statutes, ch. 36, sec. 4; *Horbach v. Tyrrell,* 48 Nebr., 514. And whether, under the facts in this case, the wife's acknowledgment is such as contemplated by the statute, even if it should be conceded that there was not duress within the legal signification of the term, may well be doubted. But we do not put the determination of the question upon that ground. It may be true that under the strict rule of the common law the acts complained of would not be sufficient to constitute duress; but it is very clear that the statement made by the husband of appellee that he would be sent to the penitentiary if she did not sign, his coercion in the way of abuse while in an intoxicated condition, and the physical demonstrations by appellant Albright, and the violent words used by him, had such an effect upon her mind that the act of signing was not one of her own free volition; that is, was not her act. No equities of any description existed in favor of appellant Albright. The appellee, at the time of the formation of the partnership, objected to it, and stated to Albright that she would not permit her homestead at Scribner to go into the business; that she was going to keep that; and that while

she might go to Beemer for a time, she would return again and occupy her home at Scribner. Not a dollar of consideration was paid her for the conveyance. Her husband, to whom she had a right to look for protection and counsel, had apparently turned against her, and while intoxicated, threatened and scolded her, till she was induced to sign the deed purporting to convey her homestead. This was sufficient to constitute duress and undue influence. It is impossible to read this record without reaching the conclusion that the signature and acknowledgment of appellee were extorted from her by coercion and duress exercised by her husband and appellant. Neither the statutes nor the courts of this state permit the homestead right to be taken this way. The trial court found that the conveyance was not the voluntary conveyance of the wife, and such finding seems to have abundant support in the testimony. In the case of *Munson v. Carter,* 19 Nebr., 293, this court said: "Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence." Again this court, in the case of *Hargreaves v. Korcek,* 44 Nebr., 660, said: "The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it and make that appear to be his act, which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract." Upon the question of duress by threats of imprisonment, it is said in the same opinion: "One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which

were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way. * * * In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's."

It seems very clear from the evidence in this case that the property in controversy is the homestead of appellee, and that she never voluntarily conveyed it. The findings and judgment of the trial court are right, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the findings and judgment of the trial court are

AFFIRMED.

GEORGE ALLEN ET AL. V. JOHN H. HALL.*

FILED MARCH 19, 1902. No. 11,248.

Commissioner's opinion, Department No. 2.

1. **Real Estate Agent: ORAL AGREEMENT: STATUTE OF FRAUDS.** A verbal contract with an agent or broker to sell land for the owner thereof, is void under the statute of frauds, and it requires the voluntary act of both parties thereto to completely execute it, so to take it out of the operation of the statute.

2. **Tenant: LANDLORD'S TITLE.** A tenant who leases land, enters into the possession thereof, cultivates it, raises the crops thereon, converts them to his own use, and is not disturbed in his possession by any one claiming by paramount title, can not plead want of title in his landlord as a defense to an action for the rent.

3. **Instructions: ERROR WITHOUT PREJUDICE.** The giving of an instruction which is fairly within the issues raised by the pleadings and the evidence produced on the trial, and which the record shows did not mislead the jury, though not technically correct, is error without prejudice.

4. **Evidence: STATEMENT BY PARTY: HEARSAY.** Statements made by

*Rehearing allowed. Judgment below reversed.

a party to a suit, to a third person, may be received in evidence against him, and are not open to the objection that they are hearsay evidence.

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

T. M. Morrow, for plaintiffs in error.

F. A. Wright, contra.

BARNES, C.

This action was commenced by the defendant in error, who will hereafter be called "defendant," in the district court for Scott's Bluff county to recover the sum of $107.20, alleged to be the rental value of certain land leased by the defendant to the plaintiffs in error during the year 1897. The plaintiffs, in their answer, attempted to plead three defenses, as follows: First, they admitted that they rented and cultivated the land described in defendant's petition, but alleged that they only agreed to pay whatever they thought proper; that the land was wild and uncultivated; that it took an extra amount of labor to cultivate it and raise the crops thereon; and that therefore there was nothing due to the defendant; second, that subsequent to the time they leased the premises they entered into a verbal agreement with defendant that if they would procure a purchaser for the land at a stipulated price the defendant would give them any interest he might have in the crop; that they did procure a purchaser, who bought the land at the price mentioned, and that thereupon all the interest defendant had in the crop vested in them, and that they appropriated the same to their own use under said agreement, and that defendant was thereby estopped from asserting any ownership thereto; third, that while the crops were growing on the land defendant sold and conveyed it by warranty deed to another, and thereby conveyed away all his right, title and interest in said crop, if he ever had any, to said third person, and that he had

no interest therein at the time of bringing his action. The reply to this answer was a general denial. The case was tried, and the jury returned a verdict for the defendant herein for the sum of $40. A motion for a new trial was overruled, judgment was entered on the verdict, and the plaintiffs in error bring the case to this court for review.

1. They contend that the court erred in striking out and rejecting all of the evidence in relation to the second defense, to wit, the defense of their verbal contract to act as agents or brokers to procure a purchaser for the land, and have, as compensation therefor, all of the defendant's interest in the crop. The record shows that the court heard all of the evidence on this question, and afterwards struck the same out and refused to submit that question to the jury. At the time the alleged verbal contract was entered into section 74 of chapter 73 of the Compiled Statutes was in force. That section is as follows: "Every contract for the sale of lands, between the owner thereof, and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Plaintiffs in error in their argument admit the force of this statute, and concede that, if the contract was not fully executed at the time the action was commenced, they could not recover thereon. They contend, however, that the contract was (to use their language) fully executed, because they had possession of the defendant's portion of the crop; that, having such possession, it was not necessary for the defendant to deliver it to them, and therefore they paid themselves, though contrary to the defendant's wishes, and the contract became fully executed. The fallacy of this position is that the plaintiff's possession of the defendant's rental share of the crop did not arise under, or grow out of, this void contract. It arose upon, and was incident to, the valid contract for the leasing of the land. It would be a travesty

to say that plaintiffs could keep the defendant's share of the crop against his will, and by reason of such forcible and wrongful action, so taken without his consent and against his protest, compel him to execute the void contract, and then say to him, "You have executed the contract which you repudiated as void, and therefore can not recover the rental value of the land." The complete execution of a contract necessary to take it out of the statute of frauds must be the voluntary act of both parties thereto. Again, the evidence was hardly sufficient to sustain this verbal contract, and for these reasons we hold that the court did not err in striking the evidence out of the record and refusing to submit this question to the jury.

2. It is contended that the court erred in sustaining the objections to the introduction of the deed, by which defendant conveyed the land to one Effert, and in thus depriving the plaintiffs of their third defense. They admit that they leased the land of the defendant, who was the owner of it at that time; that they cultivated it, raised the crops thereon, harvested them and converted them to their own use. They do not plead eviction by any one, or that they were disturbed in their leasehold estate, or that they were compelled to attorn to any one with a paramount title. Under these facts their answer did not state a defense, and they are strictly within the rule of *Nissen v. Turner,* 50 Nebr., 272, and *Mosher v. Cole,* 50 Nebr., 636, which held that where the lessee held the land under his lease, and had not been disturbed in his possession, and that there had been no eviction by paramount title, he could not plead want of title in his landlord as a defense to the payment of the rent. The court did not err in excluding this evidence.

3. It is contended that the court erred in giving the fourth paragraph of his instructions to the jury. We have examined the record in connection with this instruction, and, while it may not have been accurately and carefully worded, it was fairly within the pleadings and the evidence, and did not have any tendency to mislead the jury.

They certainly were not misled by it, for the verdict was for only $40, when it might have been for $107.20, and not excessive. The giving of this instruction, if error at all, was error without prejudice.

4. The errors complained of in the admission of evidence having been carefully examined by us, we find that it is contended that the court erred in receiving the evidence of the witness Lee, because it is claimed that he got his information second hand, and that his testimony was hearsay evidence. It is a sufficient answer to this objection to say that the evidence complained of was the statements made by the plaintiffs themselves to the witness, in relation to the kind and amount of crops raised upon the land in question. The statements of a party, against his own interests, are always admissible in evidence against him.

A careful reading of the bill of exceptions shows that there was no substantial error in receiving or rejecting evidence. The judgment in this case is right, and we recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ESTATE OF JOHN FITZGERALD, DECEASED, V. FIRST NATIONAL BANK OF CHARITON, IOWA.

FILED MARCH 19, 1902. No. 10,783.

Commissioner's opinion, Department No. 2.

1. **County Court: CLAIM: JURISDICTION: LIMITATION.** The county court has no jurisdiction over a claim against the estate of a decedent which is not filed for allowance until after it has been finally barred by the statute of non-claims.

2. ———: ———: ———: ———: **EXTENSION OF TIME FOR FILING CLAIM.** When the county court fixes a time for the presentation of claims against an estate and enters an order barring

all claims not then presented, as provided by section 217, chapter 23, Compiled Statutes, such time may be extended on application of a belated claimant, provided such application is for good cause, and is made within six months of the time first fixed and within two years of the appointment of the commissioners.

3. ———: ———: ———: ———: ———: ERROR: DISTRICT COURT: APPEAL. Where a claim against a decedent's estate is not presented before the time first fixed for the presentation of claims, its allowance afterwards, unless upon special proceedings to revive the commission and to extend the time for the presentation of claims, is error, whether in the county court or on appeal to the district court.

4. Administrator: WAIVER. An administrator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense.

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

James Manahan, for plaintiff in error.

Charles L. Burr and *Lionel C. Burr, contra.*

OLDHAM, C.

This action originated on a claim in the nature of a promissory note, due on demand, for $5,000 and interest, filed in the probate court of Lancaster county, Nebraska, by the plaintiff below against the estate of John Fitzgerald, deceased. The facts appearing from the record necessary for a determination of this cause are: That John Fitzgerald, intestate, died December 30, 1894. On March 14, 1895, Mary Fitzgerald was duly appointed and qualified as administratrix of his estate. On the same day the county court made and entered an order limiting the time in which creditors might present claims against the said estate to six months, and naming June 29, 1895, and September 30, 1895, for examining such claims as might be presented. On September 30, 1895, the county court made

and entered an order forever barring all claims not then presented against said estate, and this order was not appealed from and has never been vacated, changed or modified. On May 22, 1896, the plaintiff in the court below presented to the county court and filed the claim in dispute against the estate of John Fitzgerald, deceased. On the same day the administratrix indorsed in writing on said claim her motion to have the same stricken from the files on the ground that it was not presented within the time limited by order of the court for presenting claims against said estate. This motion was overruled and on June 19, 1896, the county court ordered the administratrix to file an answer to said claim. On August 24, 1896, the administratrix, in obedience to the order of the court, filed the following answer:

"CLAIM OF THE FIRST NATIONAL BANK OF CHARITON, IOWA,
v.
THE ESTATE OF JOHN FITZGERALD, DECEASED, MARY FITZGERALD, ADMINISTRATRIX OF SAID ESTATE.

"Comes now Mary Fitzgerald, as administratrix of the estate of John Fitzgerald, deceased, and for answer to the claim filed herein by the First National Bank of Chariton, Iowa, says: that save and except as hereinafter expressly admitted, she denies each and every allegation made by the said claimant in its complaint and each and every part thereof; she admits that John Fitzgerald, died on the 30th day of December, 1894, and that she is now the duly qualified and acting administratrix of his estate; and she admits further that in May, 1896, Charles Burr, Esq., one of the claimants attorneys presented to her a paper saying it was a note of John Fitzgerald held by the First National Bank of Chariton, Iowa, and that she then and there refused to recognize it as such. Further answering said claim said administratrix states that the

estate of John Fitzgerald is not in any manner indebted to the said claimant and asks that the said claim be disallowed.

MARY FITZGERALD,
"Administratrix of the Estate of John Fitzgerald.
"By JAMES MANAHAN, *her Attorney.*"

On a hearing subsequently had on said claim, on March 11, 1897, the claim was allowed and the cause was appealed by the administratrix to the district court of Lancaster county, Nebraska. No order was made by the district court directing an issue to be made between the parties in that court, and the hearing was had on the transcript and pleadings which had been certified from the probate court to the district court. Counsel for plaintiff in error objected to the introduction of the claim in suit for the reason that it had not been presented against the defendant in the county court within the time limited by that court for the presentation of claims against that estate; and for the reason that it had not been presented until long after a judgment of the county court had been rendered forever barring all claims not then presented against said estate; and for the further reason that this claim was not filed in the county court for more than six months after the county court had entered its order forever barring all claims not then filed. These objections were overruled by the district court. The claim was admitted in evidence. Plaintiff had judgment in the court below and defendant brings error to this court.

There are numerous errors alleged against the proceedings in the trial of this cause in the district court in the brief of the plaintiff in error, but in view of the conclusion which we shall reach with reference to the action of the trial court in overruling the objections to the introduction of the claim, it will not be necessary to consider any of the other alleged errors. The trial court overruled the objections of the administratrix to the introduction of the claim on the ground that it was an issue which was not tendered by her answer in the county court. It is the general rule of practice that, when a cause is appealed

from the judgment of the county court or a justice of the peace, the cause must be tried on the issues tendered in the court below, unless the issue tendered above is one which challenges the jurisdiction of the subject-matter of the controversy. The questions then arise: Is a plea of the statute of non-claims one that can be waived by the administrator of an estate? and is it an issue that goes to the jurisdiction of the county court over the subject-matter of the claim? These questions have never been specifically determined by a judgment of this court. The case of *Stichter v. Cox,* 52 Nebr., 532, determined some questions bearing strongly on the point at issue. In that case a claim was presented to the county court after its bar by the statute of non-claims. No pleadings were filed in the county court, but the administrator objected to the claim because of the bar of the statute. The cause was appealed to the district court, and that court directed an issue to be made between the parties. The administrator answered, and tendered the issue of the statute of non-claims. No motion was made to strike this defense from the answer. On error proceedings in this court the claimant sought to raise the question that the statute of non-claims had not been pleaded in the county court. In discussing this question NORVAL, C. J., said: "More than one answer can be properly made to this contention. There is no provision of statue requiring the administrator to plead in the county court to a claim presented therein against his intestate, except section 221, chapter 23, Compiled Statutes, makes it his duty to exhibit any claim of the decedent in offset to that of the creditor. In this case, however, the administrator did file in the county court formal objections to the allowance of this claim, and in the district court, in his answer, he specially pleaded the statute of limitations. The claimant did not move to strike this defense from the answer, nor did he in any other manner present the question to the trial court that the issues raised by the answer were different from those in the county court, obtain a ruling thereon, and preserve an exception thereto

in the record. This was indispensable to make available here the objection that there was a variance in the issues. *Robertson v. Buffalo County Nat. Bank,* 40 Nebr., 239." While the decision in this case turned on the question of the failure of the claimant to object to the answer filed by the administrator in the district court, yet it says that "more than one answer can be properly made to this contention," and it also says that the administrator was not required to file any answer in the probate court, and by inference it says that his objection to the claim in the county court was sufficient to raise the issue of the statute of non-claims.

Turning now to the sections of the statute providing for the payment of debts and legacies of deceased persons, and particularly to those sections that provide for the presentation and allowance of matured and absolute claims, to which class the claim in suit belongs, we find that sections 217-219, chapter 23, Compiled Statutes of 1901, provide as follows:

"Sec. 217. 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.

"Sec. 218. The probate court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years from the time of appointing such commissioners.

"Sec. 219. On the application of a creditor who has failed to present his claim, if made within six months from the time previously limited, the court may, for good cause shown, renew the commission, and allow further time, not exceeding three months, for the commissioners to examine such claims, in which case the commissioners shall personally notify the parties of the time and place of hearing,

and, as soon as may be, make return of their doings to the probate court."

These sections are followed by sections 221 and 226, which provide as follows:

"Sec. 221. When a creditor against whom the deceased has had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claim of the deceased in off-set to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be, but no claim barred by the statute of limitation shall be allowed by the commissioners in favor of or against the estate as a set-off or otherwise."

This section prohibits the commissioners or the county judge from allowing any claim that is barred by the statute of limitation.

"Sec. 226. Every person having a claim against a deceased person whether due or to grow due, whether absolute or contingent, who shall not, after giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand or from setting off the same in any action whatever," etc.

An examination of the sections of the statute above quoted reveals the fact that, after claims against an estate have been barred by the order of the county court at the time first fixed, it is still left within the power of the county court, by section 218, *supra,* to extend the time to present claims against the estate to a time not to exceed two years from the appointment of the commissioners. This section of the statute plainly contemplates a general order made by the county judge, in his sound discretion, to apply alike to all claimants who have failed to present their claims at the time first fixed. This section is followed by section 219, *supra,* which provides the manner in which a single claimant may secure a special order for the extension of the time of the presentation of his particular

claim, and the provision is that this order may be made "on the application of a creditor who has failed to present his claim, if made within six months from the time previously limited," etc.

Now, in the case at bar, it clearly appears from the record that no application has ever been made to the county court to extend the time first allowed by that court for presenting claims; and even if we should construe the mere filing of the claim into an application for an extension of time for presenting claims, which we can not do, it yet clearly appears that the claim was not presented until nearly eight months after the time first fixed for the final presentation of claims. In the case of *Sleeper v. Estate of Gould,* 53 Vt., 111, it was held that, to give any effectiveness whatever to the plain reading of a statute similar to our own, the application for an extension of time must be made within six months of the time first fixed. In the case of *McGee v. Atkinson,* 33 N. W. Rep. [Mich.], 737, it is held that the probate court would have no jurisdiction of a claim presented after the time fixed for presenting claims, where no proceedings had been taken to have the time of presentation extended. In discussing the question of the defense of non-claim, Rice, in his work on American Probate Law (sec. 8, p. 358), says: "The principle referred to is, in practical effect, a statute of limitation, having at the same time no affinities with the general statutes of limitation. According to these enactments, claimants who neglect to exhibit their demands against the estate within a set period mentioned, are forever barred, and courts should, of their own motion, insist upon this defense where it is apparent the administrator has neglected it."

In the settlement of an estate an administrator is merely the agent and trustee of the decedent and possesses only such powers as are given him by statute, and he must discharge his trust subject to all limitations prescribed by statute. It is uniformly held that an administrator has no authority to waive the statute of non-claim, either by failing to plead it or by consenting to the filing of a claim

after its bar; and the same rule applies with reference to the general statute of limitations in all states which, like our own, prohibit the allowance of claims barred by such statutes. *O'Keefe v. Foster,* 5 Wyo., 343, 40 Pac. Rep., 527; *Voorman v. Li Po Tai,* 45 Pac. Rep. [Cal.], 470; *Rockport v. Walden,* 54 N. H., 167, 20 Am. Rep., 131; *Ames v. Jackson,* 115 Mass., 508; *Collamore v. Wilder,* 19 Kan., 67; *Miner v. Aylesworth,* 18 Fed. Rep., 199; *Bush v. Adams,* 22 Fla., 177. We are aware of the fact that the conclusions which we are about to reach appear to be somewhat at variance with the doctrine announced by the supreme court of Wisconsin in the case of *Tredway v. Allen,* 20 Wis., 500, in the construction of a statute substantially the same as our own. The issues in that case arose on a claim that was presented for allowance more than six months after the time first fixed, and less than two years from the time of the appointment of the commissioners, but it differs from the facts in issue in the case at bar in that an application was made to the probate court for an extension of time, and that this application was granted over the objection of the administrator, before the claim was filed. No appeal appears to have been taken from the order of the probate court allowing the claim, but an appeal was taken from the order of distribution made by the probate judge directing the payment of the claim. On the appeal from this order of distribution the supreme court found against the administrator, and in rendering the opinion said: "We are inclined to hold that this was merely an irregular or erroneous exercise of power on the part of the county court, and did not go to the question of jurisdiction. For, as already observed, when the respondent made his application to have his claim allowed, the county court, under section 6, has an undoubted right to extend the time for all creditors of the estate to come in and present their claims. The two years did not expire until the 29th of September, 1862. But, although the court assumed to proceed under section 7, and only extended the time as to the respondent, yet, at

most, we think this was but error. Such being the case, that part of the order of distribution appealed from must be affirmed." While our statute, as above stated, is substantially the same as the statute construed in the cause just cited, it is also a substantial copy of the statute of the state of Vermont, and the construction that we are inclined to give this statute seems to be fairly sustained by the supreme court of the state of Vermont in the case of *Sleeper v. Estate of Gould, supra,* and also to be sustained strongly by the supreme court of Michigan in the case of *McGee v. Atkinson, supra.* Again, we notice that the supreme court of Wisconsin, in the later case of *Carpenter v. Murphy,* 15 N. W. Rep., 800, refers with approval to the construction of these statutes by the supreme court of Vermont. It is an elementary rule of statutory construction that, if possible, a statute should be so construed as to give full force and effect to each and all of its provisions. The construction we favor gives full force and effect to all the provisions of both sections 218 and 219, *supra,* and is in full harmony with this rule, while the construction of the statute which is intimated in *Tredway v. Allen, supra,* practically nullifies the provisions of section 219. Even if *Tredway v. Allen, supra,* contained a proper construction of the statute, and the action of the county court in allowing the claim to be filed was erroneous, and not void, as that case holds, we still think the defense of nonclaim should have been permitted by the district court, because if this defense existed the administratrix had no right to waive it.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

POUND, C., dissenting.

I am unable to agree in the conclusions reached in the opinion of my Brother OLDHAM. To my mind the con-

struction given to the sections of the statute quoted is required neither by the terms of the statute itself nor by the authorities cited. Section 214, chapter 23, Compiled Statutes, provides that ordinarily claims against an estate shall be presented to and ruled upon by the county judge, but that if the parties interested, or one of them, so demand, commissioners are to be appointed to examine and pass on such claims. Thus there are two methods of examining claims,—one by the court itself and one by commissioners appointed for that purpose; and this fact must be borne in mind in arriving at the meaning of the subsequent sections. Section 217 fixes the time to be appointed in the first instance for the presentation of claims. Section 218 confers upon the county court a general power to extend the time allowed for presentation of claims, as the circumstances of the case may require, subject to the limitation that the whole time shall not exceed two years. Section 219 provides for applications to renew the commission and allow further time for the commissioners to consider claims, and limits applications for such renewal to six months from the time originally limited. Section 220 permits the county judge to pass on claims in such cases in person, instead of renewing the commission. The question comes to this: Is section 219 a limitation upon section 218, so that no action may be had by the court under the former unless application is made therefor within the time limited by the latter, or are they independent, and do they refer to distinct proceedings intended to be governed by different rules? I am constrained to the latter conclusion both by the language of the sections themselves and by the context. The one refers in terms to a general extension of the time within which claims may be filed, and limits the period of such extension to two years from the time when claims were originally allowed to be presented. The other refers in terms to the renewal of the commission provided for in the latter part of section 214, and contains different limitations, namely, that application for such renewal must be made within six months from the time orig-

inally limited, and that the time allowed shall not exceed three months. Under such circumstances, the proper construction, in my view, is that section 218, and not section 219, applies where there is no commission, and that the court has power to extend the time for filing claims at any time, "as the circumstances of the case may require," subject to the limitation of time of section 218, at least where no commission has been demanded or appointed. I am unable to see that the cases of *Sleeper v. Estate of Gould,* 53 Vt., 111, and *McGee v. McDonald's Estate,** 66 Mich., 628, 33 N. W. Rep., 737, militate against this view. In *Sleeper v. Estate of Gould,* commissioners had been named and had reported. Application was made to renew the commission more than six months after the time originally limited. The court had before it only the section corresponding to our section 219, and said, very properly, that the "unmistakable language of the statute" required an application for renewal of the commission to be within the six months. The language quoted by my Brother OLDHAM is used with reference to a contention of counsel bearing upon that section alone, and does not refer to any questions upon the construction of such a section as our section 218. *McGee v. McDonald's Estate* was also a case where commissioners had been appointed, and a claimant who had not presented his claim to them sought to have his claim allowed by the court after they had reported, without proceeding to obtain a renewal of the commission. It is obvious that, if such a course were permitted, the provisions giving any one interested the right to have commissioners appointed could be evaded by mere inaction till after report. Such an evasion could not be tolerated. The right course, where a commission has been demanded and appointed, is to apply for a renewal thereof. Thereupon the court may in its discretion renew the commission or itself pass upon the claim. But in the case at bar there is nothing to show that there was any commission. Hence

*This case appears in 66 Mich. by the title cited in the text, and in 33 N. W. Rep. by the title cited on page 267.—REPORTER.

the provisions of section 219 as to the time within which application to renew a commission shall be made were inapplicable. The case is one falling under section 218, and only the limitation therein provided is to be considered. This position has the support of *Tredway v. Allen*, 20 Wis., *476. The statute there passed upon is substantially the same as our own, and sections 6 and 7 thereof correspond to our sections 218 and 219. The court held that where application was made more than the six months after the period originally fixed, which was the limitation in section 7, the probate judge might extend the time under section 6, not exceeding the limitation therein provided. If this construction is correct, the error of the county court in the case at bar in allowing the claim to be filed, and overruling a motion to strike it from the files, on the ground that it was not filed in time, instead of first entering a general order of extension, and then permitting this specific claim to be filed thereunder, was formal only. The county judge had the power to do what he did. He merely exercised an undoubted power in an informal and irregular manner. How far error might have been taken from such proceedings we need not inquire. When the estate proceeded to try the merits of the claim without raising this informality, it certainly waived it. Administrators can not waive the statute of limitations nor the statute of nonclaim. But they may waive technical errors and informalities. Administrators, receivers and like officers of the courts do not, by reason of their official or fiduciary relations, occupy any vantage ground as litigants. *Arnold v. Weimer*, 40 Nebr., 216. This very situation was before the court in *Tredway v. Allen, supra,* and what has just been said is in full accord with the decision in that case. Our attention has been called to no other authority which proceeds upon such a provision as our section 218. It is sound in principle, gives entire effect to every provision of the statute, and in my opinion ought to be adhered to.

Under the view I take of the jurisdiction of the county court, it becomes necessary to consider certain errors al-

leged to have taken place at the trial had on appeal to the district court, to which the opinion of my Brother OLDHAM properly makes no reference. The estate denied the genuineness of the note sued on. The claimant, upon this issue, introduced evidence tending to show that it was given in the course of a transaction between the claimant and the decedent in which Mr. T. M. Marquett, an attorney at law, represented both parties. The claimant bank was located at Chariton, in Iowa, and the decedent lived in Lincoln, Nebraska. Mr. Marquett lived at Lincoln, also. The testimony tended to show that the decedent had executed a note to claimant which had matured, and that in order to keep its assets in proper condition it sent the note in a letter to Mr. Marquett and asked him to get a renewal. Mr. Marquett died before this case was begun, but his letters to the bank, in which he acknowledged receipt of the request to procure a renewal and promised to do so, and afterwards enclosed a renewal note with a statement that he had procured it as requested, were offered by the claimant. There is testimony to show, and the claimant contended, that the renewal note referred to is the note in suit. In my opinion, these letters were admissible. The circumstances surrounding the execution of the note were highly important upon the issue as to its genuineness, and as the negotiations were carried on by conversations and letters, had the conversations and letters passed directly between the parties thereto, there could be no question. In this case the parties did not communicate directly, but through an attorney who acted for each. Hence their letters or statements to him are clearly admissible. *Boyden v. Burke,* 14 How. [U. S.], 575. There, in an action against a public officer for refusing to give copies of documents in his office, letters from the plaintiff to a person through whom his application was made were held admissible as part of the *res gestæ.* The court said that, in substance, it was "a conversation between the parties reduced to writing." See, also, *Roberts v. Woven Wire Mattress Co.,* 46 Md., 374; *May v. Brownell,* 3 Vt., 463. On this ground the

letter to Mr. Marquett was admissible. The letters written by Mr. Marquett to the bank were equally a part of the transaction, and were also admissible on another ground. He was an attorney at law, and wrote the letters in the course of his employment as such, as a statement to his client of what he had done in the latter's business. It was his duty to apprise his client that he had carried out his instructions, and he wrote the letter for that purpose. He was dead when this litigation arose. A letter may be a memorandum as much as any other form of writing, and a lawyer's letter to his client is often the only entry which he makes of the acts performed in the course of his business. As a general proposition, memoranda made by a person who is dead, whose duty it was, in the course of business he had undertaken, to do the acts and to make the memoranda of them, are competent evidence to show that such acts were done. *Welsh v. Barrett,* 15 Mass., 380; *Bank of United States v. Davis,* 4 Cranch C. C. [U. S.], 533; *Doe v. Turford,* 3 Barn. & Adol. [Eng.], 898. In *Elsworth v. Muldoon,* 15 Abb. Pr., n. s. [N. Y.], 440, memoranda of a deceased attorney, upon a receipt of a sheriff who had sold land, that he had redeemed the land and taken the receipt for the debtor, were held admissible to prove the redemption. It was as much the duty of Mr. Marquett to write the letter in question as of the several parties who made the memoranda involved in the cases cited to write down what they did. In my opinion, the rulings of the trial court were right.

It is also contended that the verdict is contrary to the evidence; but there appears to be ample evidence to sustain it, and good ground for believing that it is right.

I therefore recommend that the judgment of the district court be affirmed.

SEDGWICK, J., dissenting.

I think that the right construction of the statute is expressed in the opinion of Mr. Commissioner POUND. The county court is a court of record, and has general jurisdic-

tion in the matter of the settlement of estates. Its jurisdiction to adjust claims against an estate is limited by section 218 to two years. Within that time, by express provision of the statute, it has jurisdiction of the subject-matter of the adjustment of such claims. The statute provides that the two years shall run "from the time of appointing such commissioners," and there is no express limitation of the time for allowing claims by the court when no commissioners are appointed; but I do not think that this defect renders necessary the result suggested in the opinion adopted by the court. The statute provides that it shall be the duty of the judge "to receive, examine, adjust and allow all claims and demands of all persons against the estate," if no commissioners are appointed. By a fair construction of the statute, section 218 should be held to prescribe the time in which he shall have jurisdiction to do so when no commissioners are appointed, as well as in cases where they are appointed. He must give the same notice of the limitation of time for filing claims as the commissioners are to give, and the two years prescribed within which he shall have jurisdiction to act upon claims must begin to run not later than the giving of this notice. In cases where no commissioners are appointed we are not compelled to say, either that the judge shall have no time at all in which to act upon claims, or that the time is unlimited. The statute then gives him two years and leaves it to his discretion whether he will hear claims after the time first limited. This discretion is a necessary one. It is not the policy of the law to unnecessarily prolong the settlement of estates, nor by technical restrictions to defeat just claims, fairly presented, without fault or neglect on the part of the claimant. When this claim was filed the court still had jurisdiction of the subject-matter. The question whether it should be allowed to be filed was presented to the court by a motion to strike it from the files because presented after the time first limited, and this was passed upon by the court. By its ruling the court decided to allow the presentation of the claim. The court being a

court of general jurisdiction, there can be no doubt of its authority to require issues to be made up, and, when a claim of over $5,000 is resisted, it seems proper that the court should require the administrator to plead the grounds upon which the claim is to be contested. This was done in this case. The answer filed by the administrator clearly waives any supposed irregularities in the proceedings by which the claim was brought into court. Having tried the cause upon the issues so presented, and suffered defeat, it seems clear that the administrator ought not to be allowed to appeal to another court, and there present other and different technical defenses.

GEORGE E. ALDRICH V. BANK OF OHIOWA.

FILED MARCH 19, 1902. No. 11,203.

Commissioner's opinion, Department No. 2.

Judicial Sale: ANNUAL CROPS. Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty.

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

Charles H. and *F. W. Sloan,* for plaintiff in error.

C. A. Fowler, contra.

OLDHAM, C.

One Nierstheimer owned a farm in Thayer county, Nebraska, of one hundred and sixty acres, upon which George E. Aldrich, the plaintiff in error, had a mortgage. This mortgage was foreclosed by a decree of the district court for Thayer county, in 1897, at the February term thereof. The statutory stay was taken. Nierstheimer, the mortgagor, was in possession of, and was farming, this land and

in the month of September of the year 1897 he planted forty acres of this land to wheat. On November 15, 1897, he gave to the Bank of Ohiowa, the defendant in error, a chattel mortgage on the north one-half of this field of wheat, to secure his note, which he had that day given it for $850. This note was by its terms due in ninety days from its date. This mortgage was duly filed for record and it is stipulated in the record that this note has not been paid. The land was sold under the decree of foreclosure by the sheriff of Thayer county on January 24, 1898, Aldrich being the purchaser. The sale was confirmed and a deed thereon was issued to Aldrich on March 21, 1898, and Aldrich at once took possession of this land and still has the possession. The bank claimed the right to go upon this land and harvest this mortgaged wheat, and demanded of Aldrich that it be permitted to do so. This was refused by Aldrich, who claimed the wheat by reason of his ownership of the land, and harvested and marketed the same; whereupon the bank brought its action against Aldrich for the conversion of the wheat. This action was tried to the district court of Thayer county (a jury being waived), which resulted in a judgment for the bank for the sum of $130.76, the value of the wheat, less the cost of harvesting and marketing, from which judgment Aldrich prosecutes error to this court.

The problem for solution, then, is, who was entitled to this wheat,—the mortgagee or the purchaser of the land at judicial sale? There is no question presented as to the validity of this chattel mortgage in its inception. The property was *in esse,* and the right to mortgage is not questioned; but it is claimed that by the confirmation of the sale the title to the real estate on which the wheat was growing passed to Aldrich and carried with it the wheat. So the ownership of this property is dependent on the question, do crops that are not matured, but growing on the land at the time of the confirmation of the judicial sale, pass to the purchaser of the land, or do they remain the property of him who planted them? Phases of this

question have been passed upon by this court. In *Foss v. Marr,* 40 Nebr., 559, this court held: "A matured crop of corn standing ungathered upon land sold at a judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor who had planted and cultivated it." In *Monday v. O'Neil,* 44 Nebr., 724, the court say: "A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree and the sale confirmed while the crop was growing and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. *Held,* That as between the tenant and purchaser the former was entitled to the crop." In this last case the court did not determine what the rights of the parties would have been had Monday secured possession and evicted O'Neil before the crop matured. But the court in both *Foss v. Marr* and *Monday v. O'Neil* bases its decision on the case of *Cassilly v. Rhodes,* 12 Ohio, 88, and *Houts v. Showalter,* 10 Ohio St., 124. The doctrine of these cases is that annual crops growing on the land do not pass to the purchaser on judicial sale, because in law they are regarded as personalty. We must either accept this classification or reject the doctrine of the Ohio cases absolutely. To reject this would be to overturn *Foss v. Marr* and *Monday v. O'Neil,* which, to the extent they have gone in the application of this doctrine, have become a rule of property in this state; and for this reason we do not feel justified in overthrowing them. This being so, nothing but the other alternative is left to us, which is the acceptance of this classification, and with the Ohio cases hold that the title to the annual crops growing on the lands does not pass to the purchaser on judicial sale, for the reason that the law regards them

as personal property. This being their legal status, the controversy over whether or not they were taken into account by the appraisers becomes immaterial. The appraisers of the land would have no right to appraise the personalty which they may find upon the land. This status of the property also renders the question of possession by the purchaser a plain and reasonable one. It will be conceded that a purchase of real estate would not carry with it the personal property of the vendor. When you buy and receive title to my land, you do not buy my horse, and by the act of buying the land you have acquired no right to the horse. The result would be, and is, the logical sequence of all personal property of whatsoever nature and kind, and hence Aldrich acquired no ownership of this property in controversy by reason of his purchase at judicial sale of the land on which the wheat was growing. Having no ownership, how would the possession of the land give him the right to treat this property as his own and apply it to his own use? Counsel suggest no answer to this question. Nor do we think it could be answered to his advantage. The land passes by a judicial sale to the purchaser, burdened with any and all the rights of other parties, including the mortgagor, that are not inconsistent with, or opposed to, title. Title, and this alone, is all the court gives the purchaser. From this he may, or may not, according to the circumstances of the case, or the rights of others, have the right of possession. But the possession of the purchaser could not by any reason of that act destroy the rights of others, nor justify him in appropriating other people's property; and it would make no difference to whom it belonged, as it did not belong to him.

The law recognizes the necessity of agriculture and favors its promotion, and, as is said in *Houts v. Showalter, supra*, "Under our system, frequent advertisements and offers for sale, and occasionally revaluations are necessary, before a sale can be effected. When an appraisement is made it can not be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public

interest, that the land should thenceforth lie waste; then, there may have been no crop sown or planted." This failure to sow or plant is what the law discourages, and it can only encourage sowing and planting under circumstances like these by assuring a man that if he sow, he shall reap.

The judgment of the court below is right and we recommend that it be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY ANDERSON V. CITY OF ALBION.

FILED MARCH 19, 1902. No. 11,305.

Commissioner's opinion, Department No. 2.

1. **Streets and Sidewalks: DEFECT: INJURY: RECOVERY: INSTRUCTION.** A city is bound to keep its streets and sidewalks reasonably safe and convenient for travel; and an instruction which charges the jury that, before a plaintiff can recover for injuries sustained by reason of a defect in a sidewalk, the jury must find "that said defect left the sidewalk in an unreasonably dangerous condition," is erroneous.

2. ———: ———: **DUTY OF OFFICER: NOTICE.** The law makes it the duty of the officers of a city to exercise reasonable diligence for the purpose of knowing whether or not its avenues of public travel are reasonably safe, and they are not to wait for knowledge of defects or dangerous conditions of its sidewalks until these facts attain notoriety in the city. An instruction which, in effect, charges that the defect in a sidewalk must have been "notorious and continued," before the city can be charged with notice thereof, is erroneous.

ERROR from the district court for Boone county. Tried below before THOMPSON, J. *Reversed.*

C. E. Spear and *J. S. Armstrong,* for plaintiff in error.

O. M. Needham, contra.

OLDHAM, C.

This is an action brought for damages by Mrs. Anderson, the plaintiff in error, against the city of Albion, for injuries received by her, alleged to have been occasioned by a defective sidewalk in that city. The petition alleges, and the testimony tends to show, that on one of the main traveled streets of that city was a wooden sidewalk, in which was a loose and broken plank; that this plank was immediately over an excavation from two to three feet deep; that Mrs. Anderson, in passing over this sidewalk, stepped on this broken and loose plank, which gave way, causing her to fall into the excavation, and thereby she sustained the injuries complained of. She testified that this broken plank was in place when she stepped upon it. Other witnesses testified that this plank had been broken for some days prior to the accident, and some of the time it was in place and at other times it was lying out of place, exposing the defect in the sidewalk and the excavation under it. The city filed its answer admitting its corporate capacity, and that the place of the alleged injury was a street with a sidewalk thereon; denied the other allegations of the petition, and then pleads affirmatively contributory negligence on the part of plaintiff. To this answer plaintiff filed a general denial. The case was tried on these issues to a jury, who returned a verdict for the city, on which judgment was entered and plaintiff below prosecutes error to this court.

The principal errors assigned are that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions. In view of the fact that instruction No. 12, given by the court, can not be sustained on any hypothesis, and contains prejudicial error, which will call for a reversal of the judgment below, and another trial of these issues, we shall refrain from passing on the sufficiency of the evidence to sustain the verdict. This instruction is as follows: "The jury are instructed that before they can find for the plaintiff, they must find the

plaintiff has suffered injury; that the injury was caused by a defect in the sidewalk; that said defect left the sidewalk in an unreasonably dangerous condition; that the plaintiff did not contribute to said injury by any negligence on her part; that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same." Among the various propositions laid down in this instruction there are two which misstate the law, viz.: First, "that said defect left the sidewalk in an unreasonably dangerous condition"; and, second, "that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same." As to the first proposition, a city of this state is intrusted by law with the charge, direction and control of the streets, sidewalks, culverts and bridges of the city, and is burdened with the duty to use reasonable care and diligence in making and keeping the streets and sidewalks safe and convenient for travel. In short, it is bound to keep its streets and sidewalks thereon reasonably safe and convenient for travel. When its sidewalks are even dangerous without being "unreasonably dangerous," it has failed in its duty in this respect; and hence the conditions of dangerous and "unreasonably dangerous" are conditions of its streets under which it can not justify defects therein which result in injuries to the traveling public. As to the second proposition, the rule is laid down tersely by Judge Dillon in his work on Municipal Corporations (vol. 2, sec. 1025), in which he says: "The corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to

have been known to it, or to its officers having authority to act respecting it. A corporate body never can either take care or neglect to take care except through its officers or servants. If such a body, by its officers or servants, has the means of knowing that a street is unfit for travel, and is negligently ignorant of its state, it is guilty of negligence." This court, in the case of *City of Lincoln v. Smith*, 28 Nebr., 762, held that, to render a city liable for injuries caused by defective sidewalks, it is not necessary that it should have had actual notice of the defect. If a state of facts exist, such that ignorance can only arise from a failure to exercise reasonable official care, notice will be presumed. In *Pomfrey v. Village of Saratoga Springs*, 104 N. Y., 459, the court said: "Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of actual vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them." The law casts on the officers of a city the obligation of vigilance and reasonable diligence to keep its streets in a reasonably safe condition, and this obligation is not discharged nor condoned by waiting until the "defect had become notorious." In other words, the law makes it the duty of the officers of the city to exercise reasonable diligence for the purpose of knowing whether or not its avenues of public travel are reasonably safe, and they are not to wait for knowledge of defects therein until they attain notoriety in the city.

We therefore recommend that the judgment of the lower court be reversed and this cause remanded for further proceedings according to law.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CITIZENS' BANK OF HUMPHREY V. FREDERICK FROMHOLZ.

FILED MARCH 19, 1902. No. 11,358.

Commissioner's opinion, Department No. 2.

1. **Bank:** PRESIDENT AND CASHIER: DEPOSIT: COLLECTION FOR CUSTOMER: DENIAL OF AUTHORITY: LIABILITY. When the president and cashier of a bank, acting in his official capacity for such bank, collects money for and places it on deposit in such bank to the credit of one of its customers and pays out of such deposit notes due to the bank from the customer and checks drawn by him against such deposit, the bank can not, for the purpose of escaping liability to its customer for the mistakes or malfeasance of its president and cashier, deny his authority to represent it in this kind of a transaction.
2. ———: DEPOSITOR: STATUTE OF LIMITATIONS: DEMAND. As between a bank and one of its depositors, the statute of limitations does not begin to run in favor of the bank, until a demand has been made for the money on deposit.
3. **Cross-Examination:** PRACTICE: DISCRETION OF COURT. The practice of permitting two counsel on the same side to examine a witness is not commended as a rule, but the privilege nevertheless rests solely within the discretion of the trial court.

ERROR from the district court for Platte county. Tried below before HOLLENBECK, J. *Affirmed.*

McAllister & Cornelius, for plaintiff in error.

Talbot & Allen and *Julius S. Dittmar, contra.*

OLDHAM, C.

This was an action by a depositor against the Citizens' Bank of Humphrey, Nebraska, to recover back the sum of $578.20 alleged to have been erroneously charged to plaintiff's account by the defendant bank on the 30th day of May, 1893. The suit was not filed until the 24th day of September, 1898. Plaintiff, however, alleged in his petition that he did not discover the mistake in the overcharge of his account until September, 1898. The defendant bank answered plaintiff's petition with a general denial and a plea of the statute of limitations. Plaintiff replied to this answer with a general denial. There was a trial of the

issues thus joined to a jury and a verdict for plaintiff. Judgment was entered on the verdict, and defendant brings error to this court.

The facts in this case, as shown by the bill of exceptions, are that the plaintiff in this cause of action was a farmer living near Humphrey, and was a customer of the defendant bank for about four years. It appears that in January, 1893, he was considerably indebted to the bank on notes which the bank held against him, and also on some overdrafts; that at the time he was preparing to remove to the territory of Oklahoma; and that he came into the bank and had a settlement for his notes and overdraft, and paid them by secured notes which he executed for that purpose. It also appears that plaintiff removed to Oklahoma, and that he left some notes for collection with the defendant bank, and that he also authorized the president and cashier of the defendant bank to negotiate a sale of his lands in Platte county, Nebraska. It appears that this sale was negotiated, and the proceeds of the sale were placed to his credit in the defendant bank by the cashier, and that the notes that he owed to the bank were taken out of the proceeds of this sale. It also clearly appears that the bank charged his account with a note of $500, and interest thereon, which all amounted to $578.20, and that this charge was made on the 30th day of May, 1893, and that this was one of the notes that had been settled for by plaintiff in January, 1893,—so that the question of the mistake in the account was clearly and unmistakably proved. The bank did not introduce its books in evidence and appeared to rely solely on the statute of limitations as a defense. It seemed, by inference, to have contended that plaintiff's account at the bank was kept by the president and cashier, E. A. Stockslager, as agent for plaintiff, and that the bank, as such, had no interest in this matter. To sustain this theory, it contends that Stockslager collected plaintiff's money and sold his farm and made the deposit for plaintiff, and that the checks which plaintiff drew against his account were mailed from

Oklahoma to Stockslager. This may be, and was, true; but Stockslager was the president and managing officer of the defendant bank and when he collected notes for plaintiff he credited plaintiff with the collection on the books of the bank. When he received a check from plaintiff, it was paid out of the money plaintiff had on deposit in the bank and charged to him on the books of the bank. In all these transactions Stockslager was acting strictly within the line of the duties devolving upon him as president and cashier of the defendant bank, and hence the bank can not now, for the purpose of avoiding the legal consequences of his malfeasance or mistake, be heard to repudiate his authority. It appears from the evidence that Stockslager left the employ of the defendant bank on the 1st of July, 1894, and that the plaintiff had no further dealings with the bank after that time until this controversy arose. Plaintiff testified that he failed to get a full statement of his account from the defendant bank until he came back to Humphrey in September, 1898, and that he then procured a statement of his account from the new cashier of the bank, and that as soon as he got this statement he discovered the mistake, and demanded payment of the balance due him, and on this demand being refused he at once instituted this suit. The question then arises as to when the statute of limitations began to run in this case. The rule seems to be that, as between a depositor and a bank, the statute of limitation does not begin to run until a demand is made for the money on deposit. This rule seems to be grounded on a sound principle, because the contract between a bank and a customer who opens a check and deposit account with it is not that the bank will pay the whole amount of the deposit at any particular day, for this would constitute a time deposit, rather than a check and deposit account, but the contract is that it will pay the amount of the deposit whenever it is demanded. Consequently in the case at bar the defendant bank was not in default for non-payment of the amount due plaintiff until such amount was demanded, and this demand was not

made until a few days before this suit was commenced. And if the testimony of plaintiff at the trial below is to be believed, he was not negligent in making this demand, because he had no means of knowing how much, if anything, was owing to him from the bank until he procured a full statement of his account from its managing officers in September, 1898. *Goodell v. Brandon Nat. Bank*, 63 Vt., 303, 21 Atl. Rep., 956; Wood, Limitation [3d ed.], sec. 17; *Thomson v. Bank of British North America*, 82 N. Y., 1; *Brahm v. Adkins*, 77 Ill., 263, 265.

Some objection is made in the brief of defendant bank to the action of the trial court in excluding some correspondence offered by defendant between the plaintiff and Stockslager, but all the correspondence excluded was about matters which threw no light on the question in controversy, and hence the action of the trial court was fully justified. Only one of the instructions given by the learned trial court is assailed in the brief of defendant bank. This was the fifteenth instruction given by the court, which told the jury, in substance, that if they found for plaintiff they should fix the amount of his recovery at $578.20, and interest at seven per cent. from the time of demand. As the evidence clearly showed that plaintiff was either entitled to that amount or nothing, we can not imagine what error is concealed in the instruction.

It is also urged that the court erred in permitting two of plaintiff's counsel to question the same witness, over the objection of defendant. While we do not commend this practice, as a rule, yet it is a matter that is purely within the discretion of the trial court.

Finding no error in the record, we recommend that the judgment of the lower court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JONATHAN LYDICK, APPELLANT, V. MARY E. CHANEY ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 11,127.

Commissioner's opinion, Department No. 2.

1. Executor: FINAL REPORT: PERSONAL LIABILITY. The decree of a county court, after examination of the final report and accounts of an executor, finding that he has assets in his hands and ordering them distributed among creditors and legatees, creates a personal liability in the executor, and has the same force as any other judgment.

2. ———: REMEDY ON BOND NOT EXCLUSIVE. Such liability may be enforced either directly against the executor, or by suit upon his bond, as circumstances may require.

3. Final Decree: EXECUTION. Execution may issue to enforce such a decree; and where it is rendered in the district court on appeal from a similar decree in the county court, or where a transcript has been duly filed in the district court, such execution may be levied upon the lands of the executor.

APPEAL from the district court for Burt county. Heard below before KEYSOR, J. *Affirmed.*

H. E. Carter, for appellant.

Willis G. Sears and *George R. Chaney, contra.*

POUND, C.

Upon examination of the final report and accounts of Jonathan Lydick, as executor of Archibald Matthews, the county court for Burt county approved them and found them correct, except as to two certain legacies for which credit was claimed, which were found to remain unpaid. Accordingly a decree was entered approving and confirming the report, with the exception of these two items, and directing the executor to pay them and to pay the costs of administration. An appeal was taken to the district court, where, upon hearing, the same conclusion was arrived at, the executor was ordered to pay the legacies and it was provided that the legatees recover the amount thereof.

The executor having failed to comply with this order, an execution issued, which was levied upon his lands. This suit is brought to enjoin such levy and to enjoin enforcement of the judgment for want of jurisdiction in the district court to render it. A decree was rendered dismissing the suit, and is now appealed from.

Two claims are made by counsel for appellant: (1.) That a decree of distribution rendered by a county court after examination of the final report and accounts of an executor, finding that he has assets in his hands and ordering them distributed among creditors and legatees, does not create any personal liability in the executor. (2.) That even if it did create such liability, the only method of enforcing it would be by suit upon the executor's bond; that the county court could not enforce its judgment or decree of distribution by execution, and in consequence the district court, upon appeal, would be equally without such power.

The first contention is disposed of by section 255, chapter 23, Compiled Statutes, which provides: "Whenever a decree shall have been made by the probate court for the distribution of the assets among the creditors, the executor or administrator of the estate, after the time of payment shall arrive, shall be personally liable to the creditors for their debts, or the dividend thereon, as for his own debts, or he shall be liable on his bond." It has been said that the decree of distribution and order to pay debts and legacies "corresponds, in some measure, to the judgment *de bonis propriis* at common law." 2 Woerner, Law of Administration, sec. 411. And this view has been taken under statutes substantially the same as our own. *Bank of Orange v. Kidder,* 20 Vt., 519, 523; *Allen v. Smith,* 72 Miss., 689. It is true there are rulings to the effect that the decree of distribution is a mere finding of amounts due, and has not the full force of a judgment. *Piggott v. Ramey,* 1 Scam. [Ill.], 145; *Green v. Fagan,* 15 Ala., 335. But in such cases it will be found that the courts of probate were of limited jurisdiction. *Matthews v. Hoff,* 113 Ill., 90. With

us the county court has full and exclusive original jurisdiction over the settlement of estates. Getting its powers from the constitution, as to probate matters, it is a court of general jurisdiction. *Johnson v. Beazley,* 65 Mo., 250; *Russell v. Lewis,* 3 Ore., 380; *Monastes v. Catlin,* 6 Ore., 119; *Tucker v. Harris,* 13 Ga., 1. It has equity powers in so far as necessary to give effect to its jurisdiction. *Wilson v. Coburn,* 35 Nebr., 530; *Glade v. White,* 42 Neb., 336. Its powers in probate matters are coextensive with the former powers of courts of chancery in administration suits. *Blanton v. King,* 2 How. [Miss.], 856. All questions relating to the settlement of estates must be adjudicated by it, in the first instance. *Boales v. Ferguson,* 55 Nebr., 565. It would seem clear, therefore, that the executor or administrator, having assets in his hands, may be made personally liable by the final decree of distribution in the county court, just as he might have been formerly by decree in an administration suit. Moreover, the statute indicates as much. Section 289, chapter 23, Compiled Statutes, provides that after payment of debts and expenses of administration, the court "shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same." Section 290 reads: "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same." In section 291 it is provided: "Such decree may be made on the application of the executor or administrator or of any person interested; but no heir, devisee, or legatee shall be entitled to a decree for his share until payment of the debts and allowances and expense mentioned in the preceding section shall have been provided for." Similar statutory provisions elsewhere have been held to authorize judgments such as the one here in question. *McLaughlin v. McLaughlin,* 4 Ohio St., 508; *Isom v. McGehee's Heirs,* 45 Miss., 712.

We do not think the remedy by suit on the executor's

bond, as given by section 312 and following of chapter 23, Compiled Statutes, is exclusive. The very language of section 312 indicates that this is an additional protection to distributees, legatees and creditors and an additional remedy, to be resorted to by them if the circumstances so require. But if the liability of the executor may be enforced directly, the parties ought not to be relegated to a separate action unless the statute so requires. We think the decree of distribution is enforceable by a simpler method wherever the executor is able to respond. In *Bank of Orange v. Kidder,* 20 Vt., 519, 523, under a statute of the same sort, the court observed that there was no reason why the probate court should not enforce its decrees by execution, if it were given power to issue such a writ. That power exists in this state, by virtue of section 19, chapter 20, Compiled Statutes, and section 18 authorizes transcripts to be filed in the district court, upon which executions may issue as upon judgments of the latter court. Under such circumstances, there is ample authority to the effect that execution may issue as in other cases. *McLaughlin v. McLaughlin,* 4 Ohio St., 508; *Isom v. McGehee's Heirs,* 45 Miss., 712; *Sherwood v. Judd,* 3 Bradf. [N. Y.], 419, 422; *Wachter's Case,* 1 Walk. [Pa.], 267. As the district court rendered the judgment here in question, the execution issued pursuant thereto was leviable upon the lands of appellant, and we are satisfied that the judgment was within the jurisdiction and powers of the court. That is all that is before us. If there were errors in the form of the judgment, the proceedings leading to it, or the findings on which it is based, they should have been raised by petition in error. They are not to be reviewed in this suit.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF GREENWOOD, APPELLEE, V. THOMAS REECE ET AL., APPELLANTS.

FILED MARCH 19, 1902. No. 10,420.

Commissioner's opinion, Department No. 3.

1. **Evidence.** Evidence examined, and *held* sufficient to support a finding that a conveyance from a father to a son was fraudulent.
2. **Fraudulent Conveyance: HOMESTEAD.** Where a conveyance of premises occupied as a homestead is set aside as fraudulent as to creditors, the homestead interest of the grantor will be protected as if such conveyance had not been made. *Stubendorf v. Hoffman*, 23 Nebr., 360.
3. **Homestead: EXEMPTION: DEBTS CREATED BEFORE DEATH OF WIFE.** Section 17 of the homestead act exempts to the owner of the fee the homestead premises against all debts existing or created previous to or at the time of the death of his wife, even though he may no longer be the head of a family.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Reversed.*

Allen Beeson, Jesse L. Root and *Samuel M. Chapman*, for appellants.

C. S. Polk and *Stephen B. Pound, contra.*

DUFFIE, C.

This is a creditors' bill to subject to the payment of certain judgments held by the plaintiff the west half of the northwest quarter of section 26, and the east half of the northeast quarter of section 27, township 12, range 9 east of the 6th P. M. as the property of the defendant, Thomas Reece. Thomas Reece and his wife moved onto the land in 1884, the wife holding title. In the year 1890 she conveyed the land to one of her sons, and he, in turn, conveyed it to his father, Thomas Reece. While the record is not clear that this conveyance to the son was for the purpose of placing the title in the name of his father, we infer that such was the case, and that the son never had any

real interest in the property. Reece and his wife continued to occupy the property until the summer of 1890, when they removed to an adjoining farm owned by another son, and rented the home farm to this son. The purpose of such removal, as shown by the evidence, was to better provide for Mrs. Reece, who was sick and not expected to recover, and the son's house was better and more comfortable than the house on the home farm. Mrs. Reece died in the spring of 1891, and Thomas Reece then returned to the farm and boarded with his son. The value of the farm, as shown by the evidence, was from $6,400 to $8,000, and it was incumbered by mortgages to the amount of $3,500. Reece was also indebted to the appellant on unsecured claims to the amount of about $2,350. About August 15, 1896, Thomas Reece executed a warranty deed conveying the farm to his son Philip for the expressed consideration of $6,400. In the deed, Philip agreed to assume and pay the mortgages upon the place, and executed to his father five promissory notes, amounting in the aggregate to $2,900, payable in one, two, three, four and five years, for the balance of the consideration. At the time of this conveyance, Philip Reece, the son, was residing in Montana, and the negotiations for the sale of the farm, if any really took place, were by letters passing between them, none of which appear in the record before us. The plaintiff, the First National Bank of Greenwood, shortly after the conveyance to Philip Reece, reduced its claims to judgment, and had execution issue thereon; and the sheriff's return thereon recites that "after diligent search, I find no goods and chattels whereon to levy belonging to either of the within named defendants; I therefore levied the same on the 24th day of May, 1897, at 11:30 A. M. on the west one-half (½) of the northwest quarter (¼) of section twenty-six (26), and the east one-half (½) of the northeast quarter (¼) of section twenty-seven (27), township twelve (12), range nine (9), east of the 6th P. M. in Cass county, Nebraska." The petition alleges that the conveyance made to Philip Reece by his father was without consideration, and for the purpose

of hindering, delaying and defrauding the creditors; that by reason of said conveyance the land can not be sold on execution, or if sold would not bring a sufficient sum to satisfy the claim,—and asks that said conveyance may be set aside and made subject to the payment of the plaintiff's judgments. The answer of the defendants, while denying any fraud in the conveyance of the property, also alleges that, at the time of the conveyance, Thomas Reece had a homestead interest in the farm; and they ask that the plaintiff's petition may be dismissed, or that, in case the court should find for the plaintiff upon the question of the bona fides of the conveyance, that $2,000 in value of said premises, free and clear from all liens, and exclusive and in addition to the two mortgages thereon, be decreed to be the property of the defendants. A decree was entered as prayed in the petition and from this decree the defendants have appealed to this court.

We think the evidence was amply sufficient to uphold the finding of the district court that the defendant, Thomas Reece, was insolvent, and that the conveyance made to his son Philip was fraudulent as to creditors. It would serve no useful purpose to review at length the evidence on these questions. Suffice to say that the debts due the plaintiff were long past due, and the defendant could not pay them in the usual course of business, as they matured. Judgments were entered thereon and the sheriff's return made on the executions issued show that he could find no property of Thomas Reece out of which to satisfy the judgments, save this farm, the legal title to which stood in the name of Philip Reece. No further or greater proof of insolvency was required. The bona fides of the conveyance to Philip, if submitted as an original proposition to this court, would, we think, have to be determined against the defendants. The deed was made to Philip while he was in Montana and the evidence that any negotiations took place between the parties by correspondence is not of a satisfactory character. No money was paid on the consideration going to the father. Two hundred and eight

dollars was sent by Philip to pay interest due on the mortgages on the farm, but nothing has ever been paid on the notes given to his father. Negotiations were had between the officers of the bank and Thomas Reece and another son, who held a power of attorney from Philip, looking to a sale of the farm, and securing payment to the bank from the proceeds. While Philip testified that he bought the place for a home, we can imagine no good reason for his giving a power of attorney to his brother, unless it was to make a sale. There are other circumstances, which we will not take the time to note, all tending to impeach the bona fides of the conveyance to Philip, and which fully sustain the finding of the district court.

Relating to the homestead claim of the defendants, it is the settled law of this state that creditors can not complain of the transfer of exempt property by their debtor; and in *Stubendorf & Co. v. Hoffman,* 23 Nebr., 360, it was held that a fraudulent grantor of premises occupied as a homestead might assert his homestead exemption, if the court should find against the bona fides of the conveyance; and in *Horton v. Kelly,* 40 Minn., 193, it was held that "where a conveyance is set aside as fraudulent as to the creditors, the homestead interest of the grantor will be protected as if it had not been made." This requires us to consider whether Thomas Reece had a homestead right in the premises at the time of the conveyance to his son. Up to the date of the death of his wife, there can be no doubt that the farm was his homestead. He had occupied it as such from 1884. The removal to the farm of his son in 1890 to give his sick wife the benefit of a better house can not in any sense be considered an abandonment of the homestead. The cases in this state establish the rule that, once a homestead, that character continues to attach to the property until the contrary is shown, and the burden is on those who seek to show an abandonment. *Union Stock Yards Nat. Bank v. Smout,* 62 Nebr., 227. No act of the defendant himself, so far as the record discloses, can be pointed out that goes to impeach his right of homestead in the

premises if his personal status is such as to give him that right. It is insisted that after the death of his wife, there being none of his children residing at home and dependent on him for support, he does not come within the provisions of section 15 of our homestead law. To acquire a homestead in the first instance, there can be no doubt that the party asserting such right must be the head of a family, as defined in section 15 of the homestead act (Compiled Statutes, ch. 36); but, the homestead once acquired, its continuance after the loss of his wife, in the absence of children, or when children, if born to him, have attained their majority, and are maintaining themselves, depends, we think, on the consideration to be given section 17 of the act. Section 17 is as follows: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The exceptions mentioned in the latter part of the section, and for which the homestead may be sold, are debts secured by mechanics', laborers' or vendors' liens, or debts secured by mortgage executed and acknowledged by both husband and wife. The statute, in clear and express terms, provides that the surviving husband or wife shall continue to enjoy the benefit of the homestead exemption in cases where the title to the property stands in the name of the deceased spouse. Where the husband, being the owner of the fee of the homestead, dies, the statute is plain that the surviving wife is vested with a life estate therein, free and clear of all debts contracted by herself or her deceased husband prior to or at the time of his death, and it is equally plain that if the fee of the homestead is in

the wife, and the husband survive her, he is vested with a life estate, divested of all debts of either contracted prior to her decease. This is the plain reading of the statute, and the right thus vested in the survivor is not made to depend upon whether any issue resulted from the marriage, but is given regardless of whether there are children to be provided for by the survivor. In such cases it is clear that the survivor may claim the homestead as exempt from prior debts during his or her life, whether the head of a family, as described in section 15 of the act, or not.

It is argued with great earnestness that no provision is made for the continuance of the homestead right in the survivor where he is the owner of the fee, and ceases to be the head of a family, and that in such cases the homestead is liable for debts contracted prior to the decease of his wife. We can not agree with this contention. If we strike from section 17 so much as relates to the right of the owner of the fee to dispose of it by will, subject to the life estate created for the survivor, and providing for the succession of the remainder in the absence of a will, it reads as follows: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life. * * * In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The words "in either case" plainly refer to the selection of the homestead. The selection may be made from the property of either the husband or the wife, but in either selection it shall not be liable for debts contracted or existing against both or either previous to or at the time of the death of one of them. The undoubted meaning and intent of the legislature was to vest in the survivor a home which could not be reached for debts contracted prior to the death of his or her spouse, regardless of whether such survivor was the head of a family or not.

We therefore recommend that the decree of the district court be reversed, and the case remanded, with instructions to enter a decree preserving to the defendant Thomas Reece, his homestead interest in the property.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed, and the case remanded with instructions to enter a decree preserving to the defendant Thomas Reece, his homestead interest in the property.

REVERSED AND REMANDED.

DAVID STEWART ET AL. V. CATHERINE DOERING.

FILED MARCH 19, 1902. No. 11,176.

Commissioner's opinion, Department No. 3.

Continuance: TRIAL. The continuance of a cause by a justice of the peace is no part of the trial of the cause, within the meaning of section 11, chapter 28, Compiled Statutes.

ERROR from the district court for Saline county. Heard below before HASTINGS, J. *Affirmed.*

A. S. Sands, for plaintiffs in error, cited *Gibson v. Sidney,* 50 Nebr., 12.

J. N. Rickards, contra.

DUFFIE, C.

Stewart, the plaintiff in error, is a justice of the peace in and for Saline county, and this action was brought upon his official bond, the breach charged being that he had exacted and collected excessive fees. Judgment went against him, from which he has taken error. The facts are not in dispute, both parties agreeing that the case in which the fee in dispute was taxed came to the plaintiff in error on

change of venue from another justice. On receipt of the transcript, the plaintiff in error docketed the case, and, upon calling the same for trial, it was continued until the 30th of December, 1897. On that date the case was again continued until December 31, 1897, on which day a trial upon the merits was commenced and concluded. Plaintiff in error charged and collected one dollar for "one day's attendance upon the trial after the first day," and the question presented is, was this fee illegally exacted? Section 11, chapter 28, Compiled Statutes of 1901, relating to the fees which may be charged by a justice of the peace, contains the following relating to the fee which may be charged for the trial of a case: "Each day's attendance upon trial of a cause, after the first day, one dollar." The record does not disclose that the case was continued at the instance of either of the parties to the action, and we might well presume that the justice himself continued the case on account of being engaged in other official business, as provided by section 959, Code of Civil Procedure. In such case, it would hardly be contended that entering an order for such continuance was any part of the trial of the cause, such as to entitle the justice to charge a fee of one dollar for attendance upon the trial at a subsequent day when the case was heard and determined. We do not care, however, to dispose of the case on a technicality, as the parties evidently desire the opinion of this court as to the meaning of the statute, and what steps in the progress of a case constitute any part of the trial.

The plaintiff in error, in a vigorous brief, contends that the justice is entitled to charge a fee of one dollar for every day after the return day of the summons that the proceedings in the case require his presence. His argument, if we understand it, is that all the taxable costs in the case previous to a trial on the merits, have been earned on the return day of the summons; that, if the case is tried and disposed of on the return day, no fee can be charged for attendance on the trial; but that if other proceedings in the case are taken by the parties, so that a trial on the

merits can not be had on the return day, such proceedings, including a continuance of the case, are a part of the trial of the cause and constitute the first day of the trial, entitling the justice to a trial fee of one dollar for his subsequent attendance. This argument, it seems to us, not only refutes itself, but is contrary to the practice followed for the many years that the statute has been in force. So far as our knowledge extends, the uniform practice in justice courts has been to tax the fee of fifty cents allowed by statute for each continuance of a case, and this continuance has never been regarded as any part of the trial. If it were, then each continuance, after the first, would entitle the justice to tax as fees, not only the fifty cents specially provided by statute for each continuance, but one dollar in addition for a day's attendance on the trial. In the case at bar the justice would be entitled to charge two dollars for two days on trial of the cause, as the case was continued twice before the day on which it was finally tried on its merits. But on principle, and from the clear reading of the statute, we hold that the postponement of a trial to some future day does not constitute any part of the trial which is so adjourned.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

UNIVERSITY OF MICHIGAN, APPELLANT, V. DANIEL L. MCGUCKIN ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,080.

Commissioner's opinion, Department No. 3.

1. **Marriage**: CONTRACT: STATUS. The marriage relation is, in only a limited, qualified sense, contractual. It is a social *status*, for the assumption of which by persons of the requisite legal capacity, all that is essential is their free consent.

2. ——: ——: LANGUAGE: CONDUCT. The consent requisite to the creation of the marriage relation need not be expressed in any especial manner or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct.

APPEAL from the district court for Douglas county. Heard below before KEYSOR, J. Rehearing of case reported in 62 Nebr., 489. *Reaffirmed.* HOLCOMB, J., dissenting.

Wright & Stout, for appellant.

The fact of copulation after a promise *per verba de futuro* is simply evidence from which the court may presume a new promise or a promise *de præsenti;* and the fact of living together is not itself marriage, but is simply evidence from which the court may presume that a promise was made. This presumption, which ordinarily would arise from continued copulation, in the case at bar, is overcome by the positive finding that no new promise was made and the relation was meretricious at its inception. Having been meretricious at its inception, it is presumed to continue meretricious until there is positive evidence of a change or a new promise. So that in this case, even if the court had not specifically found that there was no change and no promise *de præsenti* and no promise at any time when the parties were capable of entering into the relation, the court could not find from the findings of fact that any new promise existed. As to what constitutes a common-law marriage: *Schuchart v. Schuchart,* 61 Kan., 597; *United States Trust Co. v. Maxwell,* 26 Misc. Rep. [N. Y.], 276; *Williams v. Herrick,* 43 Atl. Rep. [R. I.], 1036, and authorities cited on former argument, 62 Nebr., 489.

I. R. Andrews and *J. J. Breen, contra.*

AMES, C.

This cause is resubmitted upon arguments and briefs upon a rehearing granted from a former decision in the

same cause, the opinion in which was filed on the 10th day of July, 1901. The case was submitted upon a record containing the pleadings and findings of fact of the trial court, only.

The principal question discussed upon the reargument, and the only one with which we think it requisite to deal in this opinion, is that of the validity of the alleged marriage between the appellees Anna McGuckin and Daniel L. McGuckin. The findings of fact relative to this inquiry are copied in the former opinion and need not be repeated here. The district court found, as a conclusion of law, that they were sufficient to establish the validity of the marriage. In this conclusion this court in its former opinion concurred. The facts found are many of them evidential, rather than ultimate, in character. The beginning of the cohabitation was meretricious, each of the parties having a lawful spouse then living; but both these obstacles were soon afterwards removed by decrees of divorce, and thereafter the parties not only continued for a long term of years to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public and individuals as being such. During the time, and before the making of the mortgage in question, five children were born of the union, whom their parents unitedly represented to the public, and caused to be baptized into church, as the children of lawful wedlock. That these facts and certain others, recited in the finding, would, if standing alone, be sufficient evidence of marriage, can not be doubted, and is explicitly admitted by counsel for the appellant in both brief and argument. But in connection with them, and as a part of the same finding in which they are set forth, the court also found that, although the parties made promises to marry prior to the obtaining of the divorces, yet that such promises "were the only promises ever made, and that no new promise was made after the obtaining of the divorce by Daniel L. McGuckin, nor was there any apparent change in their manner of living or holding themselves out as husband and

wife." Counsel thereupon insists that a lawful marriage could have had its inception only in a promise or agreement of marriage after the removal of the legal obstacles thereto; that the evidential facts found are of no significance, except as tending to establish the making of such a promise or agreement, or of raising a presumption that one had been made, and that whether one had been made was the only ultimate fact in controversy; and that the language quoted above from the finding, being an express negation of such promise, is decisive of the case, so that the evidential facts found are immaterial. In other words, it is contended, as we understand counsel, that a single finding by the court that there was no promise or agreement after obtaining of the divorces would have had the precise legal weight of the actual finding, and that it is not a material inquiry whether the court recited all or only part of the evidence establishing this ultimate fact, because it was not obligatory upon him to recite any of it. We can hardly believe that this is the interpretation which the trial judge himself put upon his findings, and we are not convinced that it is the true one to be given to that document. In our opinion, an express verbal promise or agreement of marriage is not in all cases indispensable under our law. The statute enacts (Compiled Statutes, ch. 52, sec. 1): "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." The main purpose of this definition is, we think, to negative the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations of any particular churches or sects. That it is not a contract resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. This was pointed out by the late Mr. Justice Field, with his usual clearness of expression and wealth of illustration, in *Maynard v. Hill*, 125 U. S., 190. What persons establish by entering into

matrimony, is not a contractual relation, but a social *status;* and the only essential features of the transaction are that the participants are of legal capacity to assume that *status,* and freely consent so to do. It may be true, as counsel for appellant contends, that the indispensable consent can not be implied, but must in all cases be expressed; but it does not follow that it must be expressed in any especial manner, or by any prescribed form of words. The statute above cited dispenses with all ceremonials,—verbal as well as other. It was probably this idea which was in the mind of the trial judge when he penned the words quoted above from his finding. In other words, it appeared to him, as it appears to us, that there was sufficient evidence that after the obtaining of the last divorce the parties consented to assume the *status* of husband and wife, although they made no explicit verbal contract or agreement so to do. Doubtless the very phrase which counsel for appellant regards as establishing the ultimate, conclusive and solely essential fact, the trial judge looked upon as slightly, if at all, material. So construed, his finding is inconsistent neither with itself, nor with the conclusion of law and judgment, and that this is its true interpretation is to our minds perfectly clear. As has already been said, it is conceded, and, indeed, it could not well be disputed, that there is in the finding, aside from this single expression, sufficient evidence of the consent of the parties, after the removal of their disabilities, to assume the marriage relation. That evidence is not rebutted by the mere negative fact that they omitted to express that consent by formal words. The ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a social relation. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent. In both cases the conclusion drawn by the court is from an implication, but in either case all that is required is that the expression be clear and unambiguous. In neither case can it properly be said that the contract or the consent is implied.

It is recommended that the former decision of this court be adhered to, and the judgment of the district court affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to, and the judgment of the district court

AFFIRMED.

HOLCOMB, J., dissents.

NOTE.—Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony. So in substance the present author defined in his earliest and all subsequent writings on the subject, and the correctness of the definition has become generally acknowledged. And the old formerly standard definitions which, taking no note of the diverse meanings of the word "marriage," termed it without discrimination a "contract," have been discarded. Now, in the law, a definition is legal doctrine epitomized. To ascertain, therefore, whether or not a proposed definition is correct, we do not compare its terms with those of prior definitions, with *dicta* of the judges, or with words of other learned persons. The test is, whether or not it accurately pictures, in miniature, not what the courts say, but the sum of what they adjudge. And in the barbarous condition of our legal literature, alike in the past and in the present, often is one thing uttered from the bench, and written down as law in our text-books, and the directly opposite is adjudged. A commentator on the law, therefore, should define legal doctrine according to its actual form in practice, not in any erroneous words which a judge or predecessor may have employed. Hence, we know that the foregoing definition of marriage is correct, because it accurately describes what the courts constantly decide. That marriage executed is not a contract we know, because the parties can not mutually dissolve it, because the act of God incapacitating one to discharge its duties will not release it, because there is no accepted performance which will end it, because a minor of marriageable age can no more recede from it than an adult, because it is not dissolved by a failure of the original consideration, because no suit for damages will lie for the non-fulfillment of its duties, because its duties are not derived from its terms but from the law, because legislation may annul it at pleasure, and because none of its other elements are those of contract, but all are of status.

Bishop, Marriage, Divorce and Separation, vol. I., 11, 12 and 13. *Campbell v. Campbell (Breadalbane Case)*, 1 L. R. Scotch & Divorce Appeals, 182; *Collins v. Voorhees*, 47 N. J. Eq., 315. A careful examination will show a distinction between these cases. The *Breadalbane Case* afterward came up in the house of lords on the right of a peer to his seat. He was given his seat. *Breadalbane Peerage Claim*, 1 L. R. Scotch & Divorce Appeals, 259. See, also, *De Thoren v. Attorney General*, 1 L. R. Appeal Cases, 686.

A legal Roman marriage was called *justæ nuptiæ, justum matrimonium*, as being conformable to *jus* (civile) or to law. A legal marriage was either *cum conventione uxoris in manum viri*,* or it was without this *conventio*. But both forms of marriage agreed in this: there must be *connubium* between the parties and consent. Biblical, Theological and Ecclesiastical Cyclopædia, vol. V., 799.

A majority of catholic theologians contend that, in marriage, the parties themselves are the ministers of the sacrament. Addis & Arnold, Catholic Dictionary, p. 546.—REPORTER.

JOHN H. WEBSTER, TRUSTEE, v. BATES MACHINE COMPANY.

FILED MARCH 19, 1902. No. 11,318.

Commissioner's opinion, Department No. 3.

1. **Lease**: REENTRY BY LANDLORD: DEFAULT IN PAYMENT OF RENT: FORFEIT OF MACHINERY: RIGHTS OF LANDLORD. When, pursuant to the terms of lease, a landlord reenters because of a default in the payment of rent under a lease covenanting that in such case machinery placed upon the premises by the tenant shall be forfeited to the lessor, the former will succeed to only such title in such personal effects as the latter himself had.

2. **Conversion**: TORTIOUS OR OTHERWISE: NOTICE. When in the absence of any relation of trust or confidence, personal property is taken possession of, tortiously or otherwise, the act alone is notice to the whole world of the nature and extent of the right, title or claim made by the party committing it; and if a person having an adverse claim thereto, fails to assert it or remains in ignorance until after the lapse of the statutory period of limitations, the fault is his own and his right of action therefor is barred. There is no distinction in this respect between actions for the recovery of chattels and those for the recovery of real property.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

*With the coming of the wife into the hand of the man.

Dryden & Main and *James H. McIntosh*, for plaintiff in error.

William Gaslin, contra.

AMES, C.

This is an action in replevin which (a jury being waived) was tried upon a stipulation of facts. From this stipulation it appears that John H. Webster, the plaintiff in error, was the owner of the fee, in trust, of a certain manufacturing building and property situate in the city of Kearney in this state. In September, 1892, he executed a lease of the premises to one Barnheisel for a term of years, reserving rent, payable semi-annually. It was covenanted in the lease that the tenant should make certain repairs and improvements, and that, if he should pay his rent promptly when due, he should, at the expiration of his term, have the right to remove from the premises "the buildings which shall have been erected thereon by said second party, during the continuance of this lease, for an engine room and boiler house; also any new boilers and engines placed therein by second party." It was further covenanted "that the second party will put a new floor in the machine room and a new roof on the same; erect new line shaft with proper pulleys; make all necessary additions, repairs to said mill and machinery, all of which additions, repairs and improvements, (except said new boilers and engines, with engine and boiler building) shall be and remain the property of said first party"; but, if the tenant should make default in the payment of rent, the lessor should be entitled to reenter, and in such case all improvements made on said premises should be forfeited to him. The tenant made default of the first instalment of rent reserved by the lease, and the lessor on or about the 20th day of July, 1893, reentered upon the premises and took possession of all the improvements and machinery placed thereon by the tenant, including the engine which is the

subject of this action, claiming title thereto under the above-mentioned covenants of the lease. Before the lease was made of record and before forfeiture thereunder had been incurred, the defendant in error, the Bates Machine Company, without any actual knowledge of the existence of the lease, sold and delivered to the tenant the engine which is the subject of this controversy, upon a written contract that the title to the same should not pass until full payment therefor, and caused the contract to be made duly of record in the office of the clerk of the county. Payment was never made. Upon this state of facts the logical conclusion seems to us irresistible that, as between the vendor of the engine and the lessor of the factory, the former has the better right. The latter is not a purchaser or mortgagee for value, nor is he an attachment or execution creditor. Under the covenants of his lease he was, upon default in payment of rent, to appropriate whatever machinery or appliance belonging to his tenant were to be found upon the premises, but he was not entitled to seize property found thereon, the title to which was in third persons,—especially so if such third persons, at the time they delivered the property upon the grounds, were ignorant of the covenants of the lease or even of the existence of that instrument. The tenant, at the time of the sale and delivery of the engine, was in possession of the factory, with all the external *indicia* of ownership. From all that appears from the stipulation of facts, the vendors had a right to regard him, and did regard him, as the sole owner of the premises. As between the parties to this action the rights of the lessor, at the time he took possession of the buildings and machinery, did not rise higher than those of his tenant; and, as between the tenant and the defendant in error, the title to the machine was unquestionably in the latter.

But the plaintiff in error pleaded the statute of limitations, and upon this plea we think must prevail. It is stipulated that on the 20th day of July, 1893, the lessor "took possession of the said premises in which was the

property involved in this suit and placed a watchman in charge of the same who has been at all times since that date, until the commencement of this suit, in possession of said premises in which the property in question is now and has been situated since said Barnheisel [the tenant] put the same therein in 1892, nor did the said Bates Machine Company demand said property from the defendant herein, until shortly before the commencement of this suit." But it is further stipulated "that when defendant's agent in July, 1893, took possession of said paper mill, in which said property in controversy was left by Barnheisel, he claimed to take posession of said property in controversy herein, and said McIntosh, agent of said defendant Webster, instructed the watchman left in charge of said paper mill to hold all property therein for said Webster, but of this neither plaintiff nor its attorneys or agent nor any one acting therefor had any notice or knowledge whatever." And again, "No notice of the defendant's claim to the property in question was ever given to said Bates Machine Co. or to their attorney, or any of their agents or representatives until the latter part of 1897, shortly after the termination of the case of Henry E. Lewis, Receiver, v. the said Bates Machine Co., hereinbefore referred to." In the interim the suit last mentioned and another action between the defendants in error and another person were prosecuted to determine the title and right of possession of the property. To neither of these actions was the plaintiff in error a party, nor is he, or his agent, McIntosh, shown to have had any knowledge of them, although in both of them attorneys representing him in this suit were counsel adverse to the machine company, and in both cases the property was, by stipulation between the parties thereto, permitted to remain undisturbed in the paper mill during the pendency of the litigation, which terminated in both instances in favor of the machine company. This action was begun on March 16, 1898. From these circumstances and others detailed in the stipulation, the trial court found that the possession of the plaintiff in error was not adverse

to the machine company, until demand and refusal, shortly before the beginning of this action.

The facts being admitted, the question of adverse possession is one of law, and the rule that an issue of fact determined by a trial court from conflicting evidence will not be disturbed is not applicable. When the plaintiff in error took possession of the premises his lease was, and for some time had been, of record in the county. He took open, notorious and exclusive possession under this instrument, which, in terms, entitled him to keep and retain all the fixtures put in the mill by his tenant, including the engines in controversy; and he put an agent in charge, with instructions to hold them for him, which he continued to do for more than four years before this action was begun. There could be no stronger evidence of his intent to hold them adversely to the whole world and to convert them to his own use under a claim of title. This is an action in replevin and there is no allegation or proof of any concealment or fraud, but, if there had been both, they would not have prevented or delayed the running of the statute. If the plaintiff in error was guilty of any wrong it was in the conversion of the property, and the rule is that in such cases the cause of action arises at the date of the conversion, even although it be fraudulent or felonious. Thus it was held in *Howk v. Minnick,* 19 Ohio St., 462, that an action for the wrongful taking of personal property was barred in four years, although the taking was under circumstances constituting larceny, and was concealed from the owner. In *Fee's Adm'r v. Fee,* 10 Ohio, 469, which was an action for money had and received, the court say: "From the statement of the case it is evident that the cause of action accrued on the receipt of the money. In such a case it is not sufficient, in order to avoid the effect of the statute, to aver that the party was ignorant of the fact that he had a cause of action. The plea of the statute goes to the existence of the cause of action, and not to the knowledge of it. This, although it is a sort of elementary principle, and has its foundation in necessity and conven-

ience, has been sometimes questioned, but I am not aware that it has ever been shaken. The case of *Granger v. George,* 5 B. & C. [Eng.], 149, is one of the last in which the point has been made. It was an action of trover. The conversion had taken place more than six years before the commencement of the suit. The plaintiff attempted to avoid the bar of the statute by replying that the fact of the conversion did not come to his knowledge till within six years. But it was held notwithstanding that the statute was a bar, and that the circumstances which were set out in the plea were entirely foreign to the issue." To the same effect is *Campbell v. Roe,* 32 Nebr., 345, the syllabus in which is: "When an agent is appointed to collect money and remit to the principal after deducting his charges, no time being stated when the remittance is to be made, the statute of limitation commences to run in favor of the agent from the time he receives the money." "Mere silence or concealment by the defendant, without affirmative misrepresentation, will not toll the statute."

The underlying reason in this class of cases is that when, in the absence of any relation of trust or confidence, personal property is taken possession of, tortiously or otherwise, that act alone is notice to the whole world of the nature and extent of the right, title or claim made by the party committing it; and, if a person having an adverse claim fails to assert it or remains in ignorance until after the lapse of the statutory period of limitations, the fault is his own, and his right of action therefor is barred. To this effect are *Wood v. Carpenter,* 101 U. S., 135; *Parker v. Kuhn,* 21 Nebr., 413-422; *Conner v. Goodman,* 104 Ill., 365. There is no distinction in this respect between actions for the recovery of chattels and those for the recovery of real property. In either case ignorance of the plaintiff's rights or of the nature of the defendant's claim, does not delay, suspend or prolong the running of the statute.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

JAMES L. GANDY V. ADDISON L. CUMMINS.

FILED MARCH 19, 1902. No. 10,578.

Commissioner's opinion, Department No. 3.

1. **Petition:** CAUSE OF ACTION. Petition examined, and *held* to state a cause of action.

2. **Motion for New Trial:** PETITION IN ERROR. A judgment will not be reversed for errors required to be assigned in a motion for a new trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling such motion. *James v. Higginbotham*, 60 Nebr., 203, followed.

ERROR from the district court for Pawnee county. Tried below before LETTON, J. *Affirmed.*

Samuel P. Davidson, for plaintiff in error.

Story & Story, contra.

ALBERT, C.

This is an action at law, brought by Addison L. Cummins against James L. Gandy to recover for money obtained of the plaintiff by the defendant by means of false and fraudulent representations. A trial to a jury resulted in a verdict for the plaintiff, and from a judgment rendered thereon the defendant prosecutes error to this court.

The first question relied on for a reversal is that the amended petition, on which the case was tried, does not state facts sufficient to constitute a cause of action. The allegations of the petition are as follows:

"1. That heretofore to-wit: during the latter part of the year 1890, Ann Fries and John Fries her husband were the

owners of the property known as the Fries Mill property consisting of something less than a quarter section of land together with the mill and other improvements situated in township one, north of range twelve, east in said county of Pawnee and state of Nebraska, did enter into a contract to sell said property for the sum of $6,500 to the plaintiff in and about which said transaction the said defendant James L. Gandy represented to this plaintiff that he was the agent of the said Ann Fries and did then and there and in that behalf represent and declare to this plaintiff that he had full and entire authority from the said Ann Fries to negotiate and enter into contracts for the sale of her interests in said real estate and to receive the purchase money for her in that behalf, and this plaintiff believing said statements of the said James L. Gandy and relying upon said declarations did negotiate with the said James L. Gandy as agent of the said Ann Fries for the purchase of the said real estate, and relying upon and believing his said representations as to his being such agent of the said Ann Fries did pay to the said James L. Gandy certain money as part of the purchase money for said premises, amounting in all to the sum of $740 which said money the said James L. Gandy received as a part of the purchase money for said real estate and did promise as such agent of said Ann Fries to faithfully apply said money on the said purchase money by paying the same to the said Ann Fries for whom he pretended to be acting when he received said money.

"2. The plaintiff further alleges that the said James L. Gandy failed, neglected and refused to pay over the said money so received to the said Ann Fries, but corruptly and fraudulently converted the same to his own use, intending and purposing thereby to defraud this plaintiff out of said money and the said defendant did thereby defraud this plaintiff out of the said sum of $740.

"The plaintiff further alleges that he relied upon the statements of the said James L. Gandy that he was the agent of the said Ann Fries and was authorized to receive

said money on her behalf and would pay the same to her but, each and all of said statements were false, fraudulent and untrue.

"The plaintiff further alleges that he did not discover until about the 3rd day of May, 1894, that each and all of said statements were untrue, and that the said defendant had not paid said money over to the said Ann Fries as he had agreed to do, but had converted the same to his own use.

"3. There is due the plaintiff from the said defendant for money belonging to the plaintiff and wrongfully and fraudulently converted by defendant to his own use as aforesaid the said sum of $740 with seven per cent. interest thereon from December 26, 1890, no part of which has been collected and paid, but payment thereof refused by the said defendant."

The sufficiency of the amended petition was first challenged by an objection to the introduction of any testimony in support of its allegations, and again by motion for judgment notwithstanding the verdict. Liberally construed, as we are bound to construe it under the settled practice of this state, the petition charges the following facts:

1. That the defendant falsely and fraudulently represented to the plaintiff that he was the agent of the owner of certain property, with full power to negotiate for its sale, and to receive the purchase price thereof.

2. That the plaintiff, relying upon said representations and believing them to be true, entered into a contract with the defendant, as such agent, for the purchase of said property, and paid him $740 as a part of the purchase price, to be paid to his alleged principal.

3. That at the time of making such representations, the defendant was not the agent of said owner, and had no authority to negotiate said sale nor to receive the said sum of money, and that said representations were falsely and fraudulently made by him.

4. That the defendant instead of applying the money,

so as aforesaid paid to him, to the purpose for which it was so paid, fraudulently converted the same to his own use.

5. That the plaintiff did not discover the fraud so as aforesaid practiced upon him until the 3d day of May, 1894.

The defendant urges that there is a failure to allege that the plaintiff was damaged by the failure of the defendant to apply said payment as agreed, or that the owner of the property had failed to ratify said sale, and to convey the property to the plaintiff. Those allegations are not essential to plaintiff's theory of the case. From the manner in which the pleading is assailed, it stands confessed that the defendant obtained plaintiff's money by means of false and fraudulent representations. There is no presumption that the owner of the property ever ratified the transaction brought about by defendant's false and fraudulent assumption of agency, nor was the plaintiff required to negative such fact in his petition. In our opinion, the amended petition states a cause of action, and the defendant's objections thereto were properly overruled.

Many other errors are assigned, but they are such as are required to be first brought to the attention of the trial court by motion for a new trial. They were thus presented, and the motion was overruled. That ruling is not complained of in the petition in error. Such omission amounts to a waiver of all errors required to be assigned in such motion. *James v. Higginbotham,* 60 Nebr., 203. Such being the case the record presents nothing further for consideration.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reason stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MINNA WIRTH V. VINCENT B. CALHOUN ET AL.

FILED MARCH 19, 1902. No. 10,917.

Commissioner's opinion, Department No. 3.

1. **Breach of Contract:** MATTER OF DEFENSE. In an action by an employee against his employer for damages for breach of contract, arising from the wrongful discharge of the former, that the plaintiff obtained, or by the exercise of due diligence, might have obtained, other employment, is a matter of defense, which the plaintiff is not required to anticipate in his petition.

2. ———: ———: BURDEN OF PROOF. The burden of proof is on the defendant to establish such defense, and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price.

3. **Sunday:** CONTRACT: SPORTING. A contract whereby a party is required to furnish one performance, consisting of music, dancing and feats of contortion, each day of the week, including Sunday, is not invalid as in contravention of section 241 of the Criminal Code; such performances not falling within the prohibition of said section.

4. ———: ———: ———: PUBLIC POLICY. The legislature having expressed the policy of the state in regard to the observance of Sunday by said section, the court will not add to the restrictions thus imposed by declaring such contract contrary to public policy.

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

Charles A. Baldwin, for plaintiff in error:

The contract in this case was in violation of the Criminal Code, section 241. In the Code the descriptive term used is "common labor." This term is defined by lexicographers: "The act of doing or endeavoring to do that which involves hard work, toil or exertion of strength, whether physical or mental, any kind of exertion which involves or is attended with fatigue—the exertion of the body or of the mind in those operations necessary for obtaining the means of subsistence, as distinguished from the exercise of the body in amusement or recreation. The performance

of work or toil." Encylopædic Dictionary. The courts have construed the term "common labor" to mean the exercise of one's ordinary business calling. *Sellers v. Dugan,* 18 Ohio, 489-493; *Quarles v. State,* 55 Ark., 10; *Bernard v. Lupping,* 32 Mo., 341.

Richard S. Horton, contra, argued that the term "common labor," as used in the statute, meant unskilled labor, citing *Bloom v. Richards,* 2 Ohio St., 387.

ALBERT, C.

It sufficiently appears from the pleadings and the evidence in this case, that on the 12th day of March, 1898, the plaintiffs and the defendant entered into a contract in writing whereby the plaintiffs agreed to give a performance each day of the week, including Sunday, for a period of five months, commencing June 1, at the defendant's music hall in Omaha. These performances were to consist of music, dancing and contortions. In consideration whereof, the defendant agreed to pay them the sum of $60 per week, and to furnish them with board and lodging. The plaintiffs, in pursuance of this contract, entered into the employ of the defendant, and gave the specified entertainments, in accordance with the terms of the contract, until the 24th day of July, 1898, when they were discharged by the defendant. After the expiration of seven months, they brought an action against the defendant for a breach of the contract. A trial to a jury resulted in a verdict for the plaintiffs. The defendant brings the case here on error.

1. It is urged by the defendant that the petition is defective for the reason that it does not allege that the plaintiffs were wrongfully discharged; that they have sustained damages by reason of such discharge; nor that they were unable to find employment in their line, after such discharge, at the same or better wages. The petition alleges that the plaintiffs kept and performed their part of the contract. This allegation, taken in connection with other parts of the record, amounts to an allegation that they

kept and performed their part of the contract so far as they were permitted to do so by the defendant. If they kept and performed their part of the contract so far as they were permitted to do so, their discharge was wrongful. As to the omission to allege that they have sustained damages, a sufficient answer is, the petition states the facts, and concludes with the allegation that there is due the plaintiffs, by reason of the matters and things hereinbefore set forth, the sum of $1,125. As to the failure to allege that they were unable to find other employment, that is a matter of defense, and they were not required to anticipate it. *Hamilton v. Love,* 54 N. E. Rep. [Ind.], 437; *Barker v. Knickerbocker Co.,* 24 Wis., 680; *Strauss v. Meertief,* 38 Am. Rep. [Ala.], 8. There is but one case that we have been able to find holding a contrary view, and that is *Fowler v. Waller,* 25 Tex., 696. There the question is not discussed, nor are any authorities cited.

The fifth instruction to the jury is as follows: "If you find from the evidence that Frederick Wirth had authority to make said contract, or that the defendant with full knowledge of the terms ratified the same, or that an estoppel exists, then you must find for the plaintiffs." The defendant insists that this instruction is in direct violation of the rule announced in *Nebraska Wesleyan University v. Parker,* 52 Nebr., 453. The rule referred to is not new, but has no application here. In that case there was not evidence of a ratification, nor of facts constituting an estoppel. In this there is evidence tending to show both.

Complaint is made of the sixth instruction, on the ground that it "was based on a state of facts not put in issue by the pleadings, and was misleading." The foregoing is the extent of the argument on that point. The instruction is too long to set out in this opinion. We have examined it in the light of the record, and do not believe it is vulnerable to the objection urged. On the contrary, we regard it as a fair statement of the law applicable to the pleadings and facts shown in evidence.

The seventh instruction is as follows: "If you find for

the plaintiffs you will assess their damages at the sum of $60 per week from July 24, 1898, to October 31, 1898, together with the reasonable value as shown by the evidence of their board and lodging for the same period." The defendant insists that this instruction is erroneous, in that the jury were instructed to allow the full contract price as damages in case they found for the plaintiff. The instruction was proper, under the pleadings and evidence in this case. It is not claimed that there was any evidence tending to show that the plaintiffs had, or, by the exercise of due diligence, might have, secured other engagements, or of any other fact in mitigation of damages. Under such circumstances, the contract price is the measure of damages. See authorities cited *supra* on the question of the sufficiency of the petition.

The defendant complains of the eighth instruction because it directs the jury that, in case they find for the defendant on the contract alleged in the petition, still they should return a verdict for the plaintiffs for $60; the defendant having admitted that amount to be due. The defendant denied the contract alleged in the petition, but alleged another and different contract. In this connection she pleaded a tender of $60, and renewed that tender by her answer. In legal effect, that was an admission that she owed the defendants that amount. In view of the rest of the instructions and the record, the instruction was proper, and there is no reasonable probability that the jury were misled by it.

It is further urged by the defendant that the contract is illegal and void for the reason that a part of the performances to be given by the plaintiffs were to be given on Sunday. In the determination of the question thus raised, it is not necessary to enter upon a discussion of the relative merits of the various systems of religion, nor of the advantages resulting to the individual or to society from the observance of one day of the week in a particular manner, because, under our form of government, all so-called Sunday laws, whatever the motives that in-

spire them, are purely municipal or police regulations. The authority to enact such laws comes from no system of religion, but from the fundamental law of the land. In the exercise of that authority, the legislature enacted section 241 of the Criminal Code, invoked by the defendant, which, so far as is material at present, is as follows: "If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in a sum not exceeding five dollars nor less than one dollar." If the contract provides for a violation of this section, it is because the performances provided for by the contract fall within the meaning of "common labor" or "sporting." As to the former term, it is clear to our minds that it does not include entertainments consisting of music and feats of a professional contortionist. Section 254 of the Criminal Code provides that words are to be taken and construed in the sense in which they are understood in common language, taking into account the context and subject matter relative to which they are employed. We are confident that in "common language" the term "common labor" is never understood to include such performances. The fact that, in one part of his argument, counsel urges that they are included in that term, and in another as strenuously urges they are included within the term "sporting," would indicate that such entertainments are not common labor. In *Henderson v. Nott,* 36 Nebr., 154, this court says: "The term 'laborer,' in the sense of the statute, is one who is hired to do manual or menial labor for another, but it does not include every person who performs labor for compensation." In *Re Ho King,* 14 Fed. Rep., 724, a

theatrical actor was held not to be a laborer, in the popular sense of the term. It remains, then, to determine whether such performances fall within the meaning of the term "sporting." "Sport" is defined by Webster as follows: "To divert; to make merry; to represent by any kind of play; to exhibit or bring out in public, as to sport a new equipage; to play; to frolic; to wanton; to practice the diversions of the field; to trifle." According to the same lexicographer, "sporting" means "indulging in sport; practicing the diversions of the field." If we use the definition of "sport," instead of the term itself, in defining the term "sporting," the definition would be as follows: (1) To indulge in diverting; (2) to indulge in merry-making; (3) to indulge in representing by any kind of play; (4) to indulge in bringing out in public, as to indulge in sporting a new hat or carriage; (5) to indulge in play or frolic; (6) to indulge in wantonness; (7) to indulge in trifling; (8) practicing the diversions of the field. It is obvious, we think, that the legislature did not employ the term in the sense of the first, second, fourth, fifth or sixth definition above given. They are too broad; they include too much. If adopted in the construction of the statute, our Sunday law would rival the most stringent of the blue laws. The third is a sense in which the term is rarely used, and is illustrated in the Century Dictionary by a line from Dryden: "Now sporting on thy lyre the loves of youth." As thus illustrated, it, also, is too broad, as it includes many common and innocent diversions. The seventh has no application to this case. This leaves the eighth, "practicing the diversions of the field," as the definition the lawmakers most probably had in mind when the law was enacted. This appears still more probable on an examination of other definitions. In the Century Dictionary the general meaning of sporting is said to be "engaging or concerned in sport or diversion;" the specific meaning, "interested in or practicing field sports." To adopt the general definition would be to impose obviously absurd and intolerable restriction on the personal liberty of the

individual. Had the lawmakers held to such strict views of the sanctity of the day as would be implied from imposing such restrictions on mere diversions and amusements, it is hardly probable that they would have framed the law in such language as to permit buying and selling, and the making of contracts on that day. The making of a contract on Sunday is not a violation of the statute. *Horacek v. Keebler,* 5 Nebr., 355. A sale made on Sunday is not for that reason invalid. *Fitzgerald v. Andrews,* 15 Nebr., 52.

From the foregoing considerations, coupled with the knowledge that to witness a desecration of the Sabbath day is extremely offensive to many people, and is by them believed to have a demoralizing effect on the young, we believe the term "sporting," as used in the statute, applies exclusively to diversions of the field and outdoor sports, which, from their nature, are forced upon the attention of the young and those whose religious sensibilities are thereby offended. But whether it should be so restricted or not, we are satisfied that to give such performances as were given in pursuance of the contract in question is not "sporting" within the meaning of the statute. Whether such performances should be permitted on Sunday is a question exclusively for the legislature.

It is suggested in argument that even though the contract is not in violation of the express provisions of the Sunday law yet, as it was to be performed partly on Sunday, it is contrary to public policy. We can not adopt that view. The state having defined its policy in regard to the proper observance of one day of the week by the enactment of a law against Sabbath-breaking, it is not within the province of this court to add to the restrictions thus imposed. And if it were, we are by no means sure that to permit the defendant to withhold from the plaintiffs what has been found to be their just due, would be the best means of impressing the public with a sense of the sure rewards of virtue, and the sanctity of the Sabbath day.

It is also claimed that the verdict is not sustained by

sufficient evidence. We have examined the evidence with some care, and consider it amply sufficient to that end.

We recommend that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—The decision in *Sellers v. Dugan*, 18 Ohio, 489-493, cited in plaintiff's brief, is a construction of a statute identical with section 241 of our Criminal Code, which we adopted from Ohio. But the rule, that one state in adopting the statute of another state adopts the judicial construction placed thereon by the former state and makes it a part of the legislative mandate, no longer obtains in Nebraska. *Morgan v. State*, 51 Nebr., 672.

In an action for trespass on the case, "for that the defendant on the seventh day of October, 1883, at said Manchester, hired of the plaintiff a phaeton buggy, horse and harness, to drive about said Manchester, and it was the duty of the said defendant to drive said horse and use said buggy and harness in a careful and prudent manner. Yet the defendant then and there so negligently, wilfully, carelessly and maliciously managed and drove said team, that said buggy was overturned and broken in pieces," the court found the hire according to the declaration; that the same was paid for in advance; that the defendant broke the buggy through careless management. *Held*, there could be no recovery, because the hiring was upon Sunday. *Chenette v. Teehan*, 63 N. H., 149, 150, following *Woodman v. Hubbard*, 25 N. H., 67-69.—REPORTER.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. NANCY L. FEATHERLY, ADMINISTRATRIX.

FILED MARCH 19, 1902. No. 11,200.

Commissioner's opinion, Department No. 3.

1. **Damages: NEGLIGENCE: BURDEN OF PROOF.** In an action for damages resulting from the alleged negligence of the defendant, when the evidence on the part of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence.

2. **Charging Jury**: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. On the facts stated, *held*, that the court erred in charging the jury that the burden of proof was on the defendant to show contributory negligence.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Reversed.*

J. W. Deweese, Fayette I. Foss and *Frank E. Bishop*, for plaintiff in error.

George H. Hastings, contra.

ALBERT, C.

This action was brought by Nancy L. Featherly, as administratrix of the estate of John Raley, deceased, against the Chicago, Burlington & Quincy Railroad Company, to recover damages sustained by the alleged negligence of the defendant, whereby the intestate was struck and fatally injured by moving cars while attempting to cross the defendant's track on a public crossing in the city of Crete. There was a verdict for the plaintiff, and from a judgment rendered thereon the defendant prosecutes error to this court.

Contributory negligence was relied upon as a defense, and touching the question of negligence on the part of the respective parties the court instructed the jury as follows: "The establishment of negligence on the part of defendant by a preponderance of the evidence is necessary before you can find any verdict for plaintiff in any event. If you find there was such negligence on the part of defendant, then the burden of proof is on the defendant to show by a preponderance of the evidence, the truth of its assertion that John Raley was negligent and so helped to cause his own injury." The defendant insists that this instruction is bad, because, from the evidence adduced on the part of the plaintiff in making her case, the jury might justly have drawn the inference that the negligence of the intestate directly contributed to the injury in question, and for that reason the burden of proof was not on the defendant to

show contributory negligence, but was on the plaintiff to show the absence of such negligence. It is the settled rule in this state that in an action for damages resulting from the alleged negligence of the defendant, when the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence on his part. *Durrell v. Johnson,* 31 Nebr., 796; *Union Stock Yards Co. v. Conoyer,* 41 Nebr., 617; *Omaha Street R. Co. v. Martin,* 48 Nebr., 65. That the intestate was struck by cars moving on the defendant's track while attempting to pass over one of the public crossings on the defendant's road, and thereby received injuries of which he died in a few hours, for present purposes, at least, may be taken as true. It will be conceded that, even were it conclusively established that such injuries would not have occurred but for the negligent acts or omissions of the defendant, the plaintiff would not be entitled to a verdict, were it also shown that the negligence of the intestate directly contributed to the injury. In other words, notwithstanding the negligence of the defendant, if there was an omission on the part of the intestate to exercise such care and prudence as a man of ordinary care and prudence would have exercised under like circumstances, and such omission directly contributed to the injury in question, there can be no recovery in this case. The circumstances attending the accident are best related by a brother of the intestate, who was with him at the time, and who testified as a witness on behalf of the plaintiff. His testimony, so far as we deem material to the present inquiry, is as follows:

Q. 52. When you got to the railroad track that night, going north, state precisely what happened to you and your brother?

A. Well, we came up near the track and stood there at least two or three minutes. I think there were two—I am favorably impressed with the belief that there were two trains on the track, and we stood some time. I noticed

particularly that right east there was a car standing, as well as I could see; and after we had staid a certain length of time my brother, John, says, "Now" and we started across with a somewhat hurried step, because of the distance across the track (there being a switch there that increases the width of the track); and, knowing the distance, we hurried over. I do not know how we got over, really. I know that we were struck and boosted off the track. I was unconscious, I could not tell what had happened. It did not seem to me that we realized what had happened, but I lay in such a way that my head was next to the track going north, yet, when I came to, to some extent, my head was laying within a couple of feet of the track. I noticed when a light came, and a light, I think, came from the backing down of the engine, that threw the headlight upon it, so that I could see more what was going on. John laid about six or eight feet from me,—west of me,—lying in the same position. I says, "John, we must get out of here."

Q. 62. I wish you would describe to the jury, Mr. Raley, just the condition of the street and the railway train, or trains that night there at the crossing where this accident occurred.

A. The sidewalk had been filled in with coal and ashes so that it had a tendency to darken everything around about over the right of way; and the train was separated mainly over the sidewalk and the right of way (highway). I thought I could see a car right eastward and the balance of the train to the westward, and we started across, as I said. They were separated in that way, yet I think there were two trains on the track, or cars that were attached to the engine. I don't know how many. The end car was about a rod and a half from the sidewalk standing partly on the right of way (highway).

Q. 63. In which direction from the sidewalk?

A. East of the sidewalk, supposing the streets run east and west and north and south,—the road angles.

Q. 64. On which side of the street was the engine on?

A. The east side.

Q. 65. And the balance of the train,—which side of the street was that on?

A. On the west. They had separated.

Q. 66. Can you tell what it was that struck you, or your brother?

A. The train came right on to us. We had no warning. Evidently, the car. I did not realize that it was the car. I did not realize what it was, it was so sudden, I was so bewildered that it could not have been much else; it could not have been thunder or lightning.

Q. 115. I suppose you were talking as you went along up this street?

A. Yes, sir.

Q. 117. How was your eyesight at that time?

A. Well, my eyesight is poor.

Q. 118. How was your hearing at that time?

A. My hearing is not good, but I think it was better. I am under the impression that up to that date it was better than it has been since.

Q. 119. But it is not very good at any time?

A. I don't hear ordinary conversation.

Q. 164. You were so intent looking out for your footing on the street that you paid no attention to the electric light, and don't know whether there was any light or not?

A. I depended upon my brother. His eyesight was better than mine.

Q. 129. As you approached these switches that night, did you stop and listen to see if you could hear any trains?

A. I don't remember that we did.

Q. 130. Did you and your brother speak of the fact that you were coming to the railroad?

A. No; I don't think there was any conversation on that point.

Q. 131. When you came up to the railroad you walked directly along, as you ordinarily would on the sidewalk, across these tracks, did you?

A. We walked up near the track, and hesitated.

Q. 133. You saw a couple of trains there?

A. I think so. My impression is that there were two trains.

Q. 137. Did you notice that an engine passed over the street going east while you were between the Cosmopolitan Hotel and the railroad track?

A. I did not. I heard the trains in motion, but paid no attention to them. I heard trains on the track.

Q. 138. You and your brother heard trains on the tracks, but paid no attention to them?

A. We knew it was a railroad track, and I very often went up the railroad track home; but because of the darkness, and because of the trains being on the track, as I said a while ago, I went this other way.

Q. 139. At the depot you knew or found out that there were some freight trains on the track so that it would be dangerous for you to go up the track?

A. Yes, sir.

Q. 140. Therefore, you went the ordinary route, by the sidewalk, around by the Cosmopolitan Hotel, and went over in that way, thinking that on that account you would be less liable to get into trouble with the cars?

A. Yes, sir.

Q. 169. Whereabouts were you with your brother that night when you stopped and looked, as you speak?

A. We were on the south side of the track. We were about a rod or a rod and a half from it, standing there near that electric light pole, or some other pole, we stood there a long time.

Q. 170. How long a time did you remain?

A. We were there a good little bit, at least two or three minutes, sure.

Q. 171. Did your brother stop also?

A. Yes, sir.

Q. 172. After you had stopped and looked and listened, then you started across?

A. Yes, sir.

Q. 141. After you had stood a while, when you got to

the tracks, then you started hurriedly to go north,—you and your brother?

A. Yes, sir.

Q. 142. It was just after that you had started to go hurriedly, that some object hit you?

A. Yes, sir.

Q. 173. How far did you proceed or walk after you started—after you stopped and listened—before you were knocked down?

A. We had got, I should think, mainly over the track?

The foregoing is the substance of the evidence tending to show the degree of care exercised by the intestate to guard himself against injury. In view of the rule, touching the question of contributory negligence, hereinbefore stated by giving the instruction complained of, the court, in effect, held, as a matter of law, that the foregoing evidence would not justify a finding of contributory negligence,—in other words, that from such evidence reasonable minds could reach no other conclusion than that the intestate, in attempting to cross the track at the time and in the manner he did, exercised such care as a man of ordinary prudence would have exercised under like circumstances. Negligence is rarely an unmixed question of law. In the present case, whether the intestate was negligent would depend largely on what he saw and heard that was calculated to warn him of danger in attempting to cross the track. It will be conceded that if he saw the approaching cars, but took the risk of crossing in front of them, or was warned of their approach in any such way as would have deterred a man of ordinary prudence, under like circumstances, from attempting to cross the track, he was guilty of contributory negligence. Whether he saw the approaching cars, or was in any way warned of their approach, and what knowledge he had of the risk he assumed in making such attempt, can only be surmised. What the witness whose testimony is quoted, saw or heard, throws little light on the subject, for the reason that both his sight and hearing were defective, and on that account he relied at

the time on the intestate, who was more fortunate in that regard. Not knowing the nature and extent of the information of the intestate as to the risk he assumed in attempting to cross the track, in our opinion, it can not be said, as a matter of law, that in making such attempt he exercised such care as a man of ordinary prudence would have exercised under like circumstances; nor, in view of the facts, can it be said that, from the evidence quoted, reasonable minds could reach no other conclusion than that he exercised such care. If we are correct in this view, the instruction under consideration is erroneous.

Objections are urged against other parts of the charge to the jury, but, aside from the paragraph just considered, the charge, taken as a whole, in our opinion, fairly states the law applicable to the facts. Other questions are argued, but, as they are not likely to arise on another trial, we have not considered them.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED

ROYAL NEIGHBORS OF AMERICA V. FRANCIS H. WALLACE.*

FILED MARCH 19, 1902. No. 11,335.

Commissioner's opinion, Department No. 3.

1. **Application for Insurance: WARRANTY: CONTRACT: PURPOSE OF PARTIES.** Where to hold that certain statements made in an application for insurance are warranties would defeat the ob-

*Rehearing allowed. Former judgment modified.

vious purpose of the parties to the contract, they will be held to be mere representations, even though it is stipulated in the policy that they are warranties. The intention of the parties is to be gathered from the entire contract, and not from any one clause contained therein.

2. **Representations: COMMON KNOWLEDGE.** Where representations are of such a character that their materiality is a matter of common knowledge, upon which reasonable minds could not differ, it is error to submit the question of their materiality to the jury.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Reversed.*

J. G. Johnson, Clark C. McNish and *J. F. Hess,* for plaintiff in error.

Frank Dolezal, contra.

ALBERT, C.

On the 10th day of September, 1897, the Royal Neighbors of America, a fraternal association, issued a benefit certificate to Ada Wallace, in which Francis H. Wallace was named as the beneficiary. On the 13th day of March, 1898, and while said certificate was in full force, unless void for the reasons hereinafter mentioned, the assured died. In due time, the beneficiary demanded payment of the amount named in the certificate, which was refused. Thereupon he commenced this action against said association to recover the amount due on the certificate. There was a trial to a jury which resulted in a verdict for the plaintiff, and from a judgment rendered thereon, the defendant prosecutes error to this court.

The certificate contains, among other things, the following provisions: "That the application and medical examination, which is made a part hereof, of said Ada Wallace for membership in the beneficiary department of this order, and which is on file in the office of the beneficiary recorder, and is hereby referred to and made a part of this contract for benefit, is true in all respects, and that the

literal truth of such application and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of this order to such member and to the beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate. That should said application, and each and every part thereof, not be literally true, then this benefit certificate shall, as to the member, the beneficiary or beneficiaries, be absolutely null and void." At the close of her application, the assured signed a statement, which, so far as is material at present, is as follows: "I have verified each of the foregoing answers and statements, * * * and declare and warrant that they are full, complete and literally true." One question propounded to the assured in the application was, "Have you within the last seven years consulted any physician in regard to personal ailment? If so, give date, disease and physician's name and address." The assured answered, "Yes, Doctor Deveres, at Fremont." The evidence shows that she had consulted, at least, one other physician, during the specified period. The defendant insists that, such being the case, her answer was not "full and complete," within the meaning of the clause just quoted. We think otherwise. The question is not whether she had consulted any physicians, and, if so, to give their names and addresses, but whether she had consulted any physician, and, if so, to give physician's name and address. The assured might well infer from the question that the association wanted the name of some physician she had consulted during that period, and that one such name would serve its purpose. The answer was full, complete, and, as appears from the evidence, literally true. The trial court committed no error in so instructing the jury. In addition to the foregoing, among the questions and answers contained in the application and medical examination, are the following: Q. "Are you now of sound body and mind, in good health, and free from disease?" Ans. "Yes." Q. "Have you ever had any serious illness, local disease or personal injury." Ans. "No." Q. "Have you ever had

any disease of the lungs?" Ans. "No." Q. "Have you ever had any hemorrhages?" Ans. "No." Q. "Have you ever had any consumption?" Ans. "No." It is charged in the answer that the foregoing answers given by the assured, were knowingly and willfully false, that they were material to the risk and were relied upon by the defendant. It is first insisted by the defendant that the trial court erred in holding that such answers were mere representations and not warranties. It is fair to presume that the association dealt with the assured in good faith, and that its acceptance of her premium, receiving her into the order and issuance to her of the certificate in question, was more than an idle ceremony, and that it intended thereby to bind itself by a valid contract of insurance. There are upwards of a hundred questions in the application and medical examination. Many of them are of such a character, that no person, however honest his intentions, could answer them with any degree of assurance that each of his answers was literally true. To hold that such questions and answers amount to warranties would be to impute bad faith to the association in pretending to enter into a contract of insurance with the assured which could become binding upon it by the merest chance. This court has held that such answers are not warranties, but mere representations. *Kettenbach v. Omaha Life Ass'n,* 49 Nebr., 842. We are thoroughly satisfied with the conclusion reached in that case. Such being the rule, the complaint under consideration, as well as those based on the action of the trial court in submitting to the jury the question of the good faith of the assured in giving her answers, falls to the ground.

The question of the materiality of the answers, above set out, was submitted to the jury by the trial court, as a question of fact. In our opinion, this was error. There is evidence at least tending to show that the assured had consumption at the time the application was made, and and that she died of such disease. Her answers to the questions under consideration were submitted to the medi-

cal examiner, and formed a part of the information upon which he acted in making a favorable report to the association on her application. The court will take judicial notice of the fact that in forming an opinion as to the physical health and condition of a person a physician is compelled to rely, to some extent, at least, on the statements of the person under examination, and that the value of such opinion depends largely on the truthfulness of such statements. The answers of the assured, and the opinion of the medical examiner, were placed before the association to enable it to decide whether to accept or reject the application. That the risk assumed by an acceptance of the application would depend largely on the facts sought to be elicited by the questions under consideration is a matter of common knowledge; that the nature of the answers of the assured, and of the report of the medical examiner based in part thereon, served as an inducement for the acceptance of the risk, is too clear to admit of doubt. Such being the case, the materiality of such answers is a question upon which reasonable minds could not differ, and its submission to the jury was error. *March v. Metropolitan Life Ins. Co.*, 65 Am. St. Rep. [Pa.], 887; *McGowan v. Supreme Court of Foresters*, 83 N. W. Rep. [Wis.], 775. We are aware of cases which apparently hold a contrary doctrine; but, in such cases, so far as our investigation has led us, the representations were not of such a character as those with which we have to deal in this case. They were such, that their materiality could be determined only in the light of the evidence. In such cases, the materiality is obviously a question for the jury. The record before us presents no such case.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

LUIGUI FELINO V. K. S. NEWCOMB LUMBER COMPANY.

FILED MARCH 19, 1902. No. 11,374.

Commissioner's opinion, Department No. 3.

1. **Mortgage:** DEFAULT: IMMEDIATE POSSESSION. A provision in a real estate mortgage that, in case of a default in the payment of the debt thereby secured, the mortgagee shall be entitled to the immediate possession of the premises, is valid as to the parties and subsequent purchasers and incumbrancers chargeable with notice.

2. **Foreclosure of Mortgage:** RENTS AND PROFITS: ACTION AT LAW. An action at law for the rents and profits, will not lie on behalf of a subsequent purchaser or incumbrancer against a mortgagee, who has entered upon and retained possession under such provision, but such mortgagee will be held to account therefor in an action to foreclose his mortgage.

3. ———: ———: DECREE AND SALE. Where an action to foreclose such mortgage has been prosecuted to a decree and sale of the premises all the parties to such proceedings are thereby concluded as to such rents and profits.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

Weaver & Giller, for plaintiff in error.

Baldrige & De Bord, contra.

ALBERT, C.

On the first day of August, 1891, Alva A. Richardson and his wife executed and delivered to Luigui Felino a mortgage on certain real estate in South Omaha, to secure the payment of their note, executed to the same party, for $2,000, with interest at seven per cent. per annum, pay-

able semi-annually, according to the tenor of ten interest coupons for $70 each, attached thereto. The mortgage was duly filed and recorded on the 5th day of August, 1891. In addition to the conveyances and agreements usually found in a mortgage, the mortgage contained the following clause: "And upon forfeiture of this mortgage, or in case of default in any of the payments herein provided the said Luigui Felino shall be entitled to the immediate possession of said premises." On the 15th day of August, 1891, the K. S. Newcomb Lumber Company sold and delivered to the said mortgagors certain material for the erection of a building on the mortgaged premises, and on the 24th day of December thereafter filed a lien therefor against said premises. On the 30th day of October, 1893, the said lumber company filed its petition in the district court against said mortgagors, and others, praying for the foreclosure of its said lien. The mortgagee, above mentioned, was not made a party to the suit. On the 29th day of December, 1894, a decree was rendered in said suit in favor of the lumber company, and on the first day of October, 1895, the premises were sold in pursuance of said decree to the said lumber company, and, in pursuance of an order confirming the same, on the 26th day of October, 1895, a deed issued to said purchaser. On the 21st day of September, 1895, Felino, the mortgagee, commenced an action for the foreclosure of his mortgage, making the said lumber company a party defendant, which action was prosecuted to a decree on the 26th day of May, 1896. In pursuance of this decree, in October, 1896, the premises were sold to Felino, the mortgagee, who on the 31st day of October, thereafter, received a sheriff's deed therefor. On the 2d day of October, 1895, and after the commencement of his suit to foreclose the mortgage, the mortgagors, having made default, surrendered possession of the premises to the mortgagee. On the 26th day of October, 1895, and after having received its deed to said premises, the lumber company demanded possession of the premises from the mortgagee, who was then in possession, which was refused.

On the 21st day of May, 1898, the lumber company commenced the present action against Felino to recover the rents and profits of said premises subsequent to the time it received its deed from the sheriff, issued in pursuance of the decree of foreclosure of its said lien. A trial was had to the court, which resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The theory of the plaintiff in the court below, and the only theory on which the judgment of the district court can be upheld, is that the mortgagor of real property retains the legal title and the right of possession until confirmation of a sale under a decree of foreclosure of the mortgage, and that such right of possession carries with it the right to the rents and profits of the mortgaged premises, and that as plaintiff, by virtue of the sale in pursuance of the decree foreclosing its lien, acquired all the right, title and interest of the owner of the fee in and to the premises in controversy, it thereby acquired their right of possession, and, consequently, their right to the rents and profits accruing subsequently to the issuance of such deed and prior to the sale to the defendant in this case in pursuance of the decree foreclosing his mortgage. In our opinion, this theory is unsound. In the absence of any statutory regulation, the mortgagee is entitled to the possession of the premises. Jones, Mortgages, sec. 667. The only statutory regulation on the subject in this state is that to be found in section 55, chapter 73, Compiled Statutes, which is as follows: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. Of this provision subse-

quent purchasers and incumbrancers, including the plaintiff in this case, were as fully charged with notice as with any other provision of the mortgage. In California it is provided by statute that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage. Under this provision it was held that if the mortgagee, after condition broken, take possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits and apply them to the debt secured, and that he is to hold possession until the debt is paid. *Dutton v. Warschauer,* 21 Cal., 609; *Frink v. LeRoy,* 49 Cal., 314. These cases, while not directly in point, clearly recognize the right of the mortgagee to the possession of the premises under a stipulation like the one under consideration. In *McIntyre v. Whitfield,* 13 Smedes & M. [Miss.], 88, it was held that a stipulation similar to the one contained in defendant's mortgage might be enforced by the mortgagees taking possession and holding it. That the mortgagee in possession would be required to account for the rents and profits, will be conceded, but such account should be taken in the suit to foreclose or in a suit to redeem. The defendant in this case, as we have seen, brought his action to foreclose his mortgage. All the parties, including the plaintiff in this case, were before the court in that suit. Every question involving the amount due on the defendant's mortgage, including the rents and profits received by him, were in issue in that case. The proceedings in that case are conclusive and binding, as to such questions, on all of the parties thereto. It follows that the judgment of the district court in this case is erroneous, and it is recommended that it be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

G. W. FALSTROM, APPELLEE, V. J. T. BANNING ET AL., IMPLEADED WITH WILLIAM FRANKLIN, APPELLANT.

FILED APRIL 2, 1902. No. 11,572.

Judicial Sale: CONFIRMATION: OBJECTIONS: DEFECTIVE RECORD: PRESUMPTION.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for appellant.

Talbot & Allen and *Alpha Morgan, contra.*

PER CURIAM.

The presumptions are all in favor of the regularity of the proceedings had in the district court when a cause is brought here by appeal for review of the proceedings had in that tribunal, and such presumptions will be indulged in until from the record the contrary appears. When objections are made to an order of confirmation of sale of real estate made in judicial proceedings, and the grounds of objections do not appear in the record, it will be presumed that no valid objection was presented, and the order appealed from will accordingly be affirmed. In the record in the present case no grounds for the objection interposed appear in the record, which simply recites that the objections to confirmation were considered and overruled. This ruling will be presumed to be right until it is made to appear affirmatively that some valid objection

existed against the right to order confirmation, which can not be be said by an inspection of the record presented for our consideration. Order

AFFIRMED.

UNION TRUST COMPANY, APPELLEE, V. OSCAR N. DAVIS, APPELLANT.

FILED APRIL 2, 1902. No. 11,581.

1. Appraisement: EVIDENCE. Evidence examined, and *held* to sustain the trial court in refusing to set aside the appraisement as being too low.
2. Foreclosure: SALE: DEPUTY SHERIFF. Where a decree of foreclosure directs a sale of real estate by a sheriff, such sale is valid if made by the deputy sheriff.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for appellant.

Talbot & Allen and *Alpha Morgan, contra.*

PER CURIAM.

This is an appeal from an order of confirmation. Two questions are discussed in appellant's brief. The land was appraised at $2,800, and it is contended that this valuation was too low. One witness on behalf of the landowner testified that the property was fairly worth $3,200, but this testimony was not sufficient to overthrow the appraisement. There is no merit in the first objection; and the second, which is that the deputy sheriff had no authority to make the appraisement and sale, is equally groundless.

The order is

AFFIRMED.

ANGELINE R. PECK, APPELLEE, V. MARGARETHA STARKS, APPELLANT.

FILED APRIL 2, 1902. No. 11,442.

1. **Vacation of Sale: LIEN: DEDUCTION BY APPRAISERS: TWO-THIRDS VALUE.** Where property sold in execution of a decree of foreclosure was struck off for more than two-thirds of its gross value, the wrongful deduction by the appraisers of one of the liens in suit will afford no ground for vacating the sale.

2. **Judicial Sale: APPRAISERS: ERROR OF JUDGMENT.** A judicial sale will not be set aside on the ground that the appraisers, through an error of judgment, underestimated the value of the property sold.

3. **"At the Court House."** The south door of a court house is "at the court house," within the meaning of section 503 of the Code of Civil Procedure.

APPEAL from the district court for Sherman county. Heard below before SULLIVAN, J., *Affirmed.*

Richard G. Nightingale, for appellant.

W. R. Mellor, contra.

SULLIVAN, C. J.

Appellants contend that the order of the district court confirming a sale of real estate made by the sheriff of Sherman county under a decree of foreclosure should be reversed for the reason that certain taxes which had been paid by the plaintiff and included in the decree were deducted from the gross value of the land as fixed by the appraisers. It appears that the land sold for more than two-thirds of the gross valuation. This being so, the error in the appraisement was not prejudicial. *La Selle v. Nicholls,* 56 Nebr., 458; *Bernheimer v. Hamer,* 59 Nebr., 733.

Another ground upon which it is claimed the order of confirmation should be reversed is that the appraised value of the property was so low as to afford an inference of fraud or mistake in the appraisement. The appraisers and

the witnesses who testified for appellant differed greatly in their estimates of the value of the property, but the most that can be said against the appraisement is that it may have been the result of an honest mistake; there is nothing whatever in the record to indicate that it was fraudulent. The fact that witnesses differ from the appraisers in their estimate of the value of property about to be offered at judicial sale affords no reason for holding the appraisement to be illegal. *Wood v. Clark,* 58 Nebr., 115; *Brown v. Fitzpatrick,* 56 Nebr., 61; *Michigan Mutual Life Ins. Co. v. Richter,* 58 Nebr., 463.

A further reason urged against the sale is that it was advertised to take place, and did in fact occur, at the south door of the court house, which is not the door by which access to the court room is gained. The statute provides (Code of Civil Procedure, sec. 503) that all sales of lands or tenements under execution or order of sale shall be held "at the court house," if there be one in the county where such lands or tenements are situate. The south door of the court house must, it seems to us, be "at the court house." The reasoning by which counsel has undertaken to show that it is not, is, we must confess, too subtle and elusive for our comprehension.

The order of confirmation is

AFFIRMED.

MAX ROSENBLOOM V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. NO. 12,451.

1. **License Tax: PEDDLER: TAXING POWER: POLICE POWER.** The law imposing a license tax upon peddlers (Compiled Statutes, 1901, ch. 77, art. 1, secs. 152-154) has for its object the raising of revenue, and its enactment was an exercise of the taxing power, and not the police power.

2. **Constitutional Law.** It is settled doctrine that the courts will not declare an act of the legislature unconstitutional unless it is manifestly so.

3. ———: REVENUE LAW: FINE AND IMPRISONMENT. The provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license tax does not trench upon the constitution, and is therefore valid. *State v. Green*, 27 Nebr., 64; *Magneau v. City of Fremont*, 30 Nebr., 843, and *Tompleton v. City of Tekamah*, 32 Nebr., 542, overruled.

4. **Act:** COMPREHENSIVE TITLE. An act entitled "An act to provide a system of revenue" covers the entire subject of taxation, and comprehends whatever means or machinery the legislature may provide to enforce payment of taxes.

5. **Classification for Taxation.** The provision of the constitution (art. 9, sec. 1) authorizing the taxation of persons engaged in certain occupations, in such manner as the legislature shall direct by general law, uniform as to the classes upon which it operates, forbids partiality and favoritism and makes equality before the law a rule of legislative action. It does not, however, forbid reasonable classification of persons for the purpose of taxation.

6. **Arbitrary Classification:** PUBLIC POLICY: DIVERSE LEGISLATION. Classification, to be valid, must not be arbitrary. It must rest on some reason of public policy,—some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.

7. **Traveling Vendors:** OWN PRODUCTS: PRODUCTS OF OTHERS: DIFFERENCE. There is such a real distinction between persons who go from house to house and place to place vending their own products and those who sell in the same way the productions of others that the legislature, acting on considerations of general policy, may make it the basis of classification for the purpose of taxation.

8. **Particular Classification.** A particular classification may be valid if the object of the statute is to raise revenue, and invalid if the object is regulation.

9. **Occupation Tax.** The law imposing an occupation tax upon peddlers is sufficiently certain to be capable of enforcement.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.* HOLCOMB, J., dissenting.

McAllister & Cornelius, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *William O'Brien*, for the state.

SULLIVAN, C. J.

Max Rosenbloom, defendant below, having been convicted of peddling in Platte county without a license, seeks by this proceeding to obtain a reversal of the sentence. The statutory provisions which we have occasion to consider in disposing of the questions presented for decision are found in the general revenue law (Compiled Statutes, 1901, art. 1, ch. 77), and are here set out:

"Sec. 152. Peddlers plying their vocation outside of the limits of a city or town within any county in this state and peddlers selling by sample outside of the limits of a city or town within any county in this state shall pay, for the use of said county, an annual tax of twenty-five ($25) dollars; those with a vehicle drawn by one (1) animal, fifty ($50) dollars; those with two (2) and less than four (4) animals seventy-five ($75) dollars; those with four (4) or more animals one hundred ($100) dollars. Nothing in this section shall be held to apply to parties selling their own work or production, or educational, either by themselves or employes, nor to persons selling at wholesale to merchants, nor to persons selling fresh meats, fruit, farm produce, trees, or plants exclusively.

"Sec. 153. A certificate or license shall be issued to any such peddler by the county clerk, upon the presentation of a receipt showing the payment of the proper tax to the county treasurer, and such certificate, or license, shall be good only in the county where issued, and shall not authorize peddling in cities and towns.

"Sec. 154. Any person peddling outside the limits of a city or town in any county within this state, without such certificate, or license, or after the expiration thereof, shall be deemed guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods sold or carried by him or not, and upon conviction thereof, shall be fined the sum of fifty ($50) dollars and stand committed until the fine is paid, or he be discharged as provided by law; and if any peddler refuses to exhibit his

license to any person requiring a view of the same, he shall be presumed to have none, and if he produces a license upon trial, such peddler shall pay all costs of prosecution."

It is conceded that the facts alleged in the information exist, but it is insisted that they do not constitute a crime. The argument is that the law taxing peddlers trenches in various ways upon the constitution, and is therefore void. It is said in the first place that the object of the legislation is to raise county revenue, and that revenue measures can not, in this state, be enforced by the infliction of fines or penalties. We agree with counsel in the view that the primary and paramount, if not the only, object of the law, is to obtain revenue, by imposing a tax upon the business of peddling. The only thing the peddler is required to do is to pay his tax, and exhibit the appropriate evidence of payment to any person who may wish to see it. The only thing he is forbidden to do is to pursue his calling without having first paid the tax. No police inspection or supervision is provided for. If the things commanded and forbidden are to be regarded as features of regulation or repression, they are not, to say the least, so pronounced or conspicuous as to suggest the idea that the law is referable to the police power, rather than to the power of taxation. But granting the contention of counsel for defendant that the statute is a revenue measure, pure and simple, we are not able to discover any valid objection to the enforcement of it in the manner provided by the legislature. It is settled doctrine in this and in every other jurisdiction that courts will not adjudge statutes unconstitutional unless they are plainly so. Now with what express provision of the higher law does the statute in question clash? We know of none. It may, perhaps, be said that imprisonment for debt has been abolished; but taxes are not debts, within the meaning of the constitution, and if they were, the provision with respect to a fine and that with respect to imprisonment are not so inseparably connected that they must stand or fall together. "The law abolishing imprisonment for debt," says Judge Cooley, "has no application to

taxes; and the remedies for their collection may include an arrest if the legislature shall so provide." Cooley, Taxation [2d ed.], 17. In speaking of license taxes the learned author further remarks that it is still customary to enforce payment of them by arrest and imprisonment, adding that "a constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax." Cooley, Taxation, 438. Among the many cases sustaining this view, we cite the following: *Appleton v. Hopkins,* 5 Gray [Mass.], 530; *Daggett v. Everett,* 19 Me., 373; *McCaskell v. State,* 53 Ala., 510; *Commonwealth v. Byrne,* 20 Gratt. [Va.], 165; *Denver City R. Co. v. City of Denver,* 21 Colo., 350; *City of St. Louis v. Sternberg,* 69 Mo., 289; *Campbell v. City of Anthony,* 40 Kan., 652; *City of Bozeman v. Cadwell,* 36 Pac. Rep. [Mont.], 1042; *City of Cincinnati v. Buckingham,* 10 Ohio, 257; *In re Dassler,* 35 Kan., 678. Limitations upon legislative power are to be found in written constitutions; it has not been customary to look for them in the opinions of the courts. When it pleased the people of this state to put an end to the ancient practice of seizing the person of a debtor as a means of coercing payment of a debt, they put into the bill of rights this expression of their sovereign will: "No person shall be imprisoned for debt in any civil action on mesne or final process unless in cases of fraud." Bill of Rights, sec. 20. This language is terse and lucid; it means just what it says, and, when considered in the light of familiar history, it seems hardly possible to misunderstand it. It deals only with procedure in civil actions,—actions having for their object the collection of debts; it has no application to the civil liability created by the bastardy act (*Ex parte Cottrell,* 13 Nebr., 193; *Ex parte Donahoe,* 24 Nebr., 66), and it has certainly no relation whatever to criminal actions brought by the state to punish the violation of a public law. The just and humane policy of abolishing imprisonment for debt can not be too highly commended, but an extension of that policy by judicial decision can be defended only on the theory that beneficent usurpation is justifiable.

Three cases decided by this court (*State v. Green*, 27 Nebr., 64; *Magneau v. City of Fremont*, 30 Nebr., 843, and *Templeton v. City of Tekamah*, 32 Nebr., 542) declare that penal provisions of an occupation tax ordinance are unenforceable; but these decisions do not profess to rest in either reason or authority, and are, in our judgment, contrary to both. If they had become a rule of property, we should certainly adhere to them, but since they have not, we think they should not be regarded as binding precedents; and they are accordingly overruled.

Another ground upon which the law is assailed is that section 154, which prescribes penalties for peddling without a license, is not embraced within the title of the act. The title is a very comprehensive one; it is "An act to provide a system of revenue," and, *ex vi termini*, covers the entire subject of taxation; it comprehends the selection of the persons, property and franchises to be taxed, the manner and method of making the assessment, equalization and levy, the amount of revenue to be raised, the means or machinery by which the taxes are to be collected, and many other matters obviously germane to a general scheme or plan for providing funds with which to defray the necessary expense of maintaining a state and local government. A law to provide a system of revenue would be singularly weak and inefficient if it did not make adequate provision for the collection of taxes. In fact, every revenue law does contain such provisions. The usual and appropriate method of enforcing payment of a property tax is by the addition of an increased rate of interest, which is in truth a penalty, and by the sale of the taxed property. But payment of taxes on occupations can not be enforced in this way and hence the ordinary, and often the only effective, method of compelling payment, is by fine and imprisonment of the person upon whom the tax is imposed. In the recent case of *Nebraska Loan & Building Ass'n v. Perkins*, 61 Nebr., 254, it is said: "If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony

with the constitutional mandate." Tested by this rule it is, we think, entirely manifest that the penal provision of section 154 is covered by the title of the act.

A further contention of counsel for defendant is that, by reason of the exceptions contained in section 152 the law lacks the essential requirement of uniformity. The constitution (art. 9, sec. 1) declares that the legislature may impose a tax upon persons engaged in certain occupations "in such manner as it shall direct by general law, uniform as to the class upon which it operates." This provision undoubtedly contemplates that all persons pursuing the same business or calling under the same conditions and circumstances shall be treated alike, and subjected to the same burdens; in other words, partiality and favoritism are forbidden, and equality before the law is made a rule of legislative action. But as was said by the supreme court of Pennsylvania in *Seabolt v. Northumberland County*, 187 Pa. St., 318, "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the constitutional prohibition." In the case of *State v. Farmers & Merchants' Irrigation Co.*, 59 Nebr., 1, 4, we had occasion to consider this question, and reached the conclusion, after a pretty thorough examination of the authorities, that the "classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." The real test of the validity of defendant's objection to this statute is not whether the classification is wise and just, but whether the legislature acted arbitrarily,—whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vend-

ing their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful. Now, there is, in our opinion, such a marked and material difference between the two classes of peddlers as to make it entirely proper for the legislature, acting on considerations of general policy, to tax one class and to permit the other to go free. The man who goes about the country selling what he has himself produced may be presumed to confer a benefit upon the general public by eliminating the profits of the retail merchant, and perhaps even those of the wholesaler and jobber. He has a fixed abode where he produces the things which he sells, and where he may be reached and required to make good his warranties. He is generally the owner of immovable property which is subject to state and local taxation. It may be that he is required by the municipality in which he lives to pay a poll tax and a tax upon his business; to build and repair sidewalks, and keep the same free from snow, ice and other obstructions. He contributes to the social, educational and financial prosperity of the community in which he resides. He bears a just share of the burdens of government. And, in addition to all this, it must be remembered that the sale of his products is only incidental to the business of producing them. These characteristics, speaking generally, distinguish the untaxed peddler from the peddler who is taxed, and they are, it seems to us, quite sufficient to justify the classification which the legislature has made. In *State v. Stevenson,* 109 N. Car., 730, a license tax upon merchants was upheld although it exempted purchasers of farm products from the producers. The court, after observing that the law puts all merchants dealing in farm products purchased of the producers in one class, and all other merchants in another class, and treats all in each class alike, goes on to say: "There is no discrimination in either class. The power to select particular trades or occupations and subject them to a license tax can not be denied to the legisla-

ture—nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform." The supreme court of Maine had before it in a recent case the question we are now considering. *State v. Montgomery,* 43 Atl. Rep., 13, 16. In delivering judgment sustaining the law, Savage, J., said: "It is contended that the exception which permits one to peddle without license 'the products of his own labor, or the labor of his family, any patent of his own invention, or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent,' is a discrimination in favor of some and against others. We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the product of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so long as the burdens imposed do not bear unevenly upon citizens. *Ex parte Thornton,* 12 Fed. Rep., 538." This decision is in conflict with *State v. Wagener,* 69 Minn., 206, referred to in the brief of counsel for defendant. In each case the statute construed was held to be a police regulation having for its object the protection of the public. In this case we have no occasion to determine which view of the matter is correct, because the classification in our statute was made for the purpose of taxation and not for the purpose of regulating the business of peddling. It is plain, of course, that a particular classification may be valid if the object of the legislation is revenue, and invalid if the object is regulation.

The law is also assailed on the ground that it lacks definiteness and certainty, but we think there is so little merit

in this objection that it may be overruled without discussion.

The judgment of the district court is

AFFIRMED.

HOLCOMB, J., dissenting.

Although entertaining the profoundest respect for the legal ability, erudition and discriminating judgment of my associates, I am unable to concur in the majority opinion formulated by the chief justice in this case, and will, as briefly as is consistent with reasonable clearness of expression of my own views, give some of the reasons which impel me to dissent therefrom.

The conclusion reached necessitates the overruling of several prior decisions of this court, of many years' standing, which have become and should be regarded as the settled law of the state; and this I am unwilling to assent to, because the principle of *stare decisis* is, in my judgment, too lightly regarded, and the overturning of the adjudications referred to is without sufficient cause. The law as therein enunciated has stood unchallenged for over a decade, and should not now, except upon the most weighty and grave consideration, be overturned. The doctrine, as expressed in the overruled decisions, as to the power to enact laws providing for imprisonment to enforce collection of taxes, is itself sound in principle, and supported by both reason and authority. The soundness of these decisions has not been challenged since they were enunciated, and they should not now be overruled unless unmistakably and radically unsound in principle. The course of legislation has been consistent with the constitution as construed in these overruled decisions. The charters and ordinances of the cities and towns have been enacted and enforced in conformity with the law as thus construed. The whole history of jurisprudence of the state lends color and support to the principle as announced therein, to the effect that the collection of taxes is to be enforced by the application of remedies civil only in their nature. It is aptly said

by Mr. Justice White, in a dissenting opinion in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 650 (and I can do no better than quote his words): "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. * * * The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

It is worthy of note that of the five eminent jurists who have graced the bench we now occupy, and who have all expressly concurred in the views as stated in the several decisions it is now proposed to overthrow, two of them were honored members of the constitutional convention which formulated the organic law of the state which they afterwards were by the people of the state called upon to interpret and expound. Who shall say that these men, not only because of their great learning, but also on account of their presence and participation in the work of that convention, were not in a peculiarly advantageous position, and well qualified to correctly interpret and construe the several provisions of that important document? When it was held in the case of *State v. Green*, 27 Nebr., 64, that an occupation tax is to be collected by distress and sale of the property of the tax debtor in the same manner as the collection of debts generally, and not by imprisonment, the conclusion, I assume, was arrived at on the theory that by the adoption of the constitution, with its provision

against imprisonment for debt in any civil action except in case of fraud, an occupation tax was a debt, within the meaning of the word as used in that instrument, and therefore collection thereof could be enforced only as other civil obligations. The language of the constitution is fairly susceptible of this interpretation without doing violence to any well-recognized rule of construction. If a tax is treated as a debt, as it is by all authorities, then the construction was proper, and the fact that no lengthy reasons were given in support of the decision in no way militates against its soundness. I am aware that in many jurisdictions a distinction is made between a debt created by the levy of taxes and those arising ordinarily between individuals on contract or otherwise. But the reason given for such construction is not free from imperfection, and is in some cases warranted, because of substantial difference in the language of the law which was being construed. The logic of the majority opinion is to hold that in a purely fiscal measure, enacted solely for the purpose of raising revenues, the enforcement of the provisions of the act, and the collection of dues levied thereunder, whether on property, person or business, may be coerced by invoking the aid of the criminal law, and the infliction of fines and imprisonment on the person on whom the obligation rests, regardless of the question of his ability to meet the obligation, or the possession of property or means wherewith to satisfy the same. The doctrine, if extended to its legitimate scope and breadth, authorizes every municipality in the state to levy taxes on the person, property and business of the inhabitants thereof, within the limits of the law, and to coerce payment by arrest and incarceration of the delinquent until the taxes are paid, or until a judgment of fine and imprisonment is satisfied. This, to me, is a startling doctrine, and thoroughly repugnant to our entire system of jurisprudence, and in conflict with the very letter of the constitution itself. Such a construction, it seems to me, is contrary to the constitution, as evidenced by the terms of that instrument, the course of judicial construction since

its adoption, and the character of the legislation enacted with reference thereto. A tax, in this state, has always, so far as my knowledge extends, been regarded as a civil liability of the same general character as other debts, and so considered by both the courts and the legislature. With reference to real estate taxes even the personal civil liability has been eliminated, under the laws in relation thereto as construed by this court; and all such taxes are held to be only a charge against the real estate against which levied, to be satisfied by a sale of the property, and not by recourse to the personal liability of the owner of the property when assessed. A personal property tax, or a tax on a business or calling, has heretofore, I think, without exception, been treated as a civil liability against the person to whom assessed, for the enforcement of which the taxing authorities could resort only to remedies common to the collection of other civil liabilities. In a very recent suit we decided that a civil action was maintainable for the recovery of personal taxes in the same manner as for the recovery of debts generally. *Hoover v. Engles,* 63 Nebr., 688. In fact, the entire history of the state, both judicial and legislative, since the adoption of our present constitution, so far as my knowledge extends, has treated the obligations imposed for revenue purposes on the same plane as debts generally, and the collection thereof to be enforced in a civil action, and not by punishment in a criminal proceeding, by fine and imprisonment. I venture to say that a search will be made in vain for an utterance either by the courts or the legislature of the state during the last quarter of a century indicative of the power of the legislature to authorize the coercion of the payment of the public revenues in a criminal action by fines and imprisonment. Is it not fairly inferable, since the legislature has made no attempt to authorize the enforcement of the collection of the revenues necessary for the expense of government, except by civil remedies, such as are common to the enforcement to all civil obligations, that it, too, has given a construction of the constitution in harmony with

the prior utterances of this court? Is it not reasonable to say that the legislature, enacting laws for the collection of the public revenues, would, in all probability, go as far as its powers were deemed to extend? The necessity for the speedy collection of all such taxes, and that all against whom the charge is made should bear their just proportion of these necessary public burdens, would naturally suggest to any legislative body the wisdom of making the payment of the obligation as certain and prompt as might be done under a full exercise of the powers belonging to the legislature in that regard. Can there exist any reasonable doubt that for over a quarter of a century the legislature and the courts of the state have deemed the power of coercing payment of the public revenues exhausted when all remedies for its collection permitted in actions civil in their nature had been provided for? I am not speaking of license taxes, but of measures purely fiscal, for the collection of revenues generally in support of government, and as the term is ordinarily understood. I shall speak of license taxes later on. If the legislature and the courts during this long period of time have so construed the force and effect of the constitutional provision referred to, then I submit that it is now too late to undertake to give to it an entirely inconsistent and contrary construction. But it is said in the majority opinion that it is not all civil liabilities that are included in the purview of this provision of the constitution, and we are cited to authorities holding to the right of imprisonment under the bastardy act, which is denominated a "civil action." These authorties, however, expressly hold that while the action is in its nature civil, as distinguished from a criminal trial, yet the law, as enacted, is an exercise of the police powers of the state. *Ex parte Donahue,* 24 Nebr., 66. As a police regulation, the imprisonment is lawful, and it was competent for the legislature to provide for imprisonment as a means to the desired end. It is not to be doubted that, in the exercise of the police powers of the state, imprisonment is justified and warranted for the preservation of public morals, good order and the peace and welfare of society.

A similar constitutional provision against imprisonment for debt is found in the constitution of Ohio, from which ours is adopted word for word, and which has existed in that state for over half a century. I have yet to learn of an authority in that jurisdiction, or action by the law-making body, recognizing the power of the legislature to coerce payment of taxes levied for public revenues by fine and imprisonment for failure to pay the obligation thus imposed. Surely this is some indication of the soundness of the construction heretofore given to an identical provision in our own constitution. It is held there, as here, that the bastardy act, providing for a judgment against the putative father, and its enforcement by imprisonment, may be resorted to, and that such judgment is not a debt, within the meaning of the constitutional provision under consideration. *Musser v. Stewart,* 21 Ohio St., 353. While the section has been construed in various ways by the court of last resort of that state, none of the decisions relating thereto give countenance or support to the construction adopted in the majority opinion in the case at bar. In a very early case in one of the inferior courts of that state that provision of the constitution was under consideration, and it is there said: "The 15th section of the first article of the constitution declares, 'That no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of frauds.' This provision is contained in the bill of rights, and is an explicit declaration that the people have reserved to themselves the sacred boon of personal liberty, and have denied to the government all control over their persons, except for the commission of crimes, and the isolated case of fraud in their business transactions. This declaration is regarded as an ample safeguard, without either legislative or judicial construction, and admits of no such thing by either the one or the other departments of the government." *Messenger v. Lockwood,* 9 West. Law J. [Ohio], 521. This construction appears reasonable and fairly supported by the language used. On the same point it is stated in the syllabus

in *State v. Mace,* 5 Md., 337: "The term 'debt,' in that clause of the constitution which provides that 'No person shall be imprisoned for debt,' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime." I hope I may be pardoned for quoting at some length from the opinion of the court in the case last mentioned, because my own views are reflected therein quite as clearly as I could express them in language of my own choosing. The court says: "The 44th section of the 3d article of the constitution declares: 'No person shall be imprisoned for debt'; and the court of common pleas have decided in this case that a fine imposed by a justice of the peace for a violation of the act of 1854, chapter 138, is a debt within the constitutional meaning of the term. In this view we do not concur. We think the constitution ought to have a common sense interpretation, by which we mean the sense in which it was understood by those who adopted it, and, if it receive such a construction, in our judgment the term 'debt' is to be understood as an obligation, arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime. Although it is a well recognized canon of construction, that where legal terms are used in a statute they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature, the principle, however, does not apply to the interpretation of the organic law, which is to be construed, according to the acceptation of those who adopted it, as the supreme rule of conduct both for officials and individuals, and, in conformity with this view, it has been habitual for the supreme judiciary of the United States to derive light and instruction from the commentaries of the framers of the federal constitution. * * * We can not be insensible to the fact that in all the struggles for the abolition of the law for imprisonment for debt, the advocates of the measure contended it was unjust and cruel to place the unfortunate debtor on the same footing with the disturber of the public

peace, or the perpetrator of crimes punishable by fines. The evident intention of the constitution was to relieve those who could not pay their debts, and not to shield from punishment persons who had violated the public law." The supreme court of North Dakota, speaking on the same subject, though with reference to provisions unlike ours (*Granholm v. Sweigle,* 3 N. D., 476, 479), says: "If not a tortious act (and we think it was not), the appellant would be protected from arrest and imprisonment by section 15 of the state constitution, which provides that 'No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law; or in cases of tort; or where there is a strong presumption of fraud.' The term 'debt,' as employed in section 15, *supra,* is manifestly used in a broad sense, and hence will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract." The supreme court of Georgia, in *Cooper v. Mayor,* 4 Ga., 68, holds that where a tax had been imposed by a city ordinance upon free persons of color, and in case of non-payment the act provided that such person should be arrested and committed to the common jail, and there confined until the same was paid, such imprisonment was repugnant to the laws of the state and therefore void. In the authorities referred to the word "debt," when found in an organic law, is given a broad and popular meaning, as it occurs to me ought to be done. If, as is said, such a provision denied to the government control of the persons of a state, except for the commission of crimes or in cases of fraud, or if the word "debt" is to be understood as an obligation arising otherwise than from the sentence of a court for a breach of the public peace or the commission of a crime, or if it embraces obligations to pay money as arise upon the law, as well as those which arise upon contract, then may it not, in reason, be said that an obligation imposed by the levying of a tax for revenue purposes is a debt fairly within the scope and purview of the word as used in the constitution, and

that the decisions overruled have such support in principle and on authority as not to justify their condemnation in order to adopt a construction which is more technical and less liberal?

In all the authorities cited in the majority opinion, a tax is recognized as a debt, in its broad and comprehensive sense, but is held not to come within the purview of the word as used in the organic law, for different reasons,—some upon one ground and some on others; but the tendency of all is to limit and restrict the meaning, rather than to use it in a popular sense. It is also to be noted that in many of the statutes and constitutions the language used is altogether different in meaning from our own. In some states the exemption from imprisonment for debt is limited to contracts, either expressed or implied, and does not extend to obligations arising *ex delicto*. Surely it will not be contended that under our constitution a civil action for a liability founded on tort can be enforced by imprisonment, and yet, to be consistent, my associates must so construe our constitution, in order to justify the doctrine enunciated. In *Re Dassler,* 35 Kan., 678, cited in the majority opinion, the supreme court of that state holds that "road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract." It is evident, by a reading of the opinion, that the right to imprison is also justified as an exercise of the police power. Says the court: "It was decided by this court, in *Re Wheeler,* that 'the provision of the constitution [sec. 16] declaring "no person shall be imprisoned for debt except in cases of fraud," applies only to liabilities arising upon contract,' therefore road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in

money in lieu of work, while in the nature of a tax, is not in common speech or in customary revenue legislation, understood as embraced in the term tax. The power to impose this labor is exercised for public purposes, and the general good and convenience of the community." *City of Charleston v. Oliver,* 16 S. Car., 47, 52, was a case relative to the right of enforcing payment of a license tax by imprisonment, and it was there held that the abolishing of imprisonment for debt did not apply to debts due as taxes. This case supports the general proposition laid down by Judge Cooley, and is the only one directly in point which may be said to fully sustain the doctrine announced in the majority opinion. In that case, as a reason for adopting the construction which it did, the court says: "The manifest object was to deprive the citizen of the power to have his fellow-citizen imprisoned for non-payment of his debt. This power, in the hands of private individuals, had long been a subject of discussion, and had been previously circumscribed by the enactment of the Insolvent Debtors' and Prison Bounds acts, which had no application to taxes, and the object of the clause in question, undoubtedly, was still further to limit this power by confining its exercise to 'cases of fraud.'"

Some of the authorities cited relate to an exercise of the right of regulation under the police powers of the state, and on decisions of that character I have no comment to offer. This power must be conceded, and is too firmly established in our system of jurisprudence to be regarded as other than one of its important branches, and necessary for the welfare and protection of society.

What I have heretofore said applies only to my conception of the duty of this court to adhere to the precedents already established, and what appears to me to be sufficient reasons therefor. I have only spoken of what, in my judgment, is a very proper construction of the scope and effect of the constitutional provision declaring against imprisonment for debt, when applied to measures for the collection of taxes of a purely fiscal character, and solely for

the purpose of raising revenues for the support of government, whether of the state and its political subdivisions, or of any municipality therein. There is another and equally important view of the question which is being decided when it is viewed and considered as imposing a license tax, as distinguished from the exercise of the taxing power generally. The majority opinion not only, in terms, overrules the three prior decisions mentioned, but in effect, and indirectly, overturns and repudiates the doctrine announced and adhered to in a long line of decisions, beginning with *State v. Bennett,* 19 Nebr., 191, to the effect that an occupation or purely revenue-producing tax can not be levied and collected as a condition precedent to the issuance of a license to engage in the business taxed; that, when so levied and collected, the tax becomes license money, to be disposed of in the manner provided by section 5, article 8 of the constitution. In escaping the provisions of the constitution against imprisonment for debt, my brothers have come in conflict with section 5, article 8, which declares that all license moneys shall be paid into the common-school fund, when collected. This latter section of the constitution by this decision has been restricted in its application, in my opinion, much more than is warranted by its unambiguous language, or than was the evident intent of its framers. It now must read, if I correctly understand the import of this decision, that all license moneys, if collected under an act or ordinance whose chief object and aim is regulation, must be paid into the common-school fund, but, if the main purpose appears to be the raising of revenues, then the license moneys derived therefrom may be applied to any lawful purpose provided by such act or ordinance. To this construction I can not assent. The section, in unmistakable terms, provides that all license moneys shall be paid into the common-school fund. There is no exception or qualification. and if the tax is a license tax, if it is required to be paid as a condition precedent to obtaining the license, or engaging in the business, if it is made unlawful to engage in the

business taxed without a license, then the fees thus derived, by whatever name the act or ordinance may be called, and whatever may appear to be its chief aim and object, are license money, and must go where the constitution directs, or that instrument is violated. This section of the constitution has made it impossible to raise revenue for general purposes by clothing an act in the garb of a license law, and providing for criminal prosecution and punishment as a means of coercing payment of the tax thus imposed. The section decrees, in unmistakable terms, that all moneys so derived shall be paid exclusively into the common-school fund. This court first fell into an error in this respect in the opinion in the case of *State v. Boyd,* 63 Nebr., 829, from which I dissented, where the rule was announced that, in construing ordinances providing for license taxes, if the purpose appeared to be to raise revenues, the money was a tax, but, if regulation was the end and object in view, the money results from an exercise of the police power, and is license money. The standard there set up by which the application of the moneys derived as a result of licensing a business is to be determined was an arbitrary one, and at variance with the intent and meaning of the language used in section 5, article 8, of the constitution, which neither makes nor warrants such distinction. The true rule, in my judgment, should be that if, in such an act or ordinance, there is any element of regulation, a license tax is justifiable, and its payment may be enforced by declaring the business taxed unlawful, and providing for punishment by fine and imprisonment for engaging in the business declared unlawful without procuring a license therefor. If the measure is solely a revenue-producing act, without any element of regulation, and in substance an occupation tax, then it must be justified and enforced under the taxing power, and as a civil liability only. I understand the rule to be of quite general application that, if there is any element of regulation in a licensing tax act, then the act is valid as an exercise of the police power, even though the collection of

revenues be one of the objects, and incidental thereto, and that it is not at all necessary that regulation shall be the paramount aim and object. This court has recognized the distinction between the two forms of taxation in *Pleuler v. State,* 11 Nebr., 547, 566, where it is said: "By the constitution of this state, the legislature, within certain specified inhibitions and limitations, is invested with full legislative power. And this power includes, as no one will deny, that of police regulation, which being neither defined nor specially limited, is practically left by the constitution to legislative discretion, so long as no right secured by that instrument is encroached upon. Taxation is also a legislative power, and is specifically mentioned in the constitution, but always in connection with the subject of revenue, for the support of the government generally, or some particular department or branch of it. And it is in such connection that we find the requirement of uniformity. This being so, we are led to conclude that this constitutional injunction has reference solely to taxation, pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue merely, and not those impositions made, incidentally, under the police power of the state, exerted either directly or by delegation, as a means of constraining and regulating what may be regarded as a pernicious or offensive act or business,"—citing and quoting from a large number of authorities. The supreme court of the United States says: "The power to license is a police power, although it may also be exercised for the purpose of raising revenue. We can not say, as a matter of law, that when a municipal corporation is authorized 'to regulate, tax and license ferry-boats,' the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power." *Wiggins Ferry Co. v. East St. Louis,* 107 U. S., 365, 27 L. Ed., 419. In *State v. Ashbrook,* 48 L. R. A. [Mo.], 265, 269, it is observed: "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to

some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare." Many other authorities might be cited, but the above are deemed sufficient for present purposes. Ordinarily, and I think it was so contemplated by the constitution framers, a license tax arises from an act of regulation, and, as expressed by the United States supreme court, is an exercise of the police power of the state. It is the exaction of a fee for the privilege of engaging in a specified business or vocation. It is not a tax on the business, but is a condition precedent to the right to engage in it. The business is regarded as one requiring regulation, and the fee is exacted as an efficient means of accomplishing the desired result. It is made unlawful, and imprisonment provided as the punishment not for failure to pay the tax, but for engaging in a business declared unlawful unless a permit is granted by the proper authorities to engage therein, and the required fee paid therefor. This is made manifest when it is considered that the offending party becomes guilty by engaging in the prohibited act without a license, and no payment of the required license fee thereafter would purge him of such guilt. He is not imprisoned until he pays the license fee, but until he has paid the fine or served the term of imprisonment imposed for its violation. When a tax is levied solely for revenue purposes, and on different kinds of business or callings, it is properly demoninated an occupation or business tax, and rests on the same general principles as the imposition of taxes generally for revenue purposes. The first is required for the privilege of engaging in the business which he is otherwise precluded from pursuing, and as a means of regulation, and the latter levied on the business he is already lawfully engaged in. With these distinctions kept clearly in mind, the validity of any law on either branch of the subject ought not to be very greatly difficult of determination. The doctrine has never heretofore gained a foothold in this state which authorizes the exaction and collection of a business tax for purely revenue

purposes under the guise of an act to license the business taxed, and with authority to imprison the delinquent if the tax is not paid. And I can not conceive of any state of affairs which would permit this to be done without expressly violating the constitutional provision declaring all moneys derived from licenses must be applied to the one specified purpose.

It is clear to my mind that the act, the validity of which is in question in the present case, is an act of regulation, and was so intended by the legislature, and not an act solely for the purpose of raising revenue, as held in the majority opinion. It seems to me almost too obvious for argument that the amendment of the act of the legislature of 1901 was chiefly for the purpose of better regulating the different kinds of business therein mentioned, and to prevent the indiscriminate peddling by wholly irresponsible parties, to the detriment of the different communities of the state, and to prevent imposition on the people generally. It bears on its face the stamp of regulation, protection to the inhabitants and the preservation of the public welfare. Its tendency is to confine the business licensed in the hands of but a few persons in each county. It has features that would indicate an intent to, in a measure, prohibit, and can this be regarded as other than for the purpose of regulation? The very fact of requiring every person included in the provisions of the act to take out a license before engaging in the business, to have a record of the issuance of the same and the name and residence or location of the party licensed, and to require an exhibition of the license when requested, are all well calculated to act as a regulation, and to dignify the calling in its importance, and to restrict it to the more responsible of those disposed to engage in the business. It is the same regulation and restraint that lies at the foundation of almost every act requiring a license fee to be paid, and the issuance of a license to the person thereby authorized to engage in a business otherwise made unlawful. The statute prior to 1901 provided generally for a tax of

$30 on each peddler of watches, clocks, jewelry or patent medicines, and all other wares and merchandise, for a license to peddle throughout the state for one year, and provided a penalty of $50 for a violation of the act, the guilty party to stand committed until the fine was paid. By the amendment of 1901 the act was made to apply only to peddlers plying their vocation outside the towns and cities, and graduated the tax from $25 on the walking peddler to $100 on the one using a team of four horses, and excluded from the provision of the act those who sold their own work or production, or educational, and those selling at wholesale to merchants, and persons selling fresh meats, fruit, farm produce, trees or plants, exclusively. Why these changes in the provisions of the original act, discriminations, and exceptions, if the raising of revenues was the aim and object in view? Who can doubt, in view of these amendments, that the intent of the legislature was to regulate the business of peddling by a certain class that was deemed detrimental to society, and consequently some form of regulation and restraint was required, and that such was the object in enacting the law, rather than that the sole purpose was to raise revenues? Peddling has from time immemorial been regarded as a subject justifying the exercise of the police power by regulating acts, and I entertain no doubt that such was the aim and object of the legislature when it amended, as it did in 1901, the act theretofore existing which related to the same subject. An instructive and interesting opinion on the point now being considered, and under a statute of the same character as ours, is found in *Morrill v. State,* 38 Wis., 428. It is there held: "Laws restricting the business of hawkers and peddlers, or providing for the licensing thereof, are an exercise of the police power of the state, and do not lose this character by requiring payment of the license fees into the state treasury." It is observed by Lyon, J., who wrote the opinion of the court: "The statute was doubtless enacted in the interest of merchants having fixed places of trade, on the theory that a sound public policy demands

that these should be encouraged, and traveling merchants or peddlers discouraged; and for the further purpose of protecting honest and well disposed citizens from the arts and importunities, and frequently from the dishonest practices, of a class of traders to whom they are usually strangers, and who are not as directly amenable to those legal and social restraints which must necessarily greatly influence the business conduct of a merchant having a fixed place of business, and depending for his patronage upon one and the same community." And further on: "The reasons (or at least some of them) why the legislature enacted the law of 1870, have already been stated. That they are stated correctly, and that the common law regarded hawkers and peddlers with disfavor, and their vocation opposed in some degree to public policy, will appear by reference to Jacobs' Law Dictionary." After quoting from the authorities it is further stated: "We give the language of the author merely to show the grounds upon which, centuries ago, parliament regulated and restricted the business, and that such regulation and restriction is an exercise of police power in the interest of the public. But with this disclaimer we must be permitted to add that, undoubtedly, resort is often had to this business for the sole purpose of obtaining admittance (which could not otherwise be obtained) into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason why the restriction or regulation of the business is an exercise of police power." The act under consideration in the case at bar, in my judgment, must be justified and upheld as an exercise of the police power. It is presumed to be constitutional and valid, and all intendments are to be taken in favor of the validity of the act, and the exercise of lawful powers by the legislature in its enactment. Whether it will, when thoroughly considered, square with all the express provisions of the fundamental law, I can express no opinion until a full investigation is made of the subject when it is considered in the light of an act of regulation. It would be a vain and useless

effort for me alone to undertake the determination of that question; hence I must content myself with dissenting from the views of my associates in upholding the law as a valid exercise of the taxing power, and in overruling the several prior decisions mentioned in order to reach that conclusion.

W. E. GERRARD V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. No. 12,476.

Occupation Tax: PEDDLERS: REVENUE LAW. The provisions of the general revenue law imposing an occupation tax upon peddlers were enacted by the legislature in the exercise of its taxing power and are valid.

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

O. M. Quackenbush and *W. A. Prince,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *R. R. Horth,* for the state.

SULLIVAN, C. J.

W. E. Gerrard, having been convicted in the district court of Hall county of peddling without a license, brings the record of his conviction to this court for review. All the questions discussed by counsel have been decided in *Rosenbloom v. State,* 64 Nebr., 342, in which we held that the provisions of the general revenue law imposing an occupation tax upon peddlers were enacted by the legislature in the exercise of its taxing power and are valid. This case is ruled by the *Rosenbloom Case.*

The judgment is

AFFIRMED.

HOLCOMB, J., dissents.

FRED MORGAN V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. NOS. 12,478 and 12,479.

1. **License:** BILLIARD AND POOL: VILLAGE: ORDINANCE. Under the provisions of section 46, and subdivision 12 of section 69, article 1, chapter 14, Compiled Statutes, 1901, village authorities have ample power by ordinance to license and regulate billiard and pool rooms.

2. ———: ———: LICENSE TAX. And by subdivision 8 of section 69, aforesaid, village trustees are authorized to raise general revenue by levying and collecting a license tax on persons engaged in the business of conducting billiard and pool rooms.

3. **Ordinance:** TITLE. An ordinance whose main object is to license and regulate a business or calling is not wholly void because a provision imposing a small occupation tax is not clearly expressed in its title, as required by section 79 of article 1, chapter 14, Compiled Statutes, 1901.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

D. W. Livingston, for plaintiff in error.

Corydon Rood, for the state.

SULLIVAN, C. J.

These cases were submitted together on the same briefs, and will be disposed of in one opinion. In each case the defendant, Morgan, was convicted of violating a village ordinance, which was clearly intended to regulate and tax the business of keeping a pool and billard room. Under the stipulation of the parties, the validity of the ordinance is the only question properly before us for decision. The first contention of the defendant is that the village authorities in the adoption of the ordinance, attempted to exercise a power which the legislature had not conferred upon them. This contention can not be sustained. The power exercised by the board of trustees is, we think, fairly within the provisions of section 46, and subdivision 12 of section 69, article 1, chapter 14, Compiled Statutes, 1901.

The interests of peace, good order and public morality require that the billiard and pool room should be conducted according to such rules and standards, and subject to such restrictions, as may be prescribed by the municipal authorities. Such a room is not, we concede, *per se* a nuisance, but without regulation and supervision it is likely to become so anywhere, and in a village it is apt to degenerate into a trysting-place for idlers and a nidus for vice.

But it is insisted that, if the ordinance was an authorized exercise of the police power, the provision imposing an occupation tax, in addition to the license fee, is invalid. Without conceding this proposition, which, on account of the restrictive title of the ordinance, is not free from doubt, we dispose of it by holding that, under the rule established by numerous decisions of this court, the taxing clause may be stricken out without destroying, or affecting in any way, the regulative provisions of the ordinance. *Scott v. Flowers,* 61 Nebr., 620; *State v. Stuht,* 52 Nebr., 209. See, also, *East Kingston v. Towle,* 48 N. H., 57; *Chicago, B. & Q. R. Co. v. Jones,* 149 Ill., 361; *McPherson v. Blacker,* 92 Mich., 377; *Grimes v. Eddy,* 126 Mo., 168.

The judgment in each case is

AFFIRMED.

HIRAM C. WELLS, APPELLEE, V. W. W. FRAZIER ET AL., IMPLEADED WITH MARION S. ALLEN ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,571.

1. **Judicial Sale:** APPRAISAL. An objection to an appraisal of real estate for the purpose of a judicial sale, to be available, must be made and filed before a sale thereof is had.

2. ———: ———: AUTHORITY OF DEPUTY SHERIFF. A deputy sheriff may act for and in the place of the sheriff in making an appraisal of real estate for the purpose of a judicial sale in the execution of a decree of court.

3. ———: ———: OWNERS OF EQUITY OF REDEMPTION: DESIGNATION OF "ET AL." An appraisal of the interests, in land about to be sold at judicial sale, of the parties to an action, against whom the decree operates, is not invalidated because the names of the

owners of the equity of redemption are not stated other than by the designation "et al." after the name of the principal defendant in the action.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for appellant:

Talbot & Allen and *Alpha Morgan, contra.*

HOLCOMB, J.

We will consider only the objections to confirmation of sale of real estate to which our attention is called in the brief of counsel for appellants.

The objection that the appraisal of the land was for an inadequate sum comes too late, since it was not made until after sale, and just before an order of confirmation was asked for.

As to the second objection, we have held several times that a deputy sheriff may act for the sheriff in making an appraisement of land for the purpose of a judicial sale in the execution of a decree of foreclosure of a real estate mortgage. *Richardson v. Hahn,* 63 Nebr., 294, and authorities there cited.

It is next urged that because in the appraisal and advertisement of sale the parties are designated as Hiram C. Wells v. William W. Frazier et al., and the appraisal was of the interest of William W. Frazier et al., without naming the defendants who appeal, and who were the owners of the equity of redemption, this renders the proceedings so irregular as to amount to prejudicial error. The parties were designated with sufficient certainty to show the nature of the proceedings and the action in which the decree of foreclosure and order of sale were entered. The appraisement found the gross value of the lands from which was deducted prior incumbrances, the net appraised value being found as the value of the interest of all the defendants in the property. This certainly would include the

owners of the equity of redemption, who were made parties to the action. We know of no legal ground of complaint because they were not specially singled out from the numerous defendants, and found to have an interest in the land as owners. It is obvious that they were in no way prejudiced by the appraisers not undertaking to ascertain and separate the interests of the different defendants against whom the decree operated. It is not required of the appraisers that they should ascertain and determine what the respective interests of the different defendants were in the land being appraised for sale. By finding the gross value of the land, and deducting therefrom the prior incumbrances, the value remaining represented the value of the interest, for the purpose of the sale, of either or all of those against whom the decree and its execution operated. *Toscan v. Devries,* 57 Nebr., 276. The object of the statute requiring the appraisal before sale is to fix the value of the real estate, below two-thirds of which the land can not be sold. It is for the protection of those whose interests therein are to be divested by the sale, and the object of the statute is accomplished by finding the net value of the land. We can conceive of no valid reason for holding that the objecting defendants were prejudiced because they were not named personally and specifically in the appraisal, and consequently the failure to so designate them is no sufficient ground for denying confirmation of sale.

The order appealed from is accordingly

AFFIRMED.

JOSHUA PALMER ET AL. V. JAMES S. CAYWOOD.

FILED APRIL 2, 1902. No. 11,573.

1. **Petition: DEMURRER: ANSWER: LEAVE OF COURT: WAIVER OF ERROR.** Where a demurrer to a petition is overruled, and an answer, under leave given by the court, is filed, the error in overruling the demurrer, if any there be, is thereby waived.

2. **Supersedeas Undertaking: SUIT: CONDITION PRECEDENT: RETURN NULLA BONA: CODE.** It is not required that an execution be issued, and returned *nulla bona*, as a condition precedent to

maintaining a suit on a supersedeas undertaking executed and delivered under the provisions of section 588 of the Code of Civil Procedure.

3. Judgment: PROPERTY OF DEBTOR: CONDITION PRECEDENT. Nor is it required that the judgment creditor shall, on affirmance of the judgment, exhaust the property of the judgment debtor, before bringing suit on the bond given to operate as a supersedeas pending the review of the proceedings resulting in the judgment by the appellate court.

4. Suit on Supersedeas Bond: JUDGMENT DEBTOR: DEATH PENDING REVIEW. Nor, where the judgment debtor has died pending such review, can the judgment creditor be required to look to the estate of the deceased, although solvent, for satisfaction of the judgment, before maintaining a suit on the supersedeas bond.

5. Issue: TRIAL: POSTPONEMENT: MATTER OF RIGHT. When the issues in an action are regularly made up, the cause stands for trial; and a party thereto will not be granted, as a matter of right, a postponement solely on the ground that the issues as made by the pleadings were formed sooner than he anticipated they would be.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

Joshua Palmer, for plaintiffs in error.

J. D. Pope, contra.

HOLCOMB, J.

The plaintiff below, defendant in error, instituted an action in the district court for Saline county against the defendants, plaintiffs in error, on their liability as sureties on an undertaking executed in favor of plaintiff's assignor, who had obtained a money judgment against the principal in the undertaking, which it was sought to have reviewed on error in the supreme court, the undertaking being executed under and by virtue of the provisions of section 588 of the Code of Civil Procedure, for the purpose of staying the execution of the judgment pending the error proceeding prosecuted to obtain a reversal thereof. The petition is in the ordinary form, and, in substance, alleges the

recovery of the judgment superseded by the undertaking sued on; the execution, delivery and approval of the supersedeas bond; the removal of the cause to the supreme court on error, and the affirmance therein of the judgment recovered in the lower court; the issuance and filing in the district court of the mandate of the supreme court directing the enforcement of the judgment as affirmed; the assignment of the judgment to the plaintiff in the action, and that no part of the judgment, or the costs adjudged against him, had been paid by the judgment debtor, his heirs or assigns, or any other person, nor by the said defendants, who were signers of the supersedeas bond; followed by a statement of the amount due, and prayer for judgment. A demurrer was interposed, which, on consideration, was overruled, and leave given to answer, which was done. We are asked to review the ruling of the trial court on the demurrer, but that seems unnecessary, in view of the defendants' action in answering to the petition, and thus waiving the error, if any there be, in the ruling on the demurrer. *Buck v. Reed*, 27 Nebr., 67. The answer admitted the main facts alleged in the petition, and as a defense, pleaded that, pending the review of the cause in which the supersedeas bond was given in the supreme court, the judgment debtor died seized of personal and real property ample to pay all his debts, and that such judgment had been allowed as a proper claim against the estate of the deceased; that the order of allowance was in full force, and said judgment was a valid claim against the estate, which was amply sufficient for its payment. It is also alleged that the plaintiff had, after the death of the judgment debtor, intermarried with the widow of the deceased, and that the plaintiff, conspiring with the assignor of the judgment, obtained an assignment thereof for the fraudulent purpose of exempting the estate of the judgment debtor from the payment of the judgment, and to enforce collection of the same from the defendants, as sureties on the supersedeas bond, in violation of their rights. The portion of the answer relating to the filing of

the judgment as a claim against the estate, and its ability to pay the obligation, was, on motion, stricken from the answer, after which a reply consisting of a general denial was filed; and on the issues thus raised the action proceeded to trial and a judgment adverse to the defendants, from which they bring the cause here for review by proceeding in error.

The only question presented by counsel for the sureties relates to the action by the trial court in striking from the answer that portion thereof heretofore referred to, and its refusal to permit the introduction of any evidence tending to prove that the estate was solvent, and to show the ability of the plaintiff to obtain satisfaction of his judgment therefrom, and without recourse to the sureties on the supersedeas bond. Counsel say: "The position that we take is that under ordinary circumstances the creditor can elect whether he will pursue the debtor or his bondsmen, but where the creditor died during the litigation of the subject-matter, and the judgment having been allowed by the county court as a claim against the debtor's estate, and when said estate is solvent, he must pursue the same course as other creditors, and get his claim from the estate, and not be allowed to pursue and distress the securities on debtor's bond." The rule is, as we understand the authorities, that the sureties' liability on the affirmance of the judgment is absolute and unconditional,—as much so as the principal debtors,—and that the judgment creditor can not, unless, perhaps, in very exceptional cases, be required to exhaust the property of the principal on the undertaking before he is entitled to have recourse against the sureties, and collect from them what is due under the terms of the instrument. The sureties have obligated themselves unconditionally to "pay the condemnation money and costs in case said judgment shall be affirmed in whole or in part." This obligation can only be discharged by the satisfaction of the judgment, when affirmed in the appellate court, by the sureties, in the event of the failure of the principal so to do. It has been frequently held by this court that an

execution is not required to be issued, and returned *nulla bona,* as a condition precedent to maintaining a suit on the undertaking. *Cortelyou v. McCarthy,* 53 Nebr., 479; *Flannagan v. Cleveland,* 44 Nebr., 58; *Ayres v. Duggan,* 57 Nebr., 750; *Anderson v. Sloan,* 1 Colo., 484. If it is unnecessary to issue an execution against the judgment debtor, it would seem, *a fortiori,* that the judgment creditor could not be required to await the delays necessary and incident to the administration of the decedent's estate before realizing on the supersedeas bond, conditioned, as it is, for the immediate payment of the judgment on its affirmance by the supreme court. *Bingham v. Mears,* 27 L. R. A. [N. Dak.], 257; *Davis v. Patrick,* 57 Fed. Rep., 909. In the last case cited it is said: "In the case heretofore cited [*Babbitt v. Finn,* 101 U. S., 7] it was held, as before stated, that a surety in an appeal bond is not entitled to have an execution issued against the principal debtor, before suit is brought on the bond; that by the affirmance of the judgment the sureties became liable to the same extent as the principal obligor; and the same ruling has been made elsewhere. *Tissot v. Darling,* 9 Cal., 278; *Murdock v. Brooks,* 38 Cal., 596, 603; *Anderson v. Sloan,* 1 Colo., 484; *Smith v. Ramsay,* 6 Serg. & R. [Pa.], 576. If it be true that the liability of the surety is so absolute that he is not entitled to insist on the issuance of an execution against the principal debtor, it can hardly be contended that the defendants below were entitled to have the suit on the bond stayed until the attached lands were sold, and that security exhausted. If the sureties desired to avail themselves of the attachment lien, it was their plain duty to pay the judgment debt, and by so doing become subrogated to whatever lien the judgment creditor had acquired on the lands in question." It is a rule of very general application in actions at law on undertakings of the character of the one under consideration that a surety must, in the first instance, meet his obligation, and can not legally cast the burden on the person to whom the obligation runs to undertake to secure satisfaction from

the principal debtor before he may legally proceed against the surety, but, on the contrary, he may, at his election, as soon as the breach occurs, proceed to the enforcement of his rights by the virtue of the undertaking, and the legal duty rests on the surety to satisfy the obligation for which he is bound, and because thereof he may be subrogated to the rights of the judgment creditor, and may in his own behalf proceed in his own way to secure reimbursement and satisfaction from the principal debtor, for whose compliance with the terms of the undertaking he has vouched and become sponsor. We know of no sound reason or any recognized rule making an exception in a case where the principal debtor has died, and, as to his liability, satisfaction must be obtained from his estate. If the estate was solvent, then, indeed, would it be no additional burden to require the sureties to satisfy the obligation, and in turn look to the estate for the enforcement of their rights as sureties, and the rights of the obligee, to which they are subrogated by the payment of the obligation. If the obligee can not be required to resort to the property of the principal debtor in the first instance, before looking to the sureties, we are unable to distinguish, on principle, why he must, when the principal debtor dies, look to his estate for satisfaction of the obligation, before having a right to proceed against the sureties. We are of the opinion the rights of the creditor are in nowise modified or changed by reason of the decease of the judgment debtor, and the sureties can not escape the obligation they assumed, or delay its enforcement, because of that fact. The defense sought to be interposed can not avail the sureties on the bond declared on in the case at bar, and the trial court did not err in its rulings in respect of the same.

There is also complaint because the trial court did not continue the cause at the time trial was had, on the defendant's application. It is insisted that because the motion to strike out a part of the answer was sustained, and the plaintiff replied instanter to the answer as it then stood, the cause should have been continued, because the issues

were prematurely made up, and before the defendants were prepared for trial. No other reason is given for a postponement of the trial, and we know of no rule of practice that will give to a defendant, as a matter of right, a continuance of a cause on the ground that the issues, as made by the pleadings, were formed sooner than he anticipated they would be. The cause stands for trial as soon as the issues are formed, unless for some valid reason one of the parties is entitled to a postponement. We perceive no error in the record and the judgment therefore should be, and accordingly is,

AFFIRMED.

E. MOULTHAN ET AL., APPELLEES, V. FRED APKING ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,579.

1. **Confirmation of Sale: EVIDENCE.** Record examined, and *held* confirmation of sale of real estate was regularly and properly entered; *held* also the evidence is sufficient to sustain the ruling of the trial court on objections to appraisal and confirmation of sale.
2. **Certificate of Incumbrance: REVENUE STAMP.** The certificates of prior incumbrances and appraisal of land for the purpose of sale in foreclosure proceedings are not required to be stamped, under the provisions of the war revenue act of 1898. *Noble v. Citizens' Bank of Geneva*, 63 Nebr., 847, followed.
3. **Brief: RECORD: QUESTION PRESENTED.** Questions discussed in briefs which are not properly presented by the record will not be considered.

APPEAL from the district court for Fillmore county. Heard below before STUBBS, J. *Affirmed.*

J. H. Stirling, for appellants.

F. B. Donisthorpe and *Charles H. Sloan, Frank W. Sloan* and *Robert J. Sloan, contra.*

HOLCOMB, J.

Appellants, who were defendants below in a suit for the foreclosure of a real estate mortgage, objected to the ap-

praisement of the land made for the purpose of a sale in satisfaction of the decree and in pursuance of the order of court, and also to the confirmation of the sale thereafter made, on the ground that the appraisement so made was so much below the real value as to be in fraud of the rights of the appellants, who were the owners of the equity of redemption. The land was appraised at the gross sum of $2,500. Three affidavits on behalf of appellants were filed in support of their objections, in which the land was estimated by the parties making the affidavits to be of the value of $2,800. The appellants filed their own affidavits, fixing the value at $4,400. But in view of their interest in the subject-matter in litigation and the highly inflated valuation placed on the land as compared with all others testifying regarding the question, as well as the evidence of value as fixed by the appraisers, these affidavits were very probably considered as of little value by the trial court in determining the matter then under consideration. No very great difference appearing between the affidavits of the others in support of the objection and the valuation as fixed by the three appraisers, and the court in passing on the question having refused to set aside the appraisal as being so grossly low and inadequate as to be presumptively fraudulent, we can not say such action is unsupported by the evidence. No actual fraud is charged, nor is any attempt made to prove that such was the case. The evidence was fairly conflicting, and we think supports the conclusion reached. Error can not, therefore, be predicated on the ruling in that regard. *Nebraska Loan & Building Ass'n v. Marshall,* 51 Nebr., 534.

It is also contended that, because no revenue stamps were attached to the certificates of incumbrances and the appraisal of the land as made by the sheriff and two others called for that purpose, no competent evidence existed showing the same to have been made, and for that reason the trial court could not rightfully enter an order confirming the sale. Such certificates are not required to be stamped, under the provisions of the war revenue act of 1898. *Noble v. Citizens' Bank of Geneva,* 63 Nebr., 847.

The objection last mentioned, for the reason stated, is untenable. Other questions are discussed which are not properly presented by the record before us, and will not, for that reason, be further noticed.

We find nothing in the record to warrant us in concluding otherwise than that the order appealed from was properly and regularly entered, and should therefore be affirmed, which is accordingly done.

AFFIRMED.

JACOB PECHA ET AL. V. JACOB KASTL.

FILED APRIL 2, 1902. No. 11,209.

Commissioner's opinion, Department No. 1.

1. **Pleading**: DENIAL: JUDGMENT. Denial of "each and every allegation of new matter set up in defendant's answer," and of "each and every other part of same, except such allegations of said answer as may be admissions of plaintiff's petition," while subject to motion to strike or to make more specific, being neither a general or specific denial, is sufficient to prevent a judgment for defendant on the allegations of the answer.
2. **Evidence**: CONVERSION. Evidence examined, and *held* sufficient to support a finding for plaintiff in action against a joint-owner and the purchaser of a horse-power for conversion of it by a sale.
3. **Instruction**: CONVERSION: RIGHT OF POSSESSION. Not prejudicial error to leave out the element of plaintiff's right of possession, in defining "conversion," where that question, so far as the case on trial is concerned, is fairly submitted in another instruction.
4. ———: ———: ———. An instruction that, if conversion was found, both seller and purchaser of the property were liable, *held* not error, when the circumstances which would and would not make the sale a conversion had been fairly indicated.

ERROR from the district court for Butler county. Tried below before BATES, J. *Affirmed.*

Hastings & Hall, for plaintiffs in error.

Matt Miller, contra.

HASTINGS, C.

In this case the first complaint is of error in not sustaining a motion for judgment in favor of defendants on the

pleadings. The ground for such motion was the fact that the reply of plaintiff merely denied "each and every allegation of new matter set up in defendants' answer," and "each and every other part of same except such allegations of said answer as may be admissions of plaintiff's petition." Plaintiff's petition was for conversion of a horse-power. Plaintiff below, defendant in error here, alleges that on January 28, 1899, he was the owner of a horse-power jointly with plaintiff in error Pecha, and that the defendants Pecha and Ptacek converted it to their own use, and refused to restore it, to plaintiff's damage in the sum of $40; that, in shelling his corn, plaintiff had been compelled to pay $7 for the use of a sheller. Defendants deny these allegations, but admit that, some time before the date mentioned, plaintiff and Pecha owned a sheller and horse-power, and say that about January 28, 1899, a division of the property was agreed on, and Pecha was to have the horse-power, and plaintiff the sheller, and since that time plaintiff had no interest in the power. To this answer the reply above stated was filed. It does not seem necessary to say that the trial court was not in error in refusing to render judgment for defendants on the pleadings. The reply does not comply strictly with our statute. It is hardly a general or special denial, but it was not a nullity. It should have been required, on motion for that purpose, to have been made more specific or to have been stricken out, but while it remained in the record it was sufficient to prevent a judgment for defendants. *Herdman v. Marshall,* 17 Nebr., 252; *Miller v. Brumbaugh,* 7 Kan., 343; *Collins v. Trotter,* 81 Mo., 275.

It is claimed that the evidence is insufficient to sustain the verdict for plaintiff in the sum of $10. The evidence is somewhat conflicting as to plaintiff's assent to the taking and appropriation of the power, but the preponderance seems clearly in favor of the jury's view that there was no settlement, nor agreement to divide the property, and that the power was taken by defendant Pecha and sold without the assent of his co-owner.

The giving of instructions Nos. 4, 7 and 9 is assigned as error. The first of these is, "The burden of proof is upon the defendant Pecha to prove the material allegations of his answer by a preponderance of the evidence." It is complained that no indication as to what were the material allegations of the answer was given to the jury. It is conceded that no instructions covering this point were asked. The abstract correctness of the instruction given is not disputed. If a more definite instruction was desired, it should have been asked. It does not appear that the jury was misled in this matter. Instruction No. 7 told the jury that the wrongful taking of the property, and appropriating the same to the party's own use, constituted conversion. It is complained that this took from the jury the issue as to the division of the property by agreement, and that it permitted a recovery by plaintiff on the weakness of defendants' title, and not simply on the strength of his own. The instructions must be taken together, and by the eighth instruction the jury were expressly told that consent by plaintiff to the taking and sale of property by Pecha would defeat his action, and also that an agreement for a division would have the same effect. The failure to call attention in the seventh instruction to the necessity that plaintiff have at least an immediate right of possession in the property seems to be amply cured in this eighth one.

The court having defined "conversion" as a wrongful taking, and having stated what circumstances would and would not make the admitted action of defendant in selling the property wrongful, it was not error to tell the jury, by the ninth instruction, that, if they found that defendant Pecha had converted the property and sold it to his codefendant, both were liable.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated above, the judgment of the district court is

AFFIRMED.

C. G. SOMERS ET AL. V. JOSEPH VLAZNEY.

FILED APRIL 2, 1902. No. 11,255.

Commissioner's opinion, Department No. 1.

1. **Liquor-License: PETITION.** Under section 25 of chapter 50, Compiled Statutes, a petition for a license to sell malt, spirituous and vinous liquors is sufficient if signed by thirty resident freeholders of the ward or village where the sale of such liquors is to take place, and, in case there are less than sixty resident freeholders in such ward or village, the petition is sufficient if signed by a majority of the resident freeholders of such ward or village.

2. **Intoxicating Liquor: LICENSE: REMONSTRANCE.** Under section 3, chapter 50, Compiled Statutes, the right to protest or remonstrate against the issuance of a license is not confined to residents of the ward or village where the intoxicating liquors are sought to be sold.

3. **Evidence.** Evidence examined, and *held* to support the judgment.

ERROR from the district court for Madison county. Tried below before ALLEN, J. *Affirmed.*

William M. Robertson and *George L. Whitham,* for plaintiffs in error.

John B. Barnes, contra.

DAY, C.

On April 11, 1899, Joseph Vlazney filed with the clerk of the city of Norfolk a petition in the usual form, praying for a license to sell malt, spirituous and vinous liquors in the first ward of said city. The usual notice of his application was duly published as required by law. Before the hearing upon the application, C. G. Somers and G. L. Whitham filed a protest or remonstrance with the city counsel against the issuing of the license, alleging, among other reasons, that the names of thirty resident freeholders of the ward were not signed to the petition; that during the previous year the applicant had a license to sell liquors, and during said year had violated the provisions of chapter

50 of the Compiled Statutes by selling intoxicating liquors to minors, and by keeping screens and blinds upon the windows and doors of said place of business and so obstructing the public gaze. At the hearing before the council the remonstrance was overruled, and a license was ordered issued as prayed. The remonstrators prosecuted an appeal from the decision of the council to the district court, where, upon hearing, the action of the council was sustained. To review the judgment of the district court the remonstrators have brought the case to this court by proceeding in error.

The evidence shows there were thirty-three resident freeholders in the first ward of said city at the time the petition and bond were filed and the notice of the application given. The petition was signed by twenty-three persons, nineteen of whom were resident freeholders in the ward and qualified to sign the petition. Section 25 of chapter 50 of the Compiled Statutes of Nebraska provides that "in granting any license the petition therefor shall be sufficient if signed by thirty of the resident freeholders, or if there are less than sixty, a majority of the freeholders of the ward or village where the sale of such liquors is to take place." The evidence showed that there were but thirty-three resident freeholders in the ward, nineteen of whom signed the petition. This was a majority and a compliance with the statute. The objection urged upon the ground that the petition did not have thirty signers is not well taken.

The district court held that remonstrators, being nonresidents of the first ward, had no interest therein entitling them to remonstrate against the issuance of the license, and that, therefore, the case stood precisely as it would had no remonstrance been filed. In so holding we think the court erred. Section 3 of chapter 50 of the Compiled Statutes of Nebraska provides: "If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county board shall appoint a day for the hearing of said case, and if it shall be satisfactorily proven

that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license." The policy of the law regulating the sale of intoxicating liquors is to place the sale of such liquors in the hands of peaceable, law-abiding persons, and with that in view requires the applicant to be "a man of respectable character and standing and a resident of this state." The publication of the notice is for the very purpose of giving the fact of the application publicity, to the end that any person who has a good reason to protest against the issuance of the license may remonstrate if he desires to do so. The statute does not confine the right to protest to the residents of the ward where the intoxicating liquors are sought to be sold. A fair construction of its provisions gives the right to protest to any one who desires to remonstrate.

One of the reasons urged by the remonstrators against the license was the claim that two of the members of the council had signed the petition for the license. The proof, however, showed that while Councilman Uhl had signed his name to the petition it had been by his direction stricken off before the hearing, and, besides, he did not vote upon the question of granting the license when that question was passed upon by the council. Objections urged against Brummond on the ground that he had signed the petition were not sustained, it being shown that it was his wife's and not his name attached to the petition.

Another reason urged by the remonstrators against the license was that the applicant had, during the previous year, sold intoxicating liquors to minors, in violation of the law. It was shown that he was convicted of such an offense before the police court, but the applicant showed that the case had been properly appealed to the district court, and was then pending and undetermined. There was therefore no competent evidence of his previous viola-

tion of the law with respect to the matter charged. It was shown there was a screen standing from six to ten feet from the entrance of the door to the room, but it is not shown that the vision of any one desiring to look into the building was successfully obstructed, or that there was any intention on the part of the applicant to obstruct the public gaze.

While we do not agree with the reasons upon which the court based its judgment, we think the judgment was right. The error was without prejudice. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HENRY L. CLARY, APPELLANT, V. MCLANE WATKINS, SR., ET AL., APPELLEES.

FILED APRIL 2, 1902. No. 11,529.

Commissioner's opinion, Department No. 1.

1. Descent: UNCLE: AUNT: COUSIN: SECOND COUSIN. G. died intestate, leaving surviving her neither issue nor husband, father, mother, brother, sister, nephew, niece, grandfather, grandmother or grandchildren; her nearest relatives being two uncles and an aunt, cousins and second cousins. *Held* that, under our statute of descent, the two uncles and the aunt took the entire estate, to the exclusion of cousins and second cousins.

———: INHERITANCE PER STIRPES. It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate, to the exclusion of those more remote. *Douglas v. Cameron*, 47 Nebr., 358, followed.

APPEAL from the district court for Nemaha county. Heard below before STULL, J. *Affirmed.*

A. L. Knabe, for appellant.

William H. Kelligar and *Edgar Ferneau, contra.*

DAY, C.

The facts necessary to an understanding of the question presented by this appeal are substantially as follows: On August 21, 1898, Mary E. Gooseman, a resident of Nemaha county, Nebraska, died intestate, seized in fee of a large amount of real estate situated in said county, a specific description of which seems unnecessary to be set out. She left surviving her neither issue nor husband, father, mother, brother, sister, niece, nephew, grandfather, grandmother or grandchildren; her nearest relatives being uncles, an aunt, cousins and second cousins. There were surviving her two uncles, who were brothers of her mother, to wit, Thomas Watkins and McLane Watkins, Sr., and an aunt, Naoma Whittle, who was a sister of her father, and numerous cousins and second cousins who were the lineal descendants of deceased uncles and aunts of the intestate. One of the cousins, Henry L. Clary, brought this action for partition in the district court of Nemaha county. The uncle, McLane Watkins, Sr., and the children of Thomas Watkins, the latter having died since the death of his sister, Mary E. Gooseman, and the aunt, Naoma Whittle, each filed answers denying any rights of the plaintiff in and to the lands, or any part thereof, and each also filed cross-petitions averring that the estate went to the two uncles and aunt, to the exclusion of the cousins and second cousins. Upon a hearing the court decreed the lands to the uncle, McLane Watkins, Sr., and to the children of Thomas Watkins, the deceased uncle, and to Naoma Whittle, to the exclusion of cousins and second cousins. To review this judgment the plaintiff has brought this case to this court by appeal.

The appellant claims that the rule of descent should be governed by subdivision 3, section 30, of chapter 23 of the Compiled Statutes, which is as follows: "Third. If the

shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; *Provided*, That if he shall have a mother also, she shall take an equal share with his brothers and sisters." The appellees claim that the case falls within the provision of subdivision 5 of said section, which is as follows: "Fifth. If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote."

The precise question here presented has been determined by this court in the case of *Douglas v. Cameron*, 47 Nebr., 358, where the rules of descent under the provisions of section 30, chapter 23, of the Compiled Statutes are considered and construed. In that case the intestate left surviving him neither issue nor father, mother, brother or sister. There were surviving him four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. The court held that the case fell within the fifth subdivision of section 30, chapter 23, and not within the third subdivision; that the twelve surviving nephews and nieces took the land to the exclusion of the grandnephews and grandnieces. In the syllabus it is said: "It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate to the exclusion of those more remote."

The judgment of the lower court is in strict conformity to the rule announced in *Douglas v. Cameron, supra*. We are satisfied with the construction of our statute as announced in that case.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE C. CLOSE, REVIVED IN THE NAME OF CARRIE ROCKWELL, APPELLANT, V. SURN SWANSON ET AL., APPELLEES.

FILED APRIL 2, 1902. No. 10,154.

Commissioner's opinion, Department No. 1.

1. **Highway**: ORDER OF COUNTY BOARD: DEDICATION: USER. Where no order has been made by a county board laying out or establishing a traveled road, the public has no rights in such road as against a landowner in adverse possession, except such as are acquired by dedication and user. *Lydick v. State*, 61 Nebr., 309, distinguished.

2. ———: DEDICATION. To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise accepted the land for that purpose.

3. **Evidence**: FINDINGS. Evidence examined, and *held* not to sustain findings and decree of trial court.

APPEAL from the district court for Burt county. Heard below before FAWCETT, J. *Reversed.*

H. E. Carter, for appellant.

Willis G. Sears and *H. H. Bowes, contra.*

KIRKPATRICK, C.

This is a suit brought by George C. Close, appellant, as the owner of the east half of the northeast quarter of section 1, township 21 north, range 10 east, in Burt county, against Surn Swanson, road overseer of district No. 12, and against Horace Brookings, road overseer of road district No. 27, both of Burt county, appellees. Separate petitions were filed against the appellees, but by consent of

all parties, an order of consolidation was made, and the two cases tried as one. The petitions are identical, and plead that appellant purchased the land in question in 1867, and soon thereafter moved upon it, and that he has resided thereon ever since; that he has valuable buildings and improvements on the land, and that he has, at great expense and labor, set out a valuable grove and hedge and ornamental trees, along the north line of his land; that he has the land inclosed by a substantial fence, placed immediately north of his grove, etc.; that immediately north of his fence there is a traveled road, which has been used by the public for such purpose for more than ten years; that said road was never laid out or established; that all rights of the public therein have been obtained solely by user; that the centre line of said road is the line dividing road district No. 27, lying on the south, of which Horace Brookings is the road overseer, and that portion of the road lying north of the centre line which is road district No. 12, of which Surn Swanson is the road overseer; that appellees, Swanson and Brookings, threaten and intend to cut down appellant's hedge, and tear down and remove his fence, and cut down his grove and ornamental trees, all within a strip of land about two rods in width within the line of his fence on the north of his premises; concluding with a prayer for a permanent injunction. The answer of the appellees admitted their official capacity, and alleged that the road was duly laid out and established, and that the fence and trees of appellant Close obstructed the public road; that he had been notified to remove his fence and cut down the hedge and timber, but that he had failed and refused to do so; concluding with a prayer that a decree be entered decreeing the existence of a sufficient, proper and legal public road over said premises, and that defendants, as road overseers, have the right to exercise lawful authority with relation thereto, and that the temporary injunction theretofore granted be dissolved, and for costs. To these answers a general denial was filed by appellant, and a trial was had, which resulted

in a judgment dismissing appellant's petitions at his cost, and vacating the temporary injunction theretofore granted. From this judgment the case is brought to this court by appeal.

A great amount of evidence was taken in the case, in which there appears little, if any, dispute, and the matters following may be said to be established beyond question. In 1867 appellant purchased the land in controversy, and in about a year thereafter established his residence thereon. At that time many of the corner stones and monuments placed by the government surveyors were in a good state of preservation. The quarter corner on the north side of section 1 was marked by a stone no doubt selected and marked by the government surveyors. The government corner at the northeast of section 1 was plain, and never has been questioned. There seems to be no question that the quarter corner on the north side of section 1 stood three or four rods north of a true east and west line. But however that may be, it is claimed by appellant as the true corner, is the only one claimed ever to have been found, and was recognized by the landowners on both sides of the line, as well as the general public, for twenty-five or thirty years, and up until the commencement of this controversy. In 1876 a petition was presented to the county board, asking for the establishment of a public road along this section line. It was signed by appellant, among others, and the road appears to have been viewed or surveyed. These were preliminary steps to be taken to authorize the county board to act, and for its information, that it might properly and understandingly act. No other steps were ever taken, and no order was made or attempted by the board laying out or establishing the road in question.

In the case of *Lydick v. State*, 61 Nebr., 309, this court said: "Where a public road has been established by proceedings under the statute, and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein; and the court will not examine

the original proceedings for the laying out of the road, and determine whether or not they were valid." Of the correctness of the rule established by that case, and the decisions cited in support thereof, we have no doubt; but in the case at bar the county board stopped short of making any order concerning, laying out, or establishing the road in question. Hence the road involved in this controversy does not come within the rule announced in that case. If an order, however irregular, had been made by the county board, laying out or establishing the road in controversy, the rule in *Lydick v. State, supra,* would govern. At the time the petition for the road was signed, appellant gave two rods of his land along the north line for road purposes, and removed his fence, which he then had on a portion of his north line, south thirty-three feet from the line claimed by him to mark his north boundary, to the place where it now stands. He plowed a furrow east and west along the line where his fence now stands, planted a hedge in the furrow, and built a fence, which he has maintained ever since. It was some little time before he completed this fence up to his northwest corner, and during a portion of the time the fence has been allowed to remain down and out of repair. But at no time from the year 1876 until the commencement of this suit did appellant permit any public travel south of the line of his fence and hedge. Long before the attempted establishment of the road mentioned, appellant had his north line surveyed by the county surveyor, who recognized the marked stone on the north side of section 1 as the true corner, and placed a stone for appellant's northwest corner on a true line between the quarter corner on the north side of section 1 and the northeast corner of that section; and this corner, so placed by the county surveyor, has always been maintained by appellant.

It is disclosed by the testimony that the parties owning the land north of the section line have during late years, as they from time to time repaired and rebuilt their fence, gradually moved it south near the quarter corner on the

north side of section 1, encroaching upon the traveled road, until at the commencement of this suit their fence was nearly three rods south of the point where the marked stone corner was located, thus nearly closing up the traveled road; and back of this case seems to lie the desire of appellees, as road overseers, and of the public, to straighten this piece of roadway, and to cut down appellant's fence, trees and hedge, in order to effectuate that purpose.

All of the above matters being clearly established by the evidence, the case seems to resolve itself into a question purely of law. The only right the public has in the use of the road extending along the north line of appellant's land is that obtained by dedication, the proceedings had for the purpose of laying out the road being wholly insufficient to confer any right upon the public to the use of the land as a highway. A fair definition of what constitutes dedication is found in 1 Bouvier, Law Dictionary [15th ed.], 492, as follows: "An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. Express dedication is made by deed. Implied dedication is presumed from an acquiescence in the public use. Without acceptance a dedication is incomplete." The rule seems to be abundantly supported by authority in this and other states that the owner of land must have an intention to dedicate, coupled with an actual abandonment of the use of the property exclusively to the public. The owner of the land must set it apart to the extent that he intends it to be appropriated; it must be given over to the public use. And the rule is equally well settled and sustained by authority that such dedication must be accepted by the public. In the case of *Brown v. Stein,* 38 Nebr., 596, this court said: "In order to establish the existence of a public highway over private property by dedication the *animus dedicandi* is essential and must be clearly proved." And again, in the case of *City of Omaha v. Hawver,* 49 Nebr., 1, it is said: "Where the acts of an owner of real estate are

relied upon to prove that he has dedicated it to the public, the acts must be such as to clearly manifest an intention on his part to dedicate it; and the public must have so acted with reference to the property as to indicate an intention of acceptance of the property dedicated. Acts of an owner which amount to a dedication of his property to the public must be such as indicate an abandonment of the use of the property exclusively to the public." The following cases, among a great list of authorities cited, support the rule announced in this state: *Johnson v. City of Burlington*, 95 Ia., 197, 63 N. W. Rep., 694; *Brooks v. City of Topeka*, 8 Pac. Rep. [Kan.], 392; *Eastland v. Fogo*, 27 N. W. Rep. [Wis.], 159; *Bell v. City of Burlington*, 27 N. W. Rep. [Ia.], 245; *City of Alton v. Meeuwenberg*, 66 N. W. Rep. [Mich.], 571.

In the case at bar, as we have seen, the undisputed evidence discloses that for more than twenty-five years appellant has occupied the land in controversy continuously, and has always had it enclosed within the fence now maintained by him; and during all this period it is equally clear that the public has used as a road only that portion of appellant's land north of his present line of fence and hedge. It follows, therefore, that the judgment of the trial court is wholly unsupported by the evidence.

It is recommended that the judgment of the trial court be reversed, and a decree entered herein that a perpetual injunction be granted as prayed for in appellant's petition.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and a decree will be entered in this court, granting a perpetual injunction as prayed for.

JUDGMENT ACCORDINGLY.

NOTE.—Highway—Dedication—United States Homestead—Fencing Land Leaving Strip Along Section Line. *Rube v. Sullivan*, 23 Nebr., 779.—REPORTER.

MARY MAYHEW V. ELIZABETH KNITTLE.

FILED APRIL 2, 1902. No. 11,254.

Commissioner's opinion Department No. 2.

1. **Assignment of Error: WAIVER.** Assignments in a petition in error, not argued in the brief of plaintiff in error, will be considered waived.

2. **Findings: EVIDENCE: BRIEF: ARGUMENT: WAIVER.** Where there are several findings, made by the trial court, which appear to be sustained by the evidence, each of which will sustain the decree and the plaintiff in error in his brief and argument in this court complains of but one of them, the decree will be affirmed without passing upon the findings complained of.

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

Lysle I. Abbott, for plaintiff in error.

Joel W. West, contra.

BARNES, C.

On the 11th day of June, 1897, the plaintiff herein commenced an action in the district court of Douglas county against the defendant, Elizabeth Knittle, to enforce the specific performance of a contract to convey certain real estate. The contract was entered into on the 20th day of July, 1891, and was alleged to be, in substance, as follows: That at the time it was entered into the defendant was the owner of the west thirty-three feet of lot 1, in block 92, original plat of Omaha; that one Lucien H. Spencer agreed to and with the defendant to build a brick block on the said lot, thirty-three feet front by sixty feet deep, and two stories high, the same to be built so that the median or middle line dividing the said building lengthwise should stand and be upon the middle line of the said lot; that the building should cost at least $5,000, and should be built according to certain plans and specifications, which were made a part of the contract. It was further provided that

when the building was fully completed, and all of the payments due for the erection of the same were made in full, the defendant should convey, by warranty deed, the east half of said lot to said Lucien H. Spencer; that upon the conveyance of the real estate, as provided in the contract, an agreement should be made and entered into by and between the parties thereto, giving to each party the free and unobstructed use in perpetuity of the hall in the second story, and the stairway leading from the street to the second story, the water-closet on the first or main floor, and the store room and water-closet in the basement, which it was stated were so constructed that they were on both sides of the middle line of the building. It was provided that the contract should be binding upon and accrue to the use of the heirs, assigns, executors and administrators of the respective parties thereto. It was further set forth in the petition that Lucien H. Spencer duly and fully complied with the terms and provisions of the contract by erecting said building, and that it cost a sum exceeding $5,000; that it was completed and the terms of the contract fully complied with by the said Lucien H. Spencer on or before the 3d day of January, 1892; that said Spencer went into the possession of his part of the building and remained in the possession thereof up to the time of his death; that he made a demand upon the defendant to execute a deed to him according to the terms of the contract, but that she refused, and has ever since refused, to make such deed. It was further alleged in the petition that soon after the completion of the contract on his part Spencer left the city of Omaha and remained away until the following June, at which time he returned, and on July 3, 1892, departed this life, leaving a will, by which he conveyed all of his property to the plaintiff (who was at that time his wife) and his sister, one Mrs. Harriet E. Smith. It was further alleged that the will had been probated and the estate settled, and that Harriet E. Smith had conveyed to the plaintiff all the interest that she had in and to the estate of the deceased. There was also a

claim made against the defendant for the rents and profits of the one-half of the building from the time of its completion to the date of the commencement of the suit. The petition concluded with a prayer for the specific performance of the contract, and an accounting for the rents and profits, and a judgment for the sum that should be found due the plaintiff. To this petition the defendant filed an answer setting forth the following defenses:

1. The defense of the statute of limitations.

2. Laches on the part of the plaintiff, together with facts incident thereto, showing the want of equity in the plaintiff's bill.

3. Gift of the property by Lucien H. Spencer during his life time to the defendant, and facts constituting a complete execution thereof.

4. A denial of all the facts stated in the petition, except those specifically admitted by the answer.

The reply was a general denial. A trial was had, and after the introduction of all of the evidence and arguments of counsel the court made the following findings:

"The court finds that there is no equity in the plaintiff's bill, and that the equities are in favor of the defendant as against the plaintiff.

"The court further finds that the defendant is the absolute owner in fee simple of the premises described in the plaintiff's petition, to wit: The west 33 feet of lot 1, in block 92, of the original plat of the city of Omaha, Douglas county, Nebraska, as surveyed, platted and recorded, and plaintiff has no right, title or interest therein by virtue of the contract set out in plaintiff's petition, nor in any other manner whatsoever.

"And the court further finds that plaintiff's cause of action is barred by the statute of limitations, and further that plaintiff was guilty of laches in commencing her suit on said contract."

And upon said findings the court made the following judgment:

"Wherefore, it is ordered, adjudged and decreed, that

the plaintiff's bill be dismissed, and that plaintiff be forever barred from having or claiming to have any right, title or interest in or to said premises, or any part thereof, and that defendant's title in and to the same be and hereby is established and quieted as against any and all claims of the plaintiff, and that the defendant recover from the plaintiff her costs herein expended, taxed at $——, to which plaintiff excepts."

The plaintiff filed a motion for a new trial, which was overruled, and she thereupon brought the case to this court upon a petition in error, which contained the following assignments:

"1. That the findings and judgment of the trial court are not sustained by sufficient evidence.

"2. That the findings and judgment of the district court are contrary to law.

"3. That the trial court erred upon the trial of said cause, and the proceedings connected therewith, in permitting the witness, J. W. West, to testify in regard to conversations with the deceased, Lucien H. Spencer, said conversations occurring before the execution of the contract sued upon in this case.

"4. The trial court erred in allowing the witness, Willie Knittle, son of the defendant, to testify concerning conversations with the deceased, Lucien H. Spencer, after the completion of the building erected by the said deceased upon the premises in controversy in this suit.

"5. The trial court erred in refusing to grant a new trial herein upon the grounds of newly-discovered evidence, as shown by the affidavit of John O. Yeiser, filed in said cause, which evidence the plaintiff was unable to discover and produce on the trial for the reason that she did not know of the existence of said evidence until after said cause had been tried.

"6. The court erred in overruling plaintiff's motion for a new trial."

1. The plaintiff, by her brief and argument of the case in this court, presents but one contention, which is that

the court erred in finding that the plaintiff's cause of action was barred by the statute of limitations. She will be deemed to have elected to stand upon this single assignment of error, and to have waived all the others. Assignments in a petition in error not argued in the brief will be considered waived. *Madsen v. State,* 44 Nebr., 631; *Scott v. Chope,* 33 Nebr., 41; *Gill v. Lydick,* 40 Nebr., 508; *Glaze v. Parcel,* 40 Nebr., 732.

2. It will be observed that the court made certain findings, other than the one complained of, which are sufficient to sustain the decree. The court found that there was no equity in the plaintiff's bill; that the defendant is the absolute owner in fee simple of the whole of the real estate described in the petition; and that plaintiff has no right, title or interest therein by virtue of the contract set out in her petition, nor in any other manner whatsoever; and that the plaintiff was guilty of laches in commencing her suit on the contract. In her brief and argument plaintiff does not challenge these findings. Under the well-established rules of this court it is not necessary to further examine the record in this case, but, in order to be sure that no injustice is done the plaintiff, we have carefully read the evidence and find that it clearly shows that at the time the contract was entered into, the deceased, Lucien H. Spencer, stated, in the presence of a third party, that he was not particular about the contract himself, because the defendant had formerly been his wife; that he had done her a great wrong and injustice by putting her away and obtaining a divorce from her. He also expressed much feeling over the matter, and stated that he had sold some property for a large amount of money,—something like $18,000,—and that he intended to erect the building in question on the lot owned by the defendant for her, and give it to her in lieu of money, so as to provide a source of income for her and his son, Willie Knittle (sometimes called Eddie Spencer), who lived with her. It is further shown that, as soon as the building was completed, Spencer informed the defendant and his son of that fact; that on

the 5th day of January, 1892, two days after its completion, the defendant and her son moved into the building, and took complete possession and absolute control of all of it; that Spencer gave the defendant all of the keys, and stated to her, in the presence of the son, that it was hers; that she could rent it or do whatever she pleased with it; that he was going to visit his homestead in Oklahoma; that he parted with the defendant and his son on friendly terms after making such statement, and on the 8th day of January started on his journey; that he returned in June, 1892, and died July 3, leaving the will mentioned in the petition, but that it contained no reference to, or description of, the property in question herein. It is further shown that the defendant has remained in the absolute control and possession of the whole property from the time that she moved into the building until the commencement of the action; that when deceased went to Oklahoma the only property he left in the building was in the basement, and was his surveying instruments, a safe, and a few tools; that he never made any claim to the property, and never demanded any deed therefor in his lifetime; that after the death of Spencer, the plaintiff and a constable or other officer went to the building, and got the things which she claimed belonged to him; that the plaintiff delayed commencing any suit to compel the specific performance of the contract for more than five years after the completion of the building; that during that time the defendant has paid all of the taxes assessed against the whole property, has had it painted at least twice, inside and out, has kept it in good repair, has paid special paving taxes thereon, and constructed a cement sidewalk in front of it, costing considerably over $100. None of these facts seem to have been disputed. It will thus be seen that there was sufficient evidence to sustain the other findings of the court, regardless of the question of the statute of limitations. These findings not having been complained of in the brief and argument of the plaintiff, and being amply sustained by the evidence, the decree of the district court is right and should be affirmed.

We decline to determine the question as to whether or not the court erred in finding that the plaintiff's cause of action was barred by the statute of limitations, because the decree must be affirmed on other grounds, and it is unnecessary to pass upon that question.

For the foregoing reasons, we recommend that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the decree of the district court is

AFFIRMED.

LOGAN ENYART, APPELLEE, V. W. F. MORAN ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,513.

Commissioner's opinion, Department No. 2.

1. **Judgment**: POWER TO SET ASIDE: JUDICIAL DISCRETION. The district court has power to set aside, change or modify its judgments during the term at which they are rendered. An application to set aside a decree and allow the introduction of evidence upon a technical point, is addressed to the discretion of the court, and error can not be predicated upon the ruling thereon.

2. **Quitclaim Deed**: INNOCENT PURCHASER: ACTUAL KNOWLEDGE OF UNRECORDED LIEN. A purchaser of real estate, who takes his title by quitclaim deed, with actual knowledge of the lien of an unrecorded mortgage thereon, and who shows by his answer that he had actual notice thereof, and caused inquiry to be made as to the amount of the lien, can not afterwards claim that he is an innocent purchaser for value.

3. ———: ———: ———: MISTAKE. Such purchaser, having requested a third person, not the agent of the lien holder, to ascertain the amount due upon the mortgage, can not defeat a recovery of any portion of the mortgage debt on account of a mistake as to the amount of the lien, made by such third person.

4. **Evidence**: DECREE: FINDING: MORTGAGE DEBT: PROCEEDINGS AT LAW. Evidence examined, and *held* sufficient to sustain the decree. *Held*, also, that where there is sufficient evidence to show

prima facie that no proceedings have been had, or commenced at law, to recover any portion of the mortgage debt, and where such evidence is not disputed, the finding of the court thereon will be sustained.

APPEAL from the district court for Otoe county. Heard below before JESSEN, J. *Affirmed.*

W. C. Sloan and *W. F. Moran,* for appellants.

E. F. Warren and *L. F. Jackson, contra.*

BARNES, C.

The appellee filed his petition in the district court of Otoe county to foreclose a mortgage given by one Julia G. Edwards (now known as Mrs. Yager) to one Emma Morton to secure the payment of a promissory note for the sum of $350, with interest at 7 per cent. per annum. The mortgage covered lot No. 6, in block No. 109, in Nebraska City proper. The petition was in the usual form, and alleged that William F. Moran had some interest in the premises, and that Maude Moran, his wife, had an inchoate dower right therein, but that the right of the appellee was paramount thereto. The appellee took the mortgage from Emma Morton by assignment, and the note by proper indorsement, all of which was duly alleged in the petition. The answer of appellant, W. F. Moran, was, in substance, that he was the owner in fee of the premises described in the mortgage; that Maude Moran is his wife. The answer also denied each and every allegation in said petition not admitted to be true. The answer further alleged that Julia G. Edwards (now Mrs. Yager) was the owner of the undivided three-fourths interest in the said premises; that on May 14, 1898, she conveyed all her right, title and interest in the premises to one Frank Gameral, and that said deed was duly recorded in the deed records of Otoe county on May 18, 1898; that on May 16 Frank Gameral conveyed the said premises to the appellant; that, before purchasing said premises, appellant made diligent search

of the records of Otoe county, Nebraska, to ascertain if there were any liens or incumbrances against the same; that the records of said county showed said premises clear of all liens and incumbrances; that the mortgage sought to be foreclosed was not recorded, and was not filed for record until August 29, 1898, more than three months after purchase of the property by appellant, and more than five years after its execution; that the appellee had due notice thereof, and took the mortgage subject to any and all equities that the appellant Moran had; and that said mortgage was inferior and subsequent to the rights of the appellant. Appellant further alleged that he had no knowledge of the existence of the mortgage at the time he purchased the premises, and was an innocent purchaser for value, without notice of any lien. Appellant also alleged that he negotiated the purchase of the land through one L. F. Jackson, who informed him that J. Sterling Morton had some lien on the land, and thereupon appellant stated that he would have nothing to do with said land until the amount of said lien was ascertained; that afterwards, J. Sterling Morton left a memorandum with Jackson which Jackson informed him stated that the lien was $70; that appellant, relying on the statement so made by Jackson, purchased Julia G. Yager's three-fourths interest in said real estate, and paid the agreed price therefor, reserving the said $70 to extinguish the said lien; that soon thereafter Jackson informed appellant that the lien was not in favor of J. Sterling Morton, but was in favor of Emma Morton, and that the amount of the lien was $170; that on the 31st day of December, 1898, appellant tendered the sum of $73.25 (that amount being the $70 and interest thereon from the date of said memorandum), which tender was refused; that said lien was not of record, and that he had no means of knowing what the amount of the lien was, except as stated in the memorandum; that the transfer to the appellee took place long after said note and mortgage were due; that appellee had full knowledge of the appellant's equities; and that the equities of appellant were

superior and prior to those of the appellee. The reply was a general denial. On February 10, 1900, a trial was had, and a decree was rendered in favor of the appellee, and was filed that day. On February 12, 1900, appellee filed a motion to withdraw the rest, and for leave to introduce evidence to support the allegation in the petition that no proceedings at law had ever been had or commenced for the collection of the debt secured by the mortgage. Notice of this motion was given to the appellant, who appeared and resisted the application. The court allowed the rest to be withdrawn, and set aside the decree. Thereupon appellee introduced his evidence in support of the allegation mentioned, and the court again found in his favor. The amount found due was $200.74, and a decree was rendered in the usual form for the foreclosure of the mortgage. The appellant thereupon brought the case to this court for review. Four propositions are contended for as grounds for a reversal of the judgment of the district court.

1. It is claimed that the court erred in sustaining the motion of the appellee to withdraw the rest, and allow him to introduce testimony in support of the allegation, that no proceedings at law had been had, or commenced for the recovery of the mortgage debt. It goes without saying that the court has full power to vacate, correct or modify its own judgments during the term at which they are rendered. This contention therefore reduces itself to the one question: Was it an abuse of the discretion of the court to sustain the motion of the appellee to set aside the rest, and allow further proof on a purely technical point? The appellant, in his brief, has suggested nothing to show that the court abused its discretionary powers. No authorities are cited in support of his contention, and we therefore hold that the matter was within the power and discretion of the court; that there was no abuse of such discretion, and there was no error in sustaining the motion.

2. The second proposition contended for is, that the appellant is an innocent purchaser for value, and without

notice; that he took the property stripped of any and all liens thereon. This contention can not be maintained, because appellant pleads a knowledge of this lien before and at the time he purchased the property in question, and this is a sufficient answer to the second assignment of error.

3. It is contended that if appellant did not take the property as an innocent purchaser for value, free and clear of any and all liens, then he took it subject only to a lien of $70. Appellant claims that he exercised due diligence to ascertain the amount of liens upon the premises before he purchased the same. The testimony shows, however, that when he was informed by Jackson, who was the agent of the vendor, Mrs. Yager, that there was a lien upon the premises, known as the "Morton lien," he instituted no sufficient inquiry to ascertain the amount of it. It is shown that the only person he inquired of was Mr. Jackson; that Jackson was not the agent of J. Sterling Morton, or of Emma Morton, or of the appellee. If Jackson acted in the capacity of agent for any one he was the agent of the appellant to make this inquiry and ascertain the amount of the lien. He inquired of J. Sterling Morton as to the amount of this lien, who stated that he would ask his sister, Emma Morton, who was the owner of the mortgage, what amount was due thereon. It appears that afterwards J. Sterling Morton, without comment, handed him a memorandum which showed the true amount to be $170, but, in reading it, Jackson made a mistake, and informed the appellant that the amount of the lien was $70; that thereupon appellant purchased the property, and had it conveyed by quitclaim deed to Gameral, who in turn quitclaimed it to him. It is further shown that appellant never saw the memorandum; that he knew nothing about it except what Jackson told him, who, as soon as he ascertained his mistake, informed appellant of that fact. Afterwards the mortgage was recorded, it not having been recorded prior to the purchase of the premises by the appellant. Some time after that, it was sold and assigned to the appellee, who commenced the foreclosure proceedings. The

court found in favor of the appellee, and rendered a decree for the true amount due and unpaid upon the note and mortgage. And the question is, does the evidence sustain the findings and decree? There was practically no dispute as to the facts in the case. The court seems to have held that the appellant had actual notice of the mortgage lien at the time he purchased the premises in question; that the mistake in the amount thereof was not the fault of the holder and owner of the mortgage lien, nor of the appellee; that it was simply the mistake of Jackson, whom the appellant had requested to ascertain the amount of the mortgage lien for him, which in no manner affected the rights of the lienholder, and therefore rendered a decree for the true amount due the appellee.

4. It is further contended that the evidence was not sufficient to support the finding that no proceedings at law had been had or commenced to recover the debt secured by the mortgage. An examination of the record shows that the evidence established that fact, at least *prima facie*. No proof having been introduced to dispute it, we hold that the evidence was sufficient to sustain that particular finding. Under the well-established rule that where there is any competent evidence to sustain the findings and decree of the trial court in an equity case a court of review will not disturb them, we are constrained to hold that the evidence was sufficient to sustain the judgment and decree of the district court. We therefore recommend that the same be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the decree and judgment of the district court is

AFFIRMED.

EMMA L. VAN ETTEN V. EDWARD F. TEST ET AL.

FILED APRIL 2, 1902. No. 11,531.

Commissioner's opinion, Department No. 2.

Ejectment: JUDGMENT: RES ADJUDICATA. A judgment in ejectment is binding on all the parties to the action, and where a party has brought an action in ejectment for the premises claimed by her, which on a trial thereof has resulted adversely to her, she is concluded thereby.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

David Van Etten, for plaintiff in error.

Isaac R. Andrews, contra.

OLDHAM, C.

On the 18th day of September, 1897, the plaintiff in error filed her petition in the district court of Douglas county, the object and prayer of which are to restrain defendants in error from claiming any interest in certain real estate (describing it), and from interfering with and disturbing her use and enjoyment thereof, and that, upon final hearing, the "injunction be made permanent and that the title and possession of said premises be quieted and confirmed in plaintiff." This petition is exceedingly lengthy, and contains a variety of allegations and recitals, of which the following will serve as a sample: "That said aforesaid verdict, judgment and decision of said supreme court were inconsistent, irregular, unsupported by either pleadings or evidence and fraudulent, the uncontradicted testimony on trial was that defendant's said house stood over and upon said land 7 feet 10 inches; defendant claimed and the jury found only 7 feet; plaintiff was therefore entitled to judgment for the 10 inches and costs, instead of which judgment with costs was rendered against her and said decision affirmed the fraud and was a fraud."

From among the mass of iterations and reiterations of this petition we gather the information that on the 24th day of March, 1890, she had instituted an action in ejectment against these same parties for these same premises; that the cause had been tried to a jury, who returned a verdict against her, on which judgment was rendered; that she had prosecuted error therefrom to the supreme court, which affirmed the action of the lower court, this action of the supreme court being the provoking cause of the above excerpt. The defendants answered setting up their judgment at law in the ejectment case. A trial was had thereon which resulted in the dismissal of the plaintiff's petition; from which she prosecutes error to this court.

The evidence on the trial shows this judgment in ejectment in full force and effect, with no attempt made or being made to have it set aside, vacated or modified. And in the face of this judgment she attempts to come into a court of equity, and seeks to obtain the results which she sought to obtain in her action in ejectment, but which was denied her there. This can not be done. That judgment, so long as it is allowed to stand, is binding upon her and is conclusive of her rights as to these premises. The trial court should have summarily dismissed this petition on its own motion, and doubtless would have done so had its attention been called to what it contained, vicious recriminations of courts, counsel and parties, with not a fact stated that entitled her to the relief sought. Such attempts as this for "equitable relief" should not be permitted to burden courts or clog the wheels of justice.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JULIUS POESSNECKER ET AL., APPELLANTS, V. FRED ENTENMANN, JR., APPELLEE.

FILED APRIL 2, 1902. No. 11,295.

Commissioner's opinion, Department No. 2.

Application for License to Sell Land: REVIEW. An application to a district court by an executor or administrator for license to sell real property is not an "action in equity" within the purview of section 675, Code of Civil Procedure. Hence a final order made in such a proceeding is reviewable only by petition in error.

APPEAL from the district court for Stanton county. Heard below before EVANS, J. *Dismissed.*

John A. Ehrhardt, for appellants.

Thomas M. Franse, contra.

POUND, C.

An appeal is prosecuted from an order of the district court dismissing an application by two executors for license to sell real property. At the argument we suggested a doubt whether an appeal would lie in such a proceeding, and a further hearing has been had on that point upon additional briefs. Section 675, Code of Civil Procedure, provides that appeals may be brought to the supreme court by "either party" in "all actions in equity." That section is the sole authority for review in this court by appeal. Does a proceeding such as the one at bar come within its purview? We think not. In *Seward v. Clark,* 67 Ind., 289, it was held that a petition to the court of common pleas for an order to sell real estate to pay debts was not a civil action from which an appeal would lie under general provisions of the law as to appeals. In North Carolina, under a statute providing that when the personal estate of a decedent is insufficient to pay debts the executor or administrator may apply by petition to the superior

court of the county where lands of the estate are situated for an order to sell such lands, it is held that such petition is not an action, but a special proceeding. *Sinclair v. McBryde,* 88 N. Car., 438; *Badger v. Jones,* 66 N. Car., 305; *Pelletier v. Saunders,* 67 N. Car., 261. To the same effect MAXWELL, J., in construing our own statute, in *McClay v. Foxworthy,* 18 Nebr., 295, 298, said: "A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem,* where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character in the sense in which the term is used in an action, as only so much of the estate descends to the heirs as exists after the payment of the debts." The words "either party" in the section cited clearly indicate an intention to refer to suits of an adversary character, and such causes—those which were maintainable by bill in equity prior to the Code, and not special statutory proceedings more or less remotely analogous thereto—are "actions in equity" within its purview. *Barger v. Cochran,* 15 Ohio St., 460. The only authority we have been able to find indicating the contrary is *Elliot v. Shuler,* 50 Fed. Rep., 454, in which it was held that an application for license to sell lands was removable to the federal court. But it is admitted in the opinion in that case that the application was a special proceeding, and the ground on which it was held removable was that "Congress has conferred upon the United States courts jurisdiction to hear and determine all cases and controversies of whatsoever nature that arise between citizens of different states, and authorized parties entitled by law to apply for the removal of such cases and controversies from the state courts into the United States circuit courts." Hence we do not think that decision applicable to the present

controversy. All judgments and final orders of the district court, whether made in actions, special proceedings, or otherwise, are reviewable by petition in error, under section 582, Code of Civil Procedure. That section, not section 675, should be resorted to in such proceedings as the one before us.

We recommend that the appeal be dismissed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the appeal is

DISMISSED.

PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, APPELLEES, V. EMMA A. PARKER ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,437.

Commissioner's opinion, Department No. 2.

1. **Errors of Procedure:** REVIEW: APPEAL. Alleged errors in matters of procedure, occurring at or before trial, are not reviewable by appeal.

2. **Foreclosure:** COUNTER-CLAIM: MALICIOUS PROSECUTION. A cause of action for alleged abuse of process and malicious prosecution of a civil suit, based on an attempt to foreclose a certain mortgage in the federal courts, can not be set up by way of counter-claim in a subsequent suit to foreclose said mortgage.

3. **Foreclosure:** ALLEGATION OF NO PROCEEDINGS OF LAW: PRIMA-FACIE CASE. The allegation that no proceedings have been had at law, required in foreclosure suits, need not be proved beyond possibility of inference to the contrary; it is enough, where no evidence appears to dispute it, if the plaintiff make a prima-facie case.

APPEAL from the district court for Lancaster county. Heard below before FROST, J. *Affirmed.*

Burr & Burr, Charles M. Parker and *E. E. Spencer,* for appellants.

Stephen L. Geisthardt, contra.

POUND, C.

This is an appeal from a decree of foreclosure. The principal points argued relate to the action of the trial court in striking out certain portions of the answer and in rejecting evidence offered by appellant at the trial. It is well settled that we can not pass upon such questions on appeal. "Alleged errors in matters of procedure occurring at or before the trial can not be reviewed on appeal." *National Life Ins. Co. v. Martin,* 57 Nebr., 350; *Troup v. Horbach,* 57 Nebr., 644, 648. Nor are rulings upon evidence reviewable otherwise than by error. *Zimmerman v. Zimmerman,* 59 Nebr., 80. We may say, however, that the rulings complained of were clearly right. The answer set up and the evidence offered tended to show abuse of process and malicious prosecution of a civil suit in prior attempts to foreclose the mortgage in question in the federal courts, whereby the appellants were put to large expense, cost and trouble in the employment of counsel, printing of briefs, and in costs and traveling expenses. It is obvious that this is to be sustained, if at all, only as a counter-claim. It is not available as a set-off, nor would it be a proper subject of cross-petition, because not a matter for a court of equity at all. It can not be brought within the provisions of the Code of Civil Procedure as to counter-claims for the reason that it does not arise out of the transaction upon which the plaintiff's cause of action is founded, namely, the execution of the note and mortgage and default in payment, nor is it connected with the subject of the plaintiff's action. *Watts v. Gantt,* 42 Nebr., 869. There the cause of action sought to be made use of as a counter-claim was an alleged libel in proceedings to procure a receiver pending foreclosure of the mortgage sued on. The court held it could not be set up in the foreclosure suit.

It is also urged that the evidence in support of the allegation that no proceedings had been had at law was insufficient to sustain the decree. The evidence makes a

prima-facie case, and is undisputed. It is true it does not exclude every possible inference. Consistently with this evidence, proceedings at law may have been had somewhere outside of this state. But the mortgagors reside here, and the likelihood of proceedings in any other state is very remote. We think the evidence ought to be held sufficient.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

NOTE.—*Abuse of Process.*—A malicious abuse of legal process, is its employment for some unlawful object not contemplated by the law. *Mayer v. Walter*, 64 Pa. St., 283.—REPORTER.

GLOBE SAVINGS BANK V. NATIONAL BANK OF COMMERCE OF NEW LONDON, CONNECTICUT, ET AL.

FILED APRIL 2, 1902. No. 11,413.

Commissioner's opinion, Department No. 3.

1. **Bank:** FUNDS OF DEPOSITOR: INDEBTEDNESS OF DEPOSITOR: TRUST FUND? A bank has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.

2. ———: ENTRIES ON BOOKS: ADMISSIONS: EVIDENCE. In a suit against a bank, entries on its books, made by its officers or bookkeeper in the regular course of its business, are admissible in evidence on behalf of the adverse party when in the nature of admissions.

3. **Deposit:** CUSTOMER: DEBT: CONVERSION. A bank that appropriates a deposit made by a customer to reduce his indebtedness due the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for a conversion of his money, and an action at law to recover the amount can be maintained.

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

Arthur S. Churchill, for plaintiff in error.

W. W. Morsman, contra.

DUFFIE, C.

This is an action brought by the National Bank of Commerce against the Globe Savings Bank and the Globe Loan & Trust Company to recover the proceeds of four paving warrants issued by the city of Omaha, which had been sent by the plaintiff to the Globe Loan & Trust Company for collection, and which were collected by that company October 31, 1895, in the sum of $1,258.94. The plaintiff's petition alleges that the Globe Loan & Trust Company, fraudulently and without authority, turned the money over to the plaintiff in error, and that it received the money "with full knowledge that the same was the property of the plaintiff and that the defendant Globe Loan & Trust Company had no right or authority to pay and deliver the same to said savings bank." The answer, after admitting the corporate existence of the several parties to the suit, is a general denial. Judgment was entered in favor of the plaintiff below against both defendants, and the Globe Savings Bank has brought error to this court, making the Globe Loan & Trust Company, which refused to join in the appeal, one of the defendants in error.

There were numerous objections to the admission of evidence upon the trial, and the action of the court in admitting certain matters of evidence against the objection of the plaintiff in error is here assigned as error. The case was tried to the court without a jury, and, following the usual practice, an examination of these alleged errors will not be necessary, provided the record discloses sufficient legal and competent evidence to sustain the judgment. The evidence is undisputed that the Globe Loan & Trust Company collected from the City of Omaha the four pav-

ing warrants in question. These warrants and others were paid by the treasurer of the city at the same time by a check drawn on the Nebraska National Bank of Omaha. This check was for the sum of $4,009.26, and the claim of the plaintiff below is that this check was deposited by the Globe Loan & Trust Company to the credit of its account with the Globe Savings Bank, and by that bank appropriated to its own use. The check itself shows that it was indorsed by the Globe Loan & Trust Company, and that the Globe Savings Bank in some manner came into possession of the check and received the benefit thereof appears from the following indorsement thereon: "Pay to the order of Commercial National Bank for account of Globe Savings Bank. W. B. Taylor, Cashier." It is insisted, however, that there is no competent evidence in the record to show that this check was deposited by the Globe Loan & Trust Company to the credit of its account with the Globe Savings Bank. The cash book and the ledger of the Globe Savings Bank were both introduced in evidence. Both of these books show a credit to the Globe Loan & Trust Company of $4,009.26 under date of October 31, 1895. The fact that the check was indorsed by the Globe Loan & Trust Company, followed by an indorsement by the Globe Savings Bank to its credit with the Commercial National Bank, and the fact that an item for the same amount is credited to the Globe Loan & Trust Company on the books of the Globe Savings Bank on the day of the date of the check, is, we think, sufficient evidence to uphold a finding that the check was paid into the Globe Savings Bank by the Globe Loan & Trust Company. It is true that the clerk who made the entry on the books of the Globe Savings Bank showing this credit to the Globe Loan & Trust Company, was not called to testify to the correctness of the books, or to show that the item was entered at the time of the transaction; but this, as we understand the rule, is necessary only where a party offers his own books of account to support his claim. The rule, we think, is general that one party may introduce the books of his ad-

versary without the preliminary proof necessary in other cases. In *Perry v. Butt,* 14 Ga., 699, it is said that "entries on the firm books are evidence against the firm, as all the members are presumed to be cognizant of such entries." And in *Currier v. Boston & M. R. Co.,* 31 N. H., 209, it is said: "Entries in the books of a party by his clerk and bookkeeper, are evidence against him, unless shown to be erroneous or mistaken. They will not be rejected because the facts stated were derived from others, and not from the owner of the books." In *German Nat. Bank of Hastings v. Leonard,* 40 Nebr., 676, this court held that book entries, made by a party in the regular course of his business, are admissible in evidence on behalf of the adverse party when in the nature of admissions.

We conclude, therefore, that there is sufficient competent evidence in the record to sustain a finding that the check in question was deposited by the Globe Loan & Trust Company to its credit in the Globe Savings Bank. The evidence is undisputed that at the date of the deposit of this check the Globe Loan & Trust Company was indebted to the Globe Savings Bank in a sum exceeding $5,000, and the question arises, whether, by using this check to reduce the amount of that indebtedness, the savings Bank converted the money of the Commercial National Bank, and is liable therefor in this action. There can be no question that a bank has a lien on the deposits of its customers for any debt due, and that it may apply a deposit made by a customer indebted to it in payment of an overdraft or any indebtedness which the bank may hold against him. This is the general rule; but, like all general rules, it has its exceptions. A bank can not apply money paid in by a customer and held by him as trustee for another to the payment of its own debt. If the bank has knowledge of the trust relation it will be liable for a conversion of the fund in case it applies it in satisfaction of its own indebtedness.

In *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.,* 104 U. S., 54, it was held that when, against a bank ac-

count designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor if it is shown to consist, in whole or in part, of funds held by him in a trust relation. In *American Trust & Banking Co. v. Boone,* 102 Ga., 202, it is said: "A bank can not, without incurring liability to the true owner, knowingly appropriate to the satisfaction of a debt due to it by another trust funds deposited with it by him after the creation of such debt." In *Bundy v. Town of Monticello,* 84 Ind., 119, it was held that a trust fund, or money substituted for such fund, may be recovered from the trustee, and all persons having notice of such trust into whose hands such fund may come. An extensive and interesting note covering the law on the question involved will be found in *Rochester & Charlotte Turnpike Co. v. Pavionr,* 52 L. R. A. [N. Y.], 790.

The Globe Loan & Trust Company and the Globe Savings Bank transacted business in the same building and used the same vault, and both corporations were largely composed of the same stockholders and officers. The same person was president of both corporations, and the cashier of the Globe Savings Bank, who indorsed the check in question for deposit in the Commercial National Bank to the credit of his own bank, was secretary and treasurer of the Globe Loan & Trust Company, and other officers of the Globe Savings Bank were trustees and officers of the Globe Loan & Trust Company; so that the bank was chargeable with knowledge that the check taken by the Globe Loan & Trust Company in payment of the warrants of the plaintiff below was a trust fund, and that it could not be appropriated, to the extent, at least, of the int[illegible] of the defendant in error, to reduce the amount due from the Globe Loan & Trust Company to the Globe Savings Bank. Having this knowledge, and making the a[illegible]ication, was a conversion of the fund, and, having converted

the money of the defendant in error, there is no doubt of its liability for the money converted.

Objection is made to the form of the action, and it is said that the plaintiff below should have proceeded in equity to reach this fund. If the fund was still in the bank to the credit of the account of the Globe Loan & Trust Company there would be force in this suggestion. In *Central Nat. Bank v. Connecticut Mutual Life Ins. Co., supra,* it is said: "When a bank account was opened in the name of a depositor, as general agent, and it was known to the bank that he was an agent of an insurance company; that conducting its agency was his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums on policies collected by him for the company, and making payment to it by checks,—the bank is chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use. The company may enforce, by bill in equity, its beneficial ownership therein against the bank, claiming a lien thereon for a debt due to it, which he contracted for his individual use." This, we believe, announces the correct rule, and if the defendant in error was asserting its rights as against a fund still in possession of the bank, but held by the bank in the name of the Globe Loan & Trust Company, then a suit in equity would be a proper action to establish the trust and to enforce the relief to which it was entitled, although we do not care to say that it is the only action that could be maintained, a decision of that question not being necessary in this case. In the present case, however, the fund is no longer in the bank. There is no account to the credit of the Globe Loan & Trust Company standing upon the books of the Globe Savings Bank. There is no fund to be reached upon which to impress a trust. The fund has been converted, and, having been converted, the only remedy offered defendant in error was a suit at law for its damages.

We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. CLARK & LEONARD INVESTMENT COMPANY, V. COUNTY OF SCOTT'S BLUFF ET AL.

FILED APRIL 2, 1902. No. 11,534.

Commissioner's opinion, Department No. 3.

1. **Judgment Against County**: LEVY: DISBURSEMENT: WARRANT. Article 6 of chapter 77 of the Compiled Statutes, making provision for the levy and collection of a tax to pay judgments entered against a county or other municipal corporation in this state, contains no special provision for disbursing the fund; hence the usual course of drawing money from the county treasury by obtaining a warrant against the fund must be pursued by the judgment creditor.

2. ——: ——: ——: ——: MANDAMUS. The board of county commissioners should draw a warrant in favor of the judgment creditor for the amount of any judgment tax collected, when demand is made by him therefor, and when any considerable amount has been collected, and is in the hands of the county treasurer applicable to the payment of the judgment; and the duty of the treasurer to pay such warrant may be enforced by mandamus.

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

Stephen L. Geisthardt, for plaintiff in error.

F. A. Wright and *Gardner & Mann, contra.*

DUFFIE, C.

The Clark & Leonard Investment Company is a judgment creditor of Scott's Bluff county. The petition al-

leges that the judgment is wholly unpaid and in full force and effect; that after the rendition of the judgment the county made provision for the payment thereof by the levy of a tax, a large part of which has been collected, and is now in the hands of the county treasurer; that the amount so collected is sufficient to make a material payment, and that all of the tax so collected is applicable for the payment of said judgment; that the relator has demanded of the defendants that they apply the funds on hand to the payment of its judgment, and have offered to credit such amount as may be paid thereon; that the defendants have failed and refused to make such payment. The prayer is for a writ of mandamus commanding the defendants to pay to the relator the amount in the hands of the treasurer, and to do and perform such other acts and things as may be necessary and proper in the premises. A general demurrer was filed to this petition, which was sustained, and the relator has brought the case here on error.

By demurring to the petition the defendants admit the facts alleged. We have, therefore, a case where it is alleged and admitted that the relator is the owner of a judgment against the county of Scott's Bluff; that a tax has been levied for the payment thereof, and sufficient of the tax collected to discharge a large part of the judgment. That it is the duty of the defendant county to pay a valid judgment can not be denied, and the only defense, as we understand from the briefs on file, is that the relator has failed to procure a warrant from the county authorities authorizing and directing the treasurer to disburse the fund. Section 91, chapter 18, article 1, Compiled Statutes of 1901, defines the duties of the treasurer in disbursing funds in his hands, as follows: "It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for

the payment thereof is or shall be otherwise made by law." Section 2, article 6, of chapter 77 of the Compiled Statutes makes provision for the payment of judgments entered against municipal corporations in this state: "If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation * * * to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments." No provision is made in the statute for disbursing the fund, and the presumption must obtain that it was the intent of the legislature that a judgment tax, when collected, should be disbursed and paid out by the county treasurer as other funds coming to his hands for which no special provision was made by statute. Such appears to have been the opinion of this court in regard to the payment of interest maturing upon bonds issued, and payable under the provisions of chapter 35 of the General Statutes of 1873. *State v. Thorne,* 9 Nebr., 458. In that case the relator applied for a writ of mandamus to compel the defendant, as treasurer of Adams county, to pay from the funds in his hands, collected for that purpose, the interest due on certain precinct bonds, issued by the commissioners of the county and held by the relator. Relating to the necessity of a warrant or order directed to the treasurer for the payment of the interest, Judge LAKE said: "When these bonds were issued there was no special provision of statute governing alone the creation and payment of this sort of indebtedness, but the whole business was assimilated to that respecting county indebtedness for a similar purpose, and, like it, was put in charge of the county commissioners of the proper county, who were not only required to issue the bonds when voted, but also to cause to be annually levied, collected, and paid to the holders of such bonds, a special tax on all the taxable property within the precinct, sufficient to pay the annual interest

as it falls due, and finally the bonds themselves at their maturity. * * * As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except where there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants issued by the county commissioners according to law.' Sec. 53, ch. 13, General Statutes, 241. Therefore, to have justified the defendant in making the payment demanded, the relator should first have obtained from the county commissioners the proper order for him to do so. But having neglected this step, the relator was not in a situation to make a legal demand for the money, and the defendant was right in withholding it." This seems to settle the question of the right of the treasurer to refuse payment of any sum in his hands upon the relator's judgment until an order from the county commissioners is presented directing him to make such payment. The manner of making payment and vouching the debt to be paid is regulated by the general statute, no special provision being found to control. The duty of the county and of the commissioners to issue an order for the payment of money held by the treasurer, collected for the payment of this judgment, can not, however, be denied.

In *United States v. Buchanan County,* 5 Dill. [U. S. C. C.], 285, it was held by the circuit court of the United States that a judgment of the court upon the bonds of the county issued in aid of a railroad company may be enforced by mandamus to compel the levy and collection of taxes, or, if the amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. It will be observed from the language used that Judge Dillon, who delivered

the opinion of the court, seemed to reach the conclusion that a warrant was necessary in order to draw the fund from the county treasury. It was argued at the bar that if the relator was bound to present his judgment to the county commissioners to have the same audited and allowed as other claims, and a warrant issued thereon, the acceptance of the warrant would operate as a satisfaction of his judgment, and that in case of refusal to pay the same he would be driven to another action against the county, and would be no nearer the collection of his claim against the county than when he instituted his first suit. We can not accept this view of the situation. The issue of a warrant directed to the treasurer for the payment of the judgment fund on hand will not operate as a payment of the judgment. In *State v. Cook*, 43 Nebr., 318, it is said: "In the absence of a statute conferring special characteristics upon warrants the authorities are practically unanimous that such instruments are merely devices for properly drawing money from the treasury; they are little more than certificates of indebtedness. 'The warrant is not intended to constitute a new debt or evidence of a new debt * * * but is the prescribed means the law has devised for drawing money from the county treasury.'* An indorsee may sue upon such warrant, not because he has title under the law merchant, but because the indorsement amounts to an assignment of the debt upon which the warrant is issued. The auditing of claims and issuing warrants therefor are not such settlements as to have the force of a judicial proceeding or to estop the corporation issuing the warrant." When the relator obtains a warrant directed to the treasurer for the payment of this money, it will be the duty of the treasurer to pay the same, and, in case of refusal, a mandamus will issue to compel him to perform his duty. In *State v. Gandy*, 12 Nebr., 232, a mandamus was awarded to compel the treasurer to pay county warrants, it appearing that there were sufficient funds in the treasury for that purpose.

**Dana v. City of San Francisco*, 19 Cal., 486.

The money collected for the payment of this judgment can be used for no other purpose. Until this judgment is fully paid and satisfied the funds must remain intact. There is no danger that the relator will lose the fund, or that it will be paid out on other demands. The treasurer would himself be liable should he divert the fund. It is probable that the treasurer would not be compelled to disburse funds upon a warrant drawn for a greater amount than he holds to the credit of that particular fund, and, while the creditor could not be compelled to accept payment of his judgment in instalments, still we believe that if he is willing to do so, and makes demand upon the board of county commissioners for a warrant to enable him to draw from the county treasury money collected for the payment of his judgment, it would be the duty of the commissioners to issue to him a warrant for the amount then collected and on hand, although not sufficient to satisfy the judgment in full. Public policy and due regard for the interests of the taxpayers of the county would require the commissioners to disburse the fund as fast as collected in any considerable amount, rather than to have the fund accumulate in the county treasury while interest is accumulating upon the judgment.

For the reasons that the relator has not alleged a demand for a warrant for the payment of the amount collected and in the hands of the treasurer, we recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM M. IODENCE, APPELLEE, V. HERMAN A. PETERS ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,272.

Commissioner's opinion, Department No. 3.

1. **Intervener: DEFECTIVE PETITION: DISMISSAL: APPEAL.** An intervener whose petition does not state facts sufficient to constitute a cause of action, and who does not pray for any judgment which the court has jurisdiction to render, should be dismissed from the action; and if he obtains a judgment with which he is not satisfied, and appeals therefrom, this court will render the judgment of dismissal which ought to have been rendered below.

2. **Real Estate Sold for Taxes: CONSTITUTIONAL GUARANTY.** By the constitution of this state owners of real estate sold for taxes are guaranteed two years from the date of the sale within which to redeem, and the statute provides that a tax purchaser, or his assignee, shall not be entitled to foreclose his lien until after the time of redemption has expired. It follows that a petition seeking to foreclose a tax lien which does not show that the land has been sold for taxes, and that at least two years have expired after the date of the sale, does not state facts constituting a cause of action.

3. **Petition: OBJECTION.** The objection that a petition is indefinite and uncertain can not be presented for the first time in this court.

4. **What Constitutes a Mortgage.** An instrument in writing, properly executed, which shows upon its face that it is intended to charge a lien upon real estate to secure the payment of a specified debt, is sufficient to constitute a mortgage in this state.

APPEAL from the district court for Dawes county. Heard below before WESTOVER, J. *Affirmed in part.*

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

AMES, C.

This is an appeal from a decree of foreclosure and sale of certain real estate for the satisfaction of a mortgage and of tax liens thereon. None of the evidence adduced on the trial was preserved in the form of a bill of excep-

tions, and we have therefore to inquire only whether the decree is warranted by the pleadings. The petition for the foreclosure of the mortgage alleges that the instrument, together with the notes the payment of which it is conditioned to secure, were executed to the McKinley-Lanning Loan and Trust Company, and afterwards, for value, indorsed, assigned and delivered to the plaintiff. The granting clause of the mortgage runs to the trust company, or its successors or assigns. The answer is substantially a general denial. It is objected to the petition, first, that it does not allege that the payee and mortgagee is a corporation; but this is not important. A partnership may be the payee of negotiable paper and the grantee in a mortgage executed to secure its payment. The question whether it may also be a grantee in a deed purporting to convey the fee of real estate is not presented. The second objection, that the use of the connective "or" instead of "and" in the granting clause makes the description of the mortgage so indefinite and uncertain as to avoid the instrument, is not well taken. The intent of the parties to charge the land with a lien for the security of the notes in which the trust company was named as payee is not doubtful, and this is all that is required in this respect to constitute a valid mortgage in this state. The petition contains an allegation "that no action at law has ever been brought in any court for the recovery of the amount due on said promissory notes and mortgage deed, nor has any part thereof ever been collected and paid, and the full amount thereof for principal and interest is now due this plaintiff thereon." It is objected that this is not a sufficiently definite allegation that no proceedings at law have been had for the recovery of the mortgage debt or any part thereof, and that said debt and no part thereof has been collected or paid; but the language used is very nearly equivalent in meaning to that employed in the statute, and no objection was made in the district court, either by demurrer or by motion to make it more definite and certain. In accordance with an often-repeated rule of this court,

the petition must be regarded as sufficient when assailed for the first time upon appeal.

The tax liens were brought into the litigation by a petition in intervention filed by the appellant West. The land was sold to the county for delinquent taxes on the 20th day of August, 1898. On the 13th day of July, 1899, after the beginning of the foreclosure suit, the certificates were sold and assigned to the intervener, and his petition in intervention was filed on the same day. To this petition no answer was ever made, and on the 12th day of September, thirteen months after the tax sale, the court by its decree adjudged a first lien in behalf of the intervener for the amounts named in his certificates and tax receipts, with twenty per cent. interest from dates of payment, but refused to award him attorney's fees thereon, and the decree is silent as to the rate of interest to be borne thereby. In this decree all parties acquiesced, except the intervener, who appeals and complains because he was not allowed attorney's fees, and because the amount found due is not adjudged to bear ten per cent. interest. We think that he has no just cause of complaint. His action for foreclosure, by intervention, was prematurely brought, and but for the acquiescence of the other parties to the suit should have been dismissed. By the terms of the statute under which he claims (Compiled Statutes, ch. 77, art. 4), he succeeded only to the rights of foreclosure acquired by the county by reason of the tax sale, and by the same statute that right did not accrue until fourteen months after his petition was filed and eleven months after the decree was entered; that is to say, not until after the time of redemption had expired, which is fixed by both the constitution and the statute at the expiration of two years from the date of sale.

There was no answer or other pleading or appearance to the petition in intervention by either of the other parties to the action, and the petition prayed for no judgment which the trial court had jurisdiction to render. The authority of this court in case of reversal upon error or appeal is limited by section 594 of the Code "to render-

ing such judgment as the court below should have rendered, or to remanding the cause to the court below for such judgment." The last named court could not lawfully have rendered a judgment of foreclosure and sale of the premises for any amount, for the satisfaction of the intervener's alleged lien for taxes, and its attempt so to do must be reversed and vacated. The intervener does not plead any facts showing that his rights as prior lienholder were in any way imperiled by the foreclosure proceeding, and it is impossible to conceive that they could have been in any respect affected thereby. A mere finding or decree by the court that he had a valid prior lien for taxes on the premises, which, if not sooner discharged, would mature more than a year subsequently, was not prayed for, and if granted would not have benefited his condition in any respect. He therefore advanced nothing in his pleading which called for any judicial action. Having, under such circumstances, obtained a judgment in his favor, one of two courses was open to him. First, to acquiesce therein as did the other parties to the suit; or to appeal to this court and obtain a reversal and a dismissal of his proceeding in intervention.

It is recommended that the judgment of the district court, in so far as it decrees a foreclosure and sale of the premises for the satisfaction of the plaintiff's mortgage, be affirmed, but that, in so far as it decrees a foreclosure and sale for the satisfaction of the intervener's tax lien, it be reversed, and the petition in intervention dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court, in so far as it decrees a foreclosure and sale of the premises for the satisfaction of the plaintiff's mortgage, be affirmed, but that, in so far as it decrees a foreclosure and sale for the satisfaction of the intervener's tax lien, it be reversed, and the petition in intervention dismissed.

JUDGMENT ACCORDINGLY.

W. A. SAUSSAY ET AL. V. WILLIAM J. LEMP BREWING COMPANY.

FILED APRIL 2, 1902. No. 11,418.

Commissioner's opinion, Department No. 3.

1. **Judgment:** JUSTICE OF PEACE: REVIEW: TRANSCRIPT. When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is sought to be reviewed in this court, the transcript in this court must contain the judgment of the justice of the peace and such other process and proceedings as are sought to be reviewed or corrected.

2. **Error:** PROCESS: AMENDMENT OF RETURN: BILL OF EXCEPTIONS. This court can not decide whether the district court erred in permitting an amendment to the return of a process, unless the process and the original return thereto, or authenticated copies of them, are preserved in the record or bill of exceptions.

3. **Transcript of Journal:** ABSENCE: RECITAL IN BILL OF EXCEPTIONS. When the record in a proceeding in this court does not contain a transcript from the journal of the district court of an alleged order made by that court, its absence is not supplied by a recital in the bill of exceptions, certified by the court reporter to be true, that such an order was made, if the judge, at the time of settling the bill of exceptions, certifies that the recital is false and orders it to be stricken out.

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

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

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

AMES, C.

This case has apparently been brewing a good while, but the results disclosed by the record in this court are not such as to apprise us with any certainty what it is all about, or to enable us to pass upon them either intelligently or intelligibly. The transcript contains what purports to be a copy of an affidavit in replevin in a justice's court in an action in which the William J. Lemp Brewing Company, a corporation, is named as plaintiff, and one

W. A. Saussay, a constable, and Kirchoff & Neubarth, apparently a copartnership, are named as defendants; but this document does not purport to have been certified by any justice of the peace, to have ever been filed before him, or to have ever been in his official custody. Following this are a motion for a new trial in the district court of Douglas county in the case at bar and an order overruling the same and a judgment by the last-named courts dismissing the action in that court, and for costs. There is a bill of exceptions preserved in the district court, to which are attached six exhibits, as follows: First, a bill of particulars in the justice's court in a suit by Kirchoff & Neubarth against Henry Wiese and Frederick Dahlman. Second, a summons issued by a justice of the peace upon said bill of particulars, with a return of service thereon by W. A. Saussay. Third, what purports to be a copy of an affidavit in replevin identical with that above mentioned and contained in the transcript. Fourth, a purported copy of a summons in replevin issued by a justice of the peace as pursuant to said purported copy of an affidavit in replevin, and a purported copy of a return of said writ by a constable, but it appears sufficiently from the bill of exceptions that this return was not in fact made by a constable or other officer. Fifth, a purported copy of an execution issued by a justice of the peace upon a judgment in favor of the plaintiff, in a suit by Kirchoff & Neubarth against Henry Wiese and Frederick Dahlman, together with a purported copy of a return by W. A. Saussay, constable, showing a levy upon certain personal property. Sixth, a purported copy of a writ in replevin in justice's court at the suit of the William J. Lemp Brewing Company against W. A. Saussay and Kirchoff & Neubarth. There is also attached to the bill of exceptions what purports to be a copy of a justice's judgment in favor of the plaintiffs in the suit of Kirchoff and Neubarth against Wiese and Dahlman. Neither this judgment nor any of the foregoing exhibits bear any official certification or other authentication. There are no pleadings in the tran-

script in the case at bar, no judgment or transcript or purported copy of one in a justice's court in any action in replevin, and no petition in error in the district court to review any such judgment.

The requirement of section 586 of the Code, that "the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified," applies equally to proceedings in error in the district court and in this court, and in the absence of such a transcript the court has no jurisdiction to proceed further than to dismiss the petition in error. *Zink v. Westervelt,* 52 Nebr., 90. It follows that the judgment of the district court was the only one that it could rightfully have rendered upon the record before us. Whether in an earlier stage of the proceeding the district court reversed a judgment of an inferior tribunal, or how this case found its way to a place upon its docket, or what was the precise subject of the litigation, or how the court acquired jurisdiction over it, the transcript does not disclose. We may gather from the bill of exceptions that the principal controversy was over the truth or falsity or the sufficiency of the return of a constable to a writ of replevin issued by a justice of the peace, and as to the right or authority of the court to amend the return, or permit it to be amended.

It is contended by the plaintiff in error that the district court did make an order permitting such an amendment, but the record contains no transcript of such order. The bill of exceptions contains an entry showing that the court did make such an order, and the court reporter certifies that the entry is true, but the judge in his certificate to the bill asserts that it is false, and orders it to be stricken out.

We think it is usually regarded as the better practice in such cases to accept the certificate of the judge rather than that of the reporter. If the other matters inquired into upon the trial were to be considered, we should have no hesitancy in saying that the conclusions of the court

adverse to the plaintiff in error are sufficiently sustained by the evidence.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

A. J. DOCKARTY ET AL. V. LULA P. TILLOTSON.

FILED APRIL 2, 1902. No. 11,524.

Commissioner's opinion, Department No. 3.

1. Agency: WITNESS: PROOF BY DECLARATIONS OF AGENT: COUNTER-PROOF. Although agency can not be proved by the admissions or declarations of the alleged agent alone, yet if, in an action against an alleged principal, the latter calls the former as a witness and induces him to testify that he never represented himself as an agent with respect to the transaction in dispute, the testimony may be contradicted by proof of specific instances in which the witness did so represent himself. In other words, he may be subjected to the same tests of credibility as would be applicable to other witnesses under like circumstances.
2. Agent: CONTRACT: PERSONAL LIABILITY. An agent, who contracts in his own name with respect to matters within the scope of his agency is personally obligated, although the fact of such agency is known to the opposite party.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

Crane, Crane & Irwin and *J. J. Boucher,* for plaintiffs in error.

William R. Patrick, contra.

AMES, C.

The plaintiff in error Dockarty was engaged in Omaha, in this state, in a business which consisted in teaching

pupils the art of making and drawing designs for letter-heads, bill-heads, checks, drafts, etc., and in making of such designs and procuring them to be engraved for the use of persons desiring them, who were his patrons or customers for pay. The designs, when prepared, were sent by him to the plaintiff in error the "Illinois Engraving Company," an Illinois corporation at Chicago, where they were engraved. The engraved plates were sent by the company to Dockarty at Omaha, and used by him at the latter city for printing the designs. Dockarty paid the company at a specified rate for its share of the services rendered. The defendant in error, Miss Tillotson, had been a pupil at Dockarty's establishment, and, after having acquired sufficient proficiency in the art, accepted employment therein. After the lapse of some time she retired from the service, and sued Dockarty and the company in justice's court for a sum alleged to be a balance due her for wages. She recovered a judgment for the amount of her claim, from which an appeal was taken to the district court, where, upon trial, a verdict was returned, and a judgment rendered in her behalf. The defendants have brought the record to this court for review by petition in error.

It is the contention of Miss Tillotson that although her business engagements were made with, and her services nominally rendered to, Dockarty personally, yet that in fact the latter was the agent of the Illinois company in the conduct of the business, and that the company was therefore obligated to her for her services rendered at his instance. Whether such was the fact is the sole question litigated in the case. As a part of her evidence the plaintiff below offered a blotter used by Dockarty in his business and for advertising purposes, which was shown to have been printed from an engraved plate made by the Illinois company, and which contained, besides some ornamental designs, the following words:

"Illinois Engraving Company, Originators, Designers, Illustrators, Colorists. Wood Engraving, Zinc and Half-Tone Etchings, Colortypes, Etc. Western Branch, Omaha,

Nebr., A. J. Dockarty, Gen. Mgr. Mel Uhl, Bus. Mgr. Offices and Art Rooms 616-17 Paxton Block."

It was objected by the company that, although the plate was engraved by its employees and at its works, it was not made to appear that any of its officers or agents, having authority to bind it, knew of the fact or had assented thereto; but the objection was overruled and the paper admitted, and we think correctly so. While it is not conclusive that Dockarty was an agent as alleged, and as represented by the printed matter, yet the closely related nature of the two businesses and the apparent business intimacy between him and the company, were circumstances which, taken in connection with the advertisement, were proper to be considered by the jury, and entitled the document to admission as evidence.

Dockarty, who was the only witness for the defense, denied in that capacity that he had ever held himself out or represented himself to be the agent of the company, and for the purpose of contradicting him in this respect a letter to a prospective pupil, written by him upon a sheet of paper at the head of which was printed, from an engraved plate, substantially the same matter as that upon the blotter, was offered by the plaintiff and admitted in evidence. Objection was made upon the ground that it was not shown where or by whom the engraving was made, or that the company had any knowledge of its existence or of the use of the letter-head by Dockarty, and that proof of an agency can not be made, as against the alleged principal, by the declarations or admissions of the person whose agency is denied. The rule as thus generally stated is doubtless correct, but it can not, consistently with justice, have so universal an application as is contended for by the plaintiffs in error. If the alleged agent had not himself been brought forward as a witness, the letter-head would not have been admissible as between the defendant in error and the company; but when the company produced him as a witness in its own behalf, concerning this very issue, it submitted his testimony to all the tests of truthfulness

which would have been applicable to that of any other witness. If the person to whom the letter was addressed had testified that Dockarty had never, to her knowledge, represented himself as an agent of the company, it will not be questioned that she could have been contradicted, by way of impeachment, by the production of the document. If so, why may not he be subjected to the same ordeal? If the paper, having been admitted, had a tendency to affect the minds of the jury concerning the real issue, that is a misfortune voluntarily incurred by the company in producing the witness, and permitting him to testify with respect to this branch of the inquiry. But, having chosen so to do, it can not insist that, having elicited from him a statement such as it desired, his credibility shall not be impeached because the evidence requisite therefor has a tendency to establish the fact of agency by his own declarations or admissions.

Several of the instructions given by the court are complained of, but, in our view of the relevance and character of the evidence, they are not objectionable. They fairly submitted to the jury the matters of fact in issue upon conflicting evidence, and afford no ground for disturbing their verdict in so far as it affects the engraving company. But the jury returned a joint verdict against both defendants, who filed separate motions for a new trial, and separate petitions in error in this court, each alleging that the verdict, as to the moving defendant, is not supported by sufficient evidence.

It is contended on behalf of Dockarty that, if the verdict and judgment against the engraving company are sustained by sufficient evidence, they must fail, as to him, because of the rule that an agent who contracts in behalf of his principal is not himself personally obligated. But counsel overlook an important exception. It was testified to by Dockarty, and not disputed, that he contracted for the services of the defendant in error in his own name, and in such cases the agent is personally bound, even although the fact of the agency be known, and the transaction is in

furtherance of the business of the principal, so that the latter is also bound. Story, Agency [7th ed.], sec. 269 *et seq.* and notes. He is at liberty, if he chooses so to do, to add his own personal liability to that of his principal. That he is equally bound if he contracts in his own name in behalf of an undisclosed principal is familiar law, not requiring the citation of authorities for its support. That Dockarty is impaled upon one or the other horn of the dilemma is beyond dispute. The cases cited in the brief of plaintiffs in error, in which either there was a contract by a pretended agent without authority, or a contract by an agent in the name of the principal, are not in point.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CLEM B. ACHENBACH ET AL. V. JOHN M. POLLOCK.

FILED APRIL 2, 1902. No. 10,506.

1. **Reversal of Judgment:** MOTION FOR NEW TRIAL. A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion.
2. **Verdict.** Verdict examined, and *held* sufficient to support the judgment rendered thereon.

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

Billingsley & Greene, for plaintiffs in error.

Kirkpatrick & Hager, contra.

ALBERT, C.

This is an action in replevin. There was a trial to a jury, which resulted in a verdict for the plaintiff. From a judgment rendered thereon, the defendants prosecute error to this court.

All assignments of error, save one, which will be noted presently, are predicated on the rulings of the trial court, which are required to be brought, and which were thus brought, to its attention by motion for a new trial. The ruling of the court on that motion is not complained of in the petition in error. Such being the case, the question arises whether the failure to assign error on the ruling of the court on the motion for a new trial precludes an examination of such errors here. This court has twice passed on that question. In *Chicago, B. & Q. R. Co. v. Cass County,* 51 Nebr., 369, in an opinion by RAGAN, C., it was held that such errors would be reviewed, notwithstanding such omission. No authorities are cited in support of that opinion. In *James v. Higginbotham,* 60 Nebr., 203, in an opinion by SULLIVAN, J., a contrary conclusion was reached. So the question is still an open one in this state. In our opinion, the latter case states the correct rule, and is fully sustained by the authorities there cited. The defendants are here seeking to reverse the judgment of the trial court. It is but fair to assume that they are satisfied with every ruling of which they make no complaint. They make no complaint of the ruling on the motion for a new trial. In other words, they are satisfied with that ruling. If they are satisfied with that ruling, then they must be held to have waived every error assignable in such motion. *Lowrie v. France,* 7 Nebr., 191; *Murray v. School District,* 11 Nebr., 436.

It may be suggested that the assignment that the court erred in overruling the motion for a new trial is covered by an assignment in detail of the rulings complained of in such motion. With equal truth could it be said that, having taken an exception to each of such rulings, an excep-

tion to the ruling on the motion for a new trial is superfluous. But this court has held otherwise, in the two cases last cited. Both suggestions are based on the assumption that, if any of the rulings complained of in the motion were erroneous, it necessarily follows that an order overruling such motion is also erroneous. That this is not true, is obvious. The motion may have been filed out of time. Errors in the progress of the trial may have been subsequently waived. There may have been an improper joinder of parties to the motion, or other reasons to justify the court in overruling it. If so, whatever the intrinsic merits of the motion, none of the rulings therein complained of can be successfully urged in this court as grounds for reversal. Hence, were every ruling, which is required to be brought to the attention of the trial court by motion for a new trial, assigned in the petition to this court, yet, in the absence of complaint of the ruling on such motion, the presumption of regularity in the proceedings of the trial court is not negatived. To our minds it is clear that a failure to complain in the petition in error of the ruling on the motion for a new trial precludes an examination of the rulings made by the trial court during the progress of the trial. That such assignment is rarely omitted clearly indicates that the profession regards it as essential.

This leaves us but one question to determine, and that is whether in this case the verdict is sufficient to support the judgment. The verdict is as follows:

"The jury duly impaneled and sworn in the above entitled cause do find that at the time of the commencement of this action the right of possession of the property in controversy herein was in the plaintiff, and we assess the damages sustained by the plaintiff by reason of the wrongful detention of said property by the defendants at the sum of four hundred and twenty-five dollars."

The judgment rendered on the foregoing verdict is as follows:

"It is therefore considered and adjudged by the court

* * * that the said plaintiff John M. Pollock do have and recover of and from the said defendants Clem B. Achenbach and the Nebraska School Supply Company, the sum of $425 damages as assessed by the jury, with interest thereon at the rate of seven per cent. per annum, from this date until paid, together with costs of this action taxed at $145.83."

Considered apart from the other errors assigned, as we are compelled to consider it, for the reasons hereinbefore stated, there is nothing in the verdict of which the defendants should be heard to complain, in view of the record. There are other findings which the plaintiff might have insisted on, but such omissions, if they exist, are to the advantage, instead of the detriment, of the defendants. So far as the jury speak by their verdict, they find the right of possession in the plaintiff, and the amount of damages he sustained by reason of the wrongful detention of the property. That finding is amply sufficient to support the judgment in this case. But the defendants insist that there is no law under the statutes of Nebraska providing for any other judgment than one for the defendants. This contention is based on the peculiar wording of section 192 of the Code of Civil Procedure, which is as follows: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for defendant." It will be observed that the last word, "defendant," was evidently intended for "plaintiff," and it has been so held in *Blue Valley Bank v. Bane,* 20 Nebr., 294, 300. But it is urged that said section, and the one immediately following it, in so far as they authorize any other judgment than one for the defendants in the court below, is in contravention to section 11 of article 3 of the constitution, and therefore void. It is not necessary to go into the constitutionality of these sections at this late

day. Under our system of jurisprudence, if there were no statute whatever on the subject, the finding of the jury in this case would be amply sufficient to warrant the judgment of the trial court.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALEXANDER MCGAVOCK V. OMAHA NATIONAL BANK.

FILED APRIL 17, 1902. No. 11,189.

1. **Written Contract:** INTERPRETATION. In the interpretation of a written contract, when the meaning is doubtful, that construction will be preferred which gives effect to all parts of the instrument, rather than one which renders a portion of it redundant and useless.

2. **Surety:** AGREEMENT CONSTRUED. An agreement of a surety, in writing, dated May 19, 1893, that the creditor might extend time of payment on a note "pending the decision of the suit of George Canfield against Allen Rector, now in the supreme court of the state or for not over two years from this present date," *held* to authorize an extension during the pendency of *Canfield v. Rector* in this court, but no longer.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Reversed.*

Francis A. Brogan, for plaintiff in error.

Hall & McCulloch, contra.

SULLIVAN, C. J.

The judgment under review was rendered by the district court for Douglas county in an action brought by the Omaha National Bank, as payee of a note signed by George Canfield as principal, and L. M. Rheem and Alexander McGavock as sureties. McGavock contends that the

judgment, which was in favor of the bank, is the result of a wrong construction of the following contract:

"Whereas, Alex. McGavock and L. M. Rheem are joint signers with George Canfield on one certain note payable to the Omaha National Bank, for three thousand dollars, dated Nov. 16, 1892, at six months, bearing interest at ten per cent. per annum from date, and on which interest has been paid to maturity, said note having arisen from various renewals of the note for same amount described in the agreement between said Canfield, McGavock and Rheem, bearing date Jan'y 29, 1890, securing said McGavock and Rheem against loss arising through signing said note: It is agreed by said McGavock and Rheem in order to avoid frequent signing of renewals, that said Canfield may from time to time pay interest in advance on said note of Nov. 16, 1892, for not over ninety-three days at one time, and have the same extended for such time, said McGavock and Rheem not to be released by such extension from their liability as it exists at this date.

"This agreement to hold good pending the decision of the suit of said George Canfield against Allen Rector, now in the supreme court of the state or for not over two years from this present date. L. M. RHEEM.

"Omaha, May 19, 1893. A. MCGAVOCK."

This agreement, in connection with the conceded fact that Canfield had recovered a judgment against Rector in an action which had been removed to this court, and was then pending here, discloses fully the circumstances under which it was made; it exhibits the whole environment of the transaction upon which we are to pass judgment. The case of Canfield against Rector was decided by this court May 15, 1894. 40 Nebr., 595. The decision was in favor of Canfield, and the amount due upon the judgment was soon afterwards collected, paid over to the bank, and indorsed upon its note. Afterwards, on September 17, 1894, the bank, for an adequate consideration, agreed with Canfield that as to the remainder of the note the time of

payment should be extended for ninety-three days. McGavock now claims that this extension was not authorized by the agreement above set out, and that it operated to release him from his contract of suretyship. In our opinion, this view of the matter is correct. The liability of a surety is not to be extended by implication; he is not to be bound beyond the terms of his contract. *Brennan v. Clark,* 29 Nebr., 385; *Curtin v. Atkinson,* 36 Nebr., 110; *Godfrey v. City of Beatrice,* 51 Nebr., 272. The construction to be given the language of a written agreement must, however, be fair and just, not forced or strained to support a theory favorable to the surety. The spirit and intent of the instrument must be regarded rather than the forms of expression. In determining the meaning of the contract here in question, we must consider the two clauses providing for extensions in their relation to each other and to the subject-matter. We must take into account the situation of the parties, and the end and object they were seeking to accomplish. In other words we should, in expounding the contract, put ourselves, as near as may be, in the situation of the contracting parties at the time the contract was made. We should not, without reason, assume that the bank officer who wrote the agreement did not possess ordinary skill in composition, or that he did not understand the meaning of the language he employed. Clearly, the object of the parties in making the agreement was to enable Canfield to collect the amount due upon the judgment against Rector and apply it on the note in favor of the bank. The reason for the extensions being the pendency of the error proceeding, it was quite natural that the parties should stipulate that the authority for making extensions should come to an end when the reason for making them should cease to exist. The language used to express this thought was, it seems to us, entirely appropriate. It is plainly stated that the authority to make extensions was not to hold good, under all circumstances, for two years, but only during the pendency of the case in this court, "or for not over two years." The last clause is

a limitation upon the first; it marks the boundary of the bank's right to grant extensions without releasing the sureties; and that is its only function. To adopt the construction for which the bank contends would be to condemn the first clause and strike it from the contract as a useless iteration—a mischievous pleonasm, which can hardly be accounted for on the theory that there was wanting in the mind of the scrivener a distinct conception of the idea which he was seeking to express. If it were the mutual intention of the parties to allow extensions to be made during a period of two years at all events, and without any regard whatever to the time when the *Rector Case* should be decided, it is difficult to understand why a plain expression of that intention should be complicated with matters having no necessary relation to it. Bearing in mind the reason for making the contract extending the time of payment, we can not think it at all probable that the parties deliberately set down in writing an irrelevant recital and a redundant stipulation. It is to be presumed that the capable business man who wrote the contract had two ideas which he adequately expressed, rather than that he gave one idea two forms of expression at the expense of labor and perspicuity. Read in the light of subsequent events, the contract, according to the bank's interpretation of it, was an agreement for extension until May 15, 1894, or for two years from May 19, 1893. This would seem to be an absurd contract, but it would be no more absurd now than it was in the beginning. Nothing could come out of it that it did not originally contain.

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

REVERSED AND REMANDED.