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FRED SHELLENBERG V. FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JUNE 19, 1895. No. 5656.

1. **Carriers of Goods:** BAILMENT: RIGHTS OF OWNER OF GOODS. The rightful owner of personal property in the possession of a common carrier or other bailee may enforce his right thereto, although a stranger to the contract of bailment.
2. ———: REFUSAL TO SURRENDER GOODS TO OWNER: CONVERSION. The refusal of a common carrier to surrender goods in its possession to the rightful owner amounts to a conversion, for which the latter may recover if entitled to possession at the time of his demand therefor.
3. **Interpleader.** Whatever may have been the imperfections of the former practice, the remedy of the bailee under the system by proceeding in the nature of a bill of interpleader, thus requiring the several claimants of property to litigate the question of title between themselves, is ample and complete.

ERROR from the district court of Madison county. Tried below before ALLEN, J.

See opinion for statement of the case.

Wigton & Whitham, for plaintiff in error:

The plaintiff in error claims the title to the potatoes never passed from him, and that the delivery was inadvertent on his part, made with the expectation that payment would be made in cash on delivery; that when a sale is made for cash the delivery and payment of the consideration are both necessary to pass title.

When goods are sold for cash, payment is a condition precedent to the passing of title, unless payment is waived, and this is true whether there was fraud in obtaining possession or not. In such case where payment is not made, the seller may recover possession of goods delivered by re-

plevin, or an action of conversion will lie. (*Wabash Elevator Co. v. First Nat. Bank of Toledo*, 23 O. St., 311; *Russell v. Minor*, 22 Wend. [N. Y.], 659; *Allen v. Hartfield*, 76 Ill., 358; *Dows v. Kidder*, 84 N. Y., 121; *Tyler v. Freeman*, 3 Cush. [Mass.], 261; *Adams v. O'Conner*, 100 Mass., 515; *Solomon v. Hathaway*, 126 Mass., 482; *Kenney v. Ingalls*, 126 Mass., 488; *Hodgson v. Barrett*, 33 O. St., 63; *Mathews v. Cowan*, 59 Ill., 341; 5 Wait, Actions & Defenses, 581, 584, 585; *Daugherty v. Fowler* 25 Pac. Rep. [Kan.], 40; 1 Benjamin, Sales [6th Am. ed., rev. 1889], secs. 335, 350; *Acker v. Campbell*, 23 Wend. [N. Y.], 372; Hutchinson, Carriers, secs. 404–408; *The "Idaho,"* 93 U. S., 575; *Miller v. Woods*, 21 O. St., 485; *Bridge v. Bachelder*, 9 Allen [Mass.], 394.)

John B. Hawley and *B. T. White, contra:*

Being a stranger to the contract, plaintiff could not demand, nor was the defendant bound to make delivery of the property to him, except upon legal process, particularly as he was given an opportunity to protect his rights by such process. (*Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb., 556; *Gulf, C. & S. F. R. Co. v. Freeman*, 16 S. W. Rep. [Tex.], 109; *Houston & T. C. R. Co. v. Adams*, 49 Tex., 761.)

The title to the property passed with delivery. The charge of fraud is without evidence to support it. (Tiedeman, Sales, sec. 208; *Sutro v. Hoile*, 2 Neb., 186; *Haskins v. Warren*, 115 Mass., 514; *Warder v. Hoover*, 51 Ia., 491; *Cole v. Berry*, 42 N. J. Law, 308; *Smith v. Lynes*, 5 N. Y., 41; *Thompson v. Wedge*, 7 N. W. Rep. [Wis.], 560; *Perkins v. Lougee*, 6 Neb., 220; *Lumpkin v. Snook*, 63 Ia., 515; *Sheldon v. Davidson*, 55 N. W. Rep. [Wis.], 161; *Runge v. Brown*, 23 Neb., 817; *Faulkner v. Klamp*, 16 Neb., 174; *First Nat. Bank v. Yocum*, 11 Neb., 328; *Johnson v. Bent*, 9 So. Rep. [Ala.], 581; *Hedman v. Anderson*, 6 Neb., 392.)

J. B. Barnes, also for defendant in error.

POST, J.

This was an action in the district court for Madison county by the plaintiff in error to recover from the defendant in error for the conversion of a car load of potatoes. On the conclusion of the plaintiff's case the district court directed a verdict for the defendant, to which exception was taken, and judgment having been entered thereon, the cause has been removed into this court for review by means of a petition in error.

It is shown by the evidence in the bill of exceptions that about October 9, 1890, the plaintiff agreed to sell to one Day a car load of potatoes, to be delivered at Hoskins, a station on the Chicago, St. Paul, Minneapolis & Omaha railway, in Wayne county. At the time mentioned the plaintiff requested Day to pay some money on the potatoes to insure his taking them, to which the latter replied that he had already sold them and would have to take them. October 13 said Day drew a check in favor of the plaintiff or order, bearing date of October 17, on the First National Bank of Deadwood, South Dakota, for $375, the contract price of the potatoes, and informed the latter that it would be cashed by the Norfolk National Bank in the city of Norfolk. The car containing the potatoes, which was then on the side track ready for shipment, was by Day immediately consigned to the First National Bank of Deadwood, at Whitewood, South Dakota, the western terminus of the defendant's line of road. A bill of lading for the potatoes was delivered by the railroad company to Day, to which the latter attached a sight draft, drawn in his own favor, and forwarded it to the consignee bank for collection, but the drawee therein named having refused to pay the draft upon presentation, the bank, in the language of the cashier, "refused to have anything to do with the

potatoes." October 15, the Norfolk bank having refused, on presentation thereof, to cash the check drawn by Day to the plaintiff's order, the latter served the defendant, to whom the said car had in the meantime been delivered as a connecting carrier, with written notice to the effect that the potatoes mentioned had been procured by said Day through fraud and false representations, and demanded that they be held by the defendant subject to his, plaintiff's, order. Previous to the receiving of said notice the potatoes in controversy had been forwarded from Norfolk by the defendant company, and were then some place between said city and the point of their destination. October 18 the check above mentioned, which had, at plaintiff's request, been forwarded to the Deadwood bank for collection and return, was protested for non-payment. October 23 plaintiff, by his attorney, tendered to the defendant's agent at Whitewood the amount of its charges, including charges for unloading and storing, and demanded the potatoes, which demand was refused unless the plaintiff would surrender the bill of lading therefor.

The single question presented is whether the defendant, as a common carrier of property, was bound at its peril to determine which of the rival claimants of the property was the rightful owner. It was formerly held that where a bailee of goods delivered them to the rightful owner, he would, notwithstanding that fact, be answerable to the bailor without title thereto. The reason for the rule was that a bailee, having recognized the bailor as the owner, should not be permitted to dispute the latter's title; but according to the modern rule as recognized in this country and in England, it is a sufficient excuse for the non-delivery of personal property for the bailee to show that he has surrendered it to the rightful owner. (Hutchinson, Carriers, 404; *Western Transfer Co. v. Barber*, 56 N. Y., 544; *Harker v. Dement*, 9 Gill [Md.], 7; *Hardman v. Willcock*, 9 Bing. [Eng.], 382; *Cheesman v. Exall*, 7 Exch. [Eng.],

341; *Wells v. American Express Co.*, 55 Wis., 23; *American Express Co. v. Greenhalgh*, 80 Ill., 68; *Wolfe v. Missouri P. R. Co.*, 97 Mo., 473; *The "Idaho,"* 93 U. S., 575.) The reasoning upon which the modern doctrine rests is that the obligation of the bailee is to restore the property or to account for it, and that he has in legal contemplation accounted for it when he has delivered it to one whose title and right of possession is paramount to that of his bailor. He may, in brief, if he choose, yield possession to a stranger claiming the property, by taking the risk of establishing the title thus recognized. It is well established that a delivery of goods to the consignee before the carrier is made aware of the rights of a rival claimant thereto, as a complete extinguishment of its liability, although such claimant may be in fact the rightful owner (*Sheridan v. New Quay Co.*, 4 Com. B. [Eng.], 93; Hutchinson, Carriers, 408), since, as remarked by the author last cited, any other rule would be an "intolerable hardship upon the carrier."

On the question of the duty of a common carrier or other bailee at its peril to determine between the bailor and a third party claiming title, the authorities are less numerous than the importance of the subject would seem to suggest, although the pronounced weight thereof sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion, for which the latter may recover if entitled to possession at the time of his demand. In *Wells v. American Express Co.*, 55 Wis., 23, a well considered case, Judge Orton, after asserting the liability of the carrier, says: "This principle obtains in all cases of bailment, and the *jus tertii* may be enforced even as against the contract of bailment, and when enforced, will be made available to excuse and protect the bailee from the performance of delivery according to its terms, and it is founded in reason as well as sustained by a great preponderance of authority. There can be no distinction between its application in case the bailor or consignor seeks to reclaim the

property from the bailee or carrier and in case the consignee seeks its delivery, for the rights of all the parties to the contract must yield to the paramount right of the real owner of the property." It is also said in the same opinion: "When the liability of the express company to respond to the claim of a third person as the exclusive owner of the property against the terms or directions of the consignment for delivery to another, or for delivery to himself and another, is established by law as now seems clear, it follows that such third person should recover in an action against the company upon proof of his ownership." The proposition there asserted finds support in the following authorities: *Western Transportation Co. v. Barber*, 56 N. Y., 544; *The "Idaho,"* 93 U. S., 575; Hutchinson, Carriers, 406, 407. We have been referred to a single case at variance with the above doctrine, viz., *Kohn v. Richmond & D. R. Co.*, 16 S. E. Rep. [S. Car.], 376, in which, with one judge dissenting, the liability of the defendant was denied. The reasons upon which that case rests are shown by the following quotation: "It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and had a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title." There is no doubt that the assertion of conflicting claims has been the occasion of frequent embarrassment to bailees, particularly common carriers, who are bound to receive goods offered for transportation, although there has been suggested no sufficient reason for excepting them from the operation of the rule by which the rightful owner is permitted to reclaim property wherever found. We are aware of exceptions to the rule, but they rest upon equitable considerations, none of which are presented by the record in

this case and need not, therefore, be noticed; but whatever may have been the embarrassment and inconvenience of the bailee under the former practice, his remedy under our system, by an answer in the nature of a bill of interpleader, thus making the adverse claimant a party to the controversy, and requiring such claimants to litigate the question of title between themselves, is ample and complete. It follows that in directing a verdict for the defendant the district court erred, for which the judgment must be reversed and a new trial awarded.

REVERSED.

LUCRETIA CASE V. IDA CASE.

FILED JUNE 19, 1895. NO. 6189.

1. **Slander:** DAMAGES: ALIENATION OF HUSBAND'S AFFECTIONS. The alienation of the affections of a husband or wife and loss of home and support, which are proved to result from the circulation of slanderous reports, charging the injured party with the commission of the crime of adultery, are such natural and probable consequences of the reports as to constitute them proper elements of damages in an action of slander by such party against the slanderer.
2. **Instructions.** It is error for the court to refuse to give an instruction requested by a party to an action, which is pertinent and applicable to one branch of the case which the court has not covered in its charge to the jury, unless it is clear that such refusal could not have prejudiced the party by whom the instruction was tendered.

ERROR from the district court of Saunders county. Tried below before WHEELER, J.

The opinion contains a statement of the case.

George W. Simpson and *J. E. Frick*, for plaintiff in error:

The motion to strike out certain portions of the petition should have been sustained. (*Georgia v. Kepford*, 45 Ia., 48; *Beach v. Ranney*, 2 Hill [N. Y.], 309; *Terwilliger v. Wands*, 17 N. Y., 62; Sedgwick, Damages, sec. 444.)

S. H. Sornborger and *J. R. Gilkeson, contra*, contending that the motion was properly overruled, cited: *Chesley v. Thompson*, 137 Mass., 136; *Adams v. Smith*, 58 Ill., 417; *Marble v. Chapin*, 132 Mass., 225; *Mahoney v. Belford*, 132 Mass., 393; *Swift v. Dickerman*, 31 Conn., 258; *Dufort v. Abadie*, 23 La. Ann., 280; *Boldt v. Budwig*, 19 Neb., 739; *Hardin v. Harshfield*, 12 S. W. Rep. [Ky.], 779; *Adams v. Smith*, 58 Ill., 417.

HARRISON, J.

This is an action commenced by defendant in error (hereinafter referred to as "plaintiff") to recover damages of plaintiff in error (hereinafter called "defendant") on account of alleged slanderous statements made by defendant in reference to plaintiff. It appears from the evidence that the plaintiff and defendant, at the time of the occurrence upon which this suit was founded, bore the relationship of daughter-in-law and mother-in-law. The petition states that plaintiff was married to Oscar G. Case December 30, 1875, and that she was his wife at the date of the alleged slanderous remarks and at the commencement of the action; that on the 3d day of May, 1889, the defendant, in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff that she had been unchaste before her marriage, had become pregnant, and that she had a miscarriage on the evening of the wedding day, and further, that the plaintiff's first child, which was born more than a year after the marriage, was begotten by one Dr. Buck, a man other than plaintiff's husband; that "by reason of the publication and utterance of said false and malicious words

by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of $3,000." In the second cause of action it is stated that the defendant accused plaintiff of being at a neighbor's house "on a whoring scrape," or "committing adultery;" that "by reason of the utterance and publication of said false and malicious words by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of $3,000." In the third count of the petition it is stated that defendant charged plaintiff with adultery committed with a man in the employ of the husband, and with living with the hired man in a state of adultery, and that the husband caught the plaintiff and employe in the act of adultery, and concludes that "by reason of the speaking and publishing of said false and malicious words by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of $4,000." The following motion was filed by defendant:

"Comes now the defendant and moves the court to strike out of the first cause of action in the plaintiff's petition the words following, to-wit, commencing on the twenty-fourth line of the said first cause of action: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home and means of support,' for the

reason that the same are redundant, immaterial, and irrelevant.

"2. We further move the court to strike out of the second cause of action of plaintiff's petition, commencing on the tenth line thereof, the following words, to-wit: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support,' for the reason that the same are redundant, immaterial, and irrelevant.

"3. We further move the court to strike out of plaintiff's petition the following words, to-wit, commencing on the fourteenth line of the third cause of action: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness were destroyed, and plaintiff has been deprived of her home, her means of support,' for the reason that the same are redundant, irrelevant, and immaterial."

On hearing, the motion was overruled, to which counsel for defendant excepted. The answer was then filed on behalf of defendant, in which the allegations of the petition in regard to the marriage of plaintiff with Oscar G. Case and the existence of the marriage relation at the beginning of the suit, and that before such marriage the plaintiff was an unmarried woman, were admitted and each and every other allegation of the petition was denied. There was a trial of the issues to the court and a jury, resulting in a verdict for plaintiff in the sum of $4,750, and on hearing of defendant's motion for a new trial the plaintiff was required to remit from the amount of the verdict the sum of $2,250, or a new trial was awarded the defendant. The plaintiff made a remittitur of the amount required and the motion for new trial was overruled and judgment rendered in favor of plaintiff for $2,500, and on behalf of defendant the case is presented to this court for review.

The first assignment of error to which our attention is

directed by counsel in their argument is that the trial court erred in overruling the motion of defendant to strike out of each count of the petition what was claimed to be immaterial, redundant, and irrelevant matter, being all that portion of each count in which the alienation of the affections of plaintiff's husband, the destruction of her domestic peace and happiness, and deprivation of her home and means of support were stated as elements of damages resulting from the alleged slanderous words spoken of plaintiff by defendant. We think that the framer of the petition meant by the portions of the petition attacked by the motion to state, and, by a fair construction of the words employed, did state, that the plaintiff was deprived of the conjugal society of the husband; that he did not live with her or support her, or that they were separated as a result of the alleged slanderous reports. The counsel for defendant insist that this was not a reasonable and probable consequence of the utterance of the slanderous words charged, and is not and cannot be considered as an element of damages. With this contention we cannot agree. It is true that the separation may be and is the act of the party who in belief of the reports feels wronged, but the moving cause for such act, and without which it would not occur, is the effect of the slander upon the mind directly inducing such action. The wrongful act of the slanderer is the cause of the wrongful act of the husband or wife injured, and it is not only natural, but reasonable that a husband or wife, upon knowledge of such reports as were the basis of this suit, and a belief of them, should and does deny to the one to whom they attach or apply conjugal rights and duties, and we can discover no true reason for denying the party, in this case the wife, a remedy against the one who caused the injury, the slanderer. Such was the conclusion reached by Lord Campbell in the case of *Lynch v. Knight*, 9 H. L. [Eng.], 577. (See, also, Cooley, Torts, note to pages 227, 228; *Hodgkinson v. Hodgkinson*, 43 Neb., 269.) Of the

cases cited by counsel for defendant to sustain their view of the question involved is that of *Georgia v. Kepford*, 45 Ia., 48, an action of slander in which it was alleged that the defendant falsely charged plaintiff, who was a married man, with the crimes of adultery and larceny, and in consequence thereof the plaintiff's wife abandoned him and refused to live with him. The court held: "Desertion of the husband by the wife in consequence of the publication of a charge against him of larceny and adultery is not such a natural and proximate consequence of a slander as to entitle him to special damages therefor;" but also stated: "*Semble*, that if the charge had been made for the purpose of inducing the desertion, special damages would have been recoverable therefor." A comparison of the reasoning employed in the Iowa case with that in the case of *Lynch v. Knight, supra*, convinces us of the superiority of the arguments used in the latter, and the soundness of the conclusion therein reached. We will, therefore, adopt and follow them; and where proof is made of the publication of the slanderous reports, and it is also proved that the desertion of the husband or wife resulted as a consequence thereof, the injured party is entitled to compensation or damages for such desertion.

Another assignment of error is that the court erred in refusing to give to the jury instruction numbered 3 requested by defendant. The instruction referred to reads as follows: "The jury are instructed that in this case they cannot assume or infer any damages except such as are the direct and immediate result of the slanderous words spoken and published. The loss of the plaintiff's home, the alienation of the affections of her husband, domestic peace and happiness, and bodily health are not such direct and immediate results; but before any damages can be allowed for such loss it must be established by a preponderance of the evidence, and must be proved to have been occasioned by the speaking and publishing of the slanderous words charged

and offered in this cause." To arrive at a just conclusion in regard to this alleged error it will be necessary to notice a portion at least of what the trial court did, or rather failed to do, when instructing the jury in reference to the claim of the plaintiff for damages, in so far as the elements of injury alluded to in the instruction quoted were involved, or should have been noticed. In charging the jury the court first gave a summarized statement of each of the three causes of action and in each made no reference to the elements of damages claimed by the plaintiff as alleged in full in each cause of action in the petition, but closed it by saying: "by reason of which the plaintiff claimed damages in the sum of $3,000," and in one $4,000, and then further said: "The jury are instructed that the material allegations of the petition are the following," and after first, second, etc., relating, in regular order, to the publication of the slanders of the plaintiff, their falsity, etc., in the fifth gave as one of the material allegations, "that by reason thereof the plaintiff has been damaged in her reputation," here again entirely omitting the plaintiff's claim of damages for loss of society of the husband and loss of home, etc., and in no portion of the charge is any reference made to these elements of the plaintiff's claim for damages, except in the instruction numbered 18 this general one appears: "If from the evidence in the case and under the instructions of the court the jury find the issues for the plaintiff and that the plaintiff has sustained damages as charged in the petition," followed by directions as to the manner of estimating damages. Here the jury were plainly informed that they might consider and find upon the question of damages, under all the allegations of the petition in that respect, and no other, further, or different mention or reference was made to or of the elements of damages to which it was sought to direct their attention by the instruction numbered 3 requested on behalf of defendant. The evidence discloses that the plaintiff and her husband had

"difficulties," and during cross-examination she was asked the question: "You have left him?" meaning her husband, and she answered, "Yes, sir," and there is a lack of any direct evidence to show that it was by reason of the alleged slanderous reports that the separation of plaintiff and her husband ensued. We are convinced from a consideration of all the evidence introduced bearing upon this branch of the case, coupled with its being almost entirely ignored in the instructions as given, that it was error to refuse the one tendered by the defendant. To fairly submit the case to the jury an instruction in regard to this particular portion of it was necessary, and none being prepared and given by the court on its own motion and one offered by the defendant, the party to whose prejudice the failure to so instruct would operate, it was error to refuse to give it, and which we cannot say was without prejudice to the substantial rights of defendant.

The court, on consideration and determination of the motion for new trial, evidently concluded that the verdict was excessive and ordered a remittitur of the sum of $—— therefrom, which was made by the plaintiff. It is claimed by defendant that it was an error on the part of the court to so rule; that it should have set the verdict aside and ordered a new trial upon becoming convinced that the verdict was too large. It is also urged that the verdict should have been set aside on the grounds of misconduct of counsel for plaintiff during the closing argument to the jury, consisting of statements then made by the attorney. A discussion of these two alleged errors is not necessary to a decision of the case, and as there must be a new trial granted because of the error hereinbefore indicated, and these, if errors, will probably not occur again if a new trial takes place, we will not further notice them.

Objections were made to certain of the instructions given by the court on its own motion and are now urged in this court. An examination of the instructions which it is

claimed are erroneous leads us to the conclusion that some of them are somewhat imperfect in their statements of the matters sought to be presented to the jury and of the rules for their guidance, and some are not very skillfully drawn, but we do not think they are open to the objections urged against them, and as a new trial must be awarded we will leave to the trial court, in the event of such new trial, the task of revising and correcting any of the instructions now in the case which it may desire to use.

The counsel for defendant, in noticing alleged errors in the admission of testimony, make the following statement: "We contend that the court erred in admitting the evidence in response to questions numbered 30, 31, 33, 38, 41, 50, 51, 60, 68, and 70 respectively, and especially the questions which asked for general conversations, and the conduct of Oscar G. Case, the husband of defendant in error, and the arrangements made with a view of keeping watch over the conduct of the defendant in error," and proceeds with an argument directed generally against all the testimony elicited in answer to the questions enumerated, and not any particular portion of it. This evidence was, in the main, in relation to conversations between the witness and defendant, portions of which were about matters directly in issue, and at least one of which occurred in the presence and hearing of plaintiff's husband. To the extent that the testimony disclosed that an arrangement was made by which the witness and others were to watch the conduct of plaintiff, it was competent, for it was further disclosed that it was made by and with the consent and probably at the solicitation of the husband and son, although the mother, judging from what appears on this point in the testimony, was the most active and effective worker in perfecting such arrangements. This evidence clearly tended to show the condition of the husband's feeling toward his wife and was material and competent.

On the subject of evidence and errors claimed to have

been committed by the trial court in ruling upon its admissibility, the counsel for defendant further state in the brief: "The evidence elicited to questions 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 330, 332, 333, 334, 335, 336, 337, 339, 340, 342, 343, and 381 should have been excluded by the court," and this is followed by a general argument as to admissibility of evidence given in answers to interrogatories numbered in the record as indicated in the statement quoted and without reference to any particular portion or portions of it. A large part of this testimony, considered as a whole, as counsel for defendant elected to argue and present it for examination, related to the life of plaintiff and husband from the date of marriage to the time of their trouble and separation, and without doubt some of it was incompetent and immaterial and some proper and relevant, but, as we view it, none of this portion prejudicial to the rights of defendant. Other portions of this testimony which referred to conduct and acts of the husband prior to the dates of the alleged slanders tended to show an estrangement of his affections from the wife and transfers of his property which were made prior to such dates, and all of which might have been considered, and probably were, by the jury in estimating the damages to be awarded plaintiff, were not proper and should have been excluded and their admission was error.

Counsel for defendant also argue an objection to question numbered 150 in the record and the answer thereto. The portion of this answer by which it appeared that the witness then giving testimony went to the place therein indicated, at the solicitation of plaintiff's husband to watch her, was competent as tending to disclose the state of the husband's feelings toward the wife. The judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

ANNIS L. HILL, APPELLANT, V. CHARLES O. PIERSON, APPELLEE.

FILED JUNE 19, 1895. No. 6329.

1. **Gambling Places:** PUBLIC NUISANCES. A place kept for gambling purposes is a public nuisance.
2. **Public Nuisances:** RIGHT OF PRIVATE PERSON TO INJUNCTION. A public nuisance, criminal in its nature, will be enjoined at the instance of a private party only upon a showing of some special injury suffered by him aside from that suffered in common with the remainder of the public.
3. ——: ——: JUDGMENT FOR DEFENDANT. The evidence examined, and *held* to sustain the conclusions of the trial court.

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

J. W. West, for appellant.

John L. Webster, contra.

HARRISON, J.

June 9, 1893, the plaintiff commenced an action in the district court of Douglas county, in which the petition filed, or the portion we need notice, read as follows:

"The plaintiff for cause of action states:

"1. That on or about the 17th day of December, A. D. 1892, one Frank A. Kemp was the absolute owner in fee-simple of the following described property in Douglas county, Nebraska, to-wit: The west twenty-two feet of the east one-half of lot 4, in block 120, in the original city of Omaha, county and state aforesaid, said property being known as No. 1321 Douglas street, in said city; and thereupon, to-wit, on the date aforesaid, said Kemp entered into a lease in writing for the premises aforesaid with the defendant Charles O. Pierson, which leasing was for the term

commencing on the 1st day of January, A. D. 1893, and ending on the 31st day of December, A. D. 1896, a copy of which lease is hereunto attached, marked 'Exhibit A,' and made a part of this petition.

"2. That thereupon the said defendant Charles O. Pierson entered in and upon the said premises as the tenant of him, the said Frank A. Kemp.

"3. That thereafter, to-wit, on or about the —— day of ———, A. D. 18—, the said Frank A. Kemp, for a valuable consideration, did grant, bargain, sell, and convey the premises aforesaid to this plaintiff by a good and sufficient warranty deed, through and by which this plaintiff became the absolute owner in fee-simple of the premises aforesaid, taking the said real estate free and clear of all incumbrances save only the lease aforesaid, and thereupon the said Charles O. Pierson did accept, and has accepted, this plaintiff as landlord of the premises aforesaid and has paid rent for the use and occupation of the said premises to this plaintiff.

"4. The plaintiff further alleges that the said defendant is maintaining a nuisance in and upon the said premises, which nuisance consists in this, to-wit, that the said defendant is using the said premises as a gambling place, and is keeping and maintaining thereon and therein gambling tables, and is maintaining thereon and therein a faro bank, and is maintaining and carrying on thereon and therein games of chance, known as keno, roulette, hazard, and various other and sundry games of chance, the technical names of which are to this plaintiff unknown.

"5. The plaintiff further alleges that the keeping and maintaining upon and in the premises aforesaid of the nuisance as aforesaid has brought the premises aforesaid into ill-repute, and if permitted to be maintained and carried on in and upon the said premises, the plaintiff will become subject to statutory liabilities, which will bring upon her great and irreparable injuries, and will subject her to public scandal and disgrace.

"6. The plaintiff further alleges that the keeping and maintaining of the nuisance aforesaid in and upon the said premises is a great and irreparable injury to the plaintiff's said property, from the nature and character of which injury redress at law would be uncertain and inadequate, and the damages resulting therefrom impossible of ascertainment. * * *

"7. The plaintiff further alleges that the defendant, for the purpose of more effectually carrying on and maintaining said nuisance in and upon said premises, is about to alter and rebuild the interior part of said building by changing the partitions and stairways therein contained so that the said building shall be cut up into divers and sundry secret passages, stairways, and rooms, and is about to cut and alter the water pipes, sewer pipes, and gas pipes and connections thereof in and upon the said building, to the great and irreparable injury of the plaintiff and her said property, and from the nature and character of said property and building, such alterations, additions, and changes of said building would cause great and irreparable injury to the plaintiff's said property.

"Wherefore the plaintiff prays that the said defendant and his agents and employes, and each of them, be restrained by order of this court from maintaining, or permitting to be maintained, or from carrying on, or permitting to be carried on, in, or upon, or about the said premises any games of chance, gambling tables, faro banks, roulette wheels, or games of poker or hazard, and each and every other game of, or under, any name whatsoever, and be restrained from altering, changing, rebuilding, or removing any of the partitions, walls, floors, stairways, passage-ways, doors, or windows in, upon, or about said building, and from changing, cutting, removing, or altering any of the water pipes, sewer pipes, or gas pipes, or the connections thereof, in, upon, or about the said premises; and for such other and further relief as in equity and good conscience she may be entitled to have."

The lease, "Exhibit A," was conditioned for the payment of rent by the tenant of $2,500 per year, to be paid monthly in advance, the tenant also to pay water rent and taxes, and contained the following statement in relation to alterations and repairs: "The said party of the second part is to have the right to make such necessary alterations and repairs in and about the said premises as may be necessary for the conducting of his business, and to rebuild and alter the stairways in and about the said building, and to alter, change, and rebuild the front of the said building; such alterations and repairs of said building to be made under the direction of the superintendent of buildings of Omaha; and the said party of the second part hereby agrees, if the party of the first part so elects at the termination of this lease, to restore the front of said building and leave it in the condition it now is; all such repairs and alterations to be paid for by the party of the second part, and to be made without expense to the party of the first part."

The premises were leased to and occupied by defendant for saloon purposes. On the day the action was instituted a restraining order was made and issued, and the hearing of the application for an injunction was fixed for the 17th day of June, 1893, on which date plaintiff was granted time to prepare and file affidavits in support of her application for injunction, and the hearing was continued to June 19, 1893. The following journal entry shows what was done on June 19th: "Now, on this 19th day of June, A. D. 1893, this cause came on to be heard upon the petition and the evidence for final disposition, and the court, being fully advised in the premises, and having heard the arguments of counsel for both plaintiff and defendant, finds that the plaintiff is not suffering any pecuniary injury from the nuisance complained of, and that there is no equity in plaintiff's bill. It is therefore ordered, adjudged, and decreed, and considered by the court that plaintiff's application for an injunction be refused, and the temporary

restraining order be and hereby is discharged, and plaintiff's bill be dismissed at her costs; to which findings, judgment, and order of the court the plaintiff at the time excepts, and is given forty days from the rising of the court to prepare and serve her bill of exceptions."

The evidence discloses that the rooms on the second or upper floor of the building occupied were used for gambling and open to the public and resorted to for such purpose. One of the questions argued and presented for determination is, whether a house kept for gambling is a common or public nuisance. This must, in view of the authorities bearing upon it, be answered in the affirmative. (See Roscoe, Criminal Evidence, 821; Garrett, Nuisances, 227; *Rex v. Rozier*, 1 B. & C. [Eng.], 272; Wood, Nuisances, 63; *Rex v. Dixon*, 10 Mod. [Eng.], 336; 8 Am. & Eng. Ency. of Law, 1073.)

Another point discussed and presented for adjudication is, will the continuance of a public nuisance, and one which is criminal in its nature, be enjoined in an action for such purpose by a private party? It has been stated by this court that a public nuisance will be enjoined in a suit instituted by a private party for such purpose, but only when the plaintiff does or will sustain a special damage, a personal injury distinct from that which he suffers in common with the rest of the public (*Shed v. Hawthorne*, 3 Neb., 179), and in the case of *Farrell v. Cook*, 16 Neb., 483, this rule was applied where the nuisance enjoined was both public and criminal in its nature, and was again recognized in the case of *Barton v. Union Cattle Co.*, 28 Neb., 350. The only thing remaining for us to determine in this case is whether the plaintiff established such special damage, such a distinct personal injury as to warrant the granting of an injunction against the continuance of gambling upon her premises. The case of *Farrell v. Cook, supra*, was one in which the nuisance enjoined was near the plaintiff's residence and materially disturbed the complainant in the

enjoyment of his home. In the case at bar it is conceded that the plaintiff was not a resident of Omaha or of this state, hence there was no special injury to plaintiff's habitation or home or enjoyment thereof, such as was the basis of the action of the court in granting the injunction in the case cited. We have carefully examined all the evidence in this case, and from such examination are satisfied that, although conflicting as to some particulars, it sustains the conclusion of the trial judge, from which he announced that the plaintiff had not made a sufficient showing to entitle her to the relief asked. The judgment of the district court must be

AFFIRMED.

I. R. ALTER ET AL. V. L. L. COVEY ET AL.

FILED JUNE 19, 1895. NO. 6140.

Trial: RULINGS ON EVIDENCE: REVIEW. Error cannot be predicated upon the refusal of the district court to permit a witness to answer a certain question, when there was made no offer of proofs which would be elicited if the desired answer was permitted to be made.

ERROR from the district court of Howard county. Tried below before HARRISON, J.

T. T. Bell, for plaintiffs in error.

Paul & Templin and *W. H. Thompson*, *contra*.

RYAN, C.

In the district court of Howard county plaintiff replevied from the defendant 171 steers, being such surviving part of 200 as had been entrusted to the defendant for keeping through the winter of 1890 and 1891. The

plaintiff also claimed damages to the amount of $300 on account of the negligent manner in which said 171 steers had been kept, as well as the market value of the other twenty-nine head, which had died or been lost, estimated at $810. The defendant claimed the right to the possession of the cattle replevied by virtue of his right to an agister's lien by reason of the performance of his own undertakings, evidenced by a written contract, by virtue of which he undertook and did care for and "rough through the winter of 1890 and 1891, 200 head of Utah cattle, at $5 per head." It was stipulated in this agreement that if aforesaid cattle were lost, or should die through the neglect or fault of the defendants, that they should pay the market value of all cattle which "are so lost or die." It was conceded that in some inexplicable manner two steers were lost, but the contention of the defendants was that the other twenty-seven head died without their fault or neglect. There was a verdict and judgment for the defendants in the sum of $870.32.

In argument plaintiffs urge as one ground of reversal that they should have been permitted to show what meaning was attached to the expression "roughing through the winter." It is a sufficient answer to this to say that there was no offer made whereby was shown what the witness, if permitted, would testify was such meaning. The alleged error, if such it was, is not available, as has been held in many cases by this court. It is urged that the verdict was for too large an amount, but we can only say as to this that it was within the limits of the proofs, and therefore we cannot now say it was excessive. These are the only questions discussed in the brief of plaintiffs in error. The judgment of the district court is

AFFIRMED.

HARRISON, J., having presided at the trial in the district court, took no part in the decision of this case.

MICHAEL O'DONOHOE, APPELLEE, V. MILTON D. POLK ET AL., APPELLANTS.

FILED JUNE 19, 1895. No. 5947.

1. **Pleading**: WAIVER OF MATERIAL ALLEGATION. The want of a material allegation in a petition may be waived by a failure to challenge attention to it in the district court.
2. **Conflicting Evidence**: REVIEW. Findings of fact upon conflicting evidence will not be disturbed on appeal unless manifestly unsustained by the evidence.

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

C. S. Polk and *Mockett, Rainbolt & Polk*, for appellants.

Matthew Gering, contra.

RYAN, C.

The appellee alleged in the district court of Cass county that he had obtained on August 24, 1891, a judgment in the county court of said county against Milton D. Polk for the sum of $499.25 and costs; that a transcript of said judgment had been duly filed in the office of the clerk of the aforesaid district court; that an execution issued upon said judgment had been returned "No property found whereon to levy;" that on the 30th of August, 1889, said Milton D. Polk had conveyed to his father, John F. Polk, certain described real property in Cass county, which plaintiff sought to subject to the payment of his judgment; that said conveyance was fraudulent as against the creditors of Milton D. Polk and was without consideration; that said Milton D. Polk was insolvent and had no property whatever out of which the aforesaid judgment could be satisfied; that to further promote the fraudulent purpose aforesaid

the said John F. Polk had conveyed said real property to his brother-in-law, S. O. Leeson, who was the uncle of Milton D. Polk, and that each of said conveyances was, with full knowledge of each party to it, of the fraudulent purpose which actuated every other party. The parties to the above transfer were made defendants and upon issues joined there was a trial, which resulted in a decree subjecting the above mentioned real property as prayed.

It is first insisted that there was alleged no levy upon the real property in aid of which the equitable powers of the district court have been invoked. If this objection had been made before trial it would have been entitled to serious consideration, for it points to a very serious defect in the petition. No question or objection was made to the sufficiency of the averment in any respect until this hearing on appeal, and it is now too late to urge it effectually. To the argument that there was no averment that the conveyances attacked prevented the subjection of the aforesaid real property to the payment of the plaintiff's judgment, it is deemed sufficient to answer that while the general conclusion was not stated, there were recited such facts as fully justified the assumption that such hindrance had an actual existence. While the evidence was such that a finding thereon in favor of the defendant would not have been disturbed as without sufficient support, it, on the other hand, was not so deficient in amount or weight as to justify an interference with the decree which was actually entered. The judgment of the district court is

AFFIRMED.

WALTER L. SELBY ET AL. V. P. J. MCQUILLAN ET AL.

FILED JUNE 19, 1895. No. 5672.

Judgment Against Sureties on Appeal Bond: NOTICE. Upon the rendition of a judgment against appellant in the district court, that court has no such jurisdiction of the person of the surety in the appeal undertaking that it may render the same judgment against him that it may against the appellant. *Moore v. Kepner*, 7 Neb., 291, and *Lininger v. Raymond*, 9 Neb., 40, distinguished, and *Banghart v. Lamb*, 34 Neb., 535, overruled.

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

Hall & McCulloch and *Brown & Talbott*, for plaintiffs in error.

John P. Breen, contra.

RYAN, C.

Plaintiff in error Walter L. Selby was surety on an appeal bond, by virtue of which this cause was brought to the district court of Douglas county. The action was replevin, in which John J. Wilkinson was plaintiff and P. J. and Bridget McQuillan were defendants. Upon a verdict in the district court aforesaid there was a judgment in favor of the McQuillans for $520.82, the value of the property replevied. Immediately following the recitation of these facts in the record there was this language: "The court finds that Walter L. Selby is surety upon the appeal bond herein and that he is liable as such surety on said appeal bond in the sum of $520.82 and the costs." For the sum last named there was thereupon rendered a personal judgment against both Wilkinson and Selby.

By the petition in error the sole question to be determined is whether or not the district court had jurisdiction

of the person of the defendant by virtue of the mere fact that he had executed an appeal undertaking with Wilkinson, the appellant. In *Moore v. Kepner*, 7 Neb., 291, MAXWELL, J., delivering the opinion of this court, said: "Objection is made that judgment was rendered against Eatherly as surety, without notice. As a rule, sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity to defend. But this rule has no application where the surety has contracted with reference to one of the parties to an action in court in the nature of the one at bar. In such case, by becoming surety, he submits to the jurisdiction of the court and is concluded by judgment." It is not at all clear from this language why the surety was held liable. Shortly afterward the writer of the above quoted language, in *Lininger v. Raymond*, 9 Neb., 40, more clearly expressed his meaning, for he said: "In *Moore v. Kepner*, 7 Neb., 291, it was held that judgment might be rendered against a surety on an appeal bond in replevin, the case having been appealed from the county court of York county to the district court, where judgment was rendered against the appellant and his surety. This was proper. (General Statutes, 257.) But it does not apply to an ordinary replevin bond." The principle upon which this proposition in the case of *Moore v. Kepner, supra*, was decided was that a party, by signing an appeal bond, submitted himself to the jurisdiction of the district court, for such effect resulted from the statute. Turning to page 257, General Statutes, above referred to, we find the section concerning appeals, which is in this language: "Sec. 37. When judgment is affirmed, the district court shall, on motion, render judgment against the appellant and his sureties for the amount of the judgment below, damages, and costs, in case such damages can be ascertained by the court without a trial." The above section had been

repealed long before the filing of the opinion or the taking of the appeal in *Banghart v. Lamb*, 34 Neb., 535, but without this fact being noted this court declared the law in relation to the rendition of judgment against an appeal surety to be the same as had been recognized in *Moore v. Kepner, supra*, and *Lininger v. Raymond, supra*. When the oversight above noted was discovered, this court, upon its own motion, ordered a rehearing. The cause was settled and dismissed, so that no opportunity earlier than the present has ever been presented to correct this mistake. The statute which should have been applied in *Banghart v. Lamb, supra*, was the same as must be applied in the case at bar, and this is its language: "When an appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." (Code, Civil Procedure, sec. 1014.) This section makes no reference to the rendition of judgment against an appeal surety, neither does it purport to make him a party to the appeal which by the undertaking which he has signed he has caused to be accomplished. The statute, as it now stands, simply declares that the judgment and costs shall be the amount for which the appeal surety is liable. It provides no special remedy for the enforcement of that liability. Because of the repeal of the section of the statute upon which was based the conclusion announced in *Moore v. Kepner* and in *Lininger v. Raymond*, those cases are no longer an authority for the rendition of a judgment against an appeal surety in an action wherein the appeal undertaking is filed. The case of *Banghart v. Lamb, supra*, having been decided under the mistaken belief that the statute was as it stood when the above two cases were decided, must be and is overruled. The judgment of the district court against Walter L. Selby was without warrant of law and is therefore

REVERSED.

AUGUST CARSTENS, APPELLEE, V. JAMES W. ELLER ET AL., APPELLANTS.

FILED JUNE 19, 1895. NO. 5925.

Conflicting Evidence: REVIEW. In this appeal is involved only a question of fact determined upon conflicting evidence by the district court. In such case the judgment will not be reversed.

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

A. S. Churchill and *J. W. Eller*, for appellants.

Connell & Ives, contra.

RYAN, C.

The appellee began this action in the district court of Douglas county for the foreclosure of a purchase money real estate mortgage. The appellants, J. W. Eller and Frances E. Eller, his wife, James W. Logan and his wife, who made the aforesaid mortgage, defended upon the ground that the debt secured had been fully paid. The rights of Mary A. Putney and her husband are based on a subsequent mortgage to that on which foreclosure proceedings were begun, hence they need not be described more at length.

There is but one question material to the determination of this appeal, and that is whether a deed, in consideration of $7,500 made by J. W. Eller and his wife, was delivered to and accepted by the appellee. If this fact existed, the mortgage upon which foreclosure proceedings were begun was fully paid and appellee was not entitled to maintain his action for the relief indicated. It is quite probable that the appellee and his wife agreed to accept the conveyance of the real property above referred to in full discharge of

the balance due upon appellee's mortgage on a part of the property mortgaged. He, however, refused to accept of any payment or receive the deed tendered him until he had consulted his attorney with reference to the title which the proposed deed, when delivered and accepted, would vest in him. Appellee, with Mr. and Mrs. Eller, thereupon together went to said attorney's office and there Mr. Eller submitted the proposed conveyance and other papers for approval. The attorney for appellee, upon various pretexts, avoided passing upon the question submitted for his judgment and succeeded in deferring action until some indefinite day in the future. It is unnecessary to inquire how it happened. It is sufficient to state that after the meeting in the attorney's office appellee refused further to proceed with his trade. There were various efforts upon the part of Mr. Eller to commit appellee to the terms doubtless previously assented to by Carstens, but without success, for the appellee insisted that he had not in law bound himself and did not propose so to do. When foreclosure proceedings were begun Mr. Eller, his wife, and their associates asserted that the deed, when submitted to Mr. Ives, the attorney of appellee, passed the title to said appellee for the reason alleged, that it was tendered and received as a conveyance. Upon this question, which was one of fact, it cannot be claimed that there was less than a conflict of evidence. The district court found adversely to the appellants. This finding was amply sustained by the proofs, and the judgment appealed from is therefore

AFFIRMED.

IRVINE, C., not sitting.

W. B. RICE, APPELLEE, V. WILLIAM WINTERS ET AL., APPELLANTS.

FILED JUNE 19, 1895. No. 6435.

1. **Bill of Exceptions:** AUTHORITY OF CLERK TO SIGN. The mere stipulation of counsel in a case that the clerk of a court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or the parties to the litigation, or their counsel, must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

2. **Mortgages:** PAYMENT: SUBROGATION. A owned real estate on which B had a first and C a second mortgage. D loaned A money to pay off B's mortgage. A agreed to and did secure D's loan by an apparent first mortgage on the real estate. The loan made by D was used in paying off the mortgage of B, and he released the same. When the mortgage of A to D was delivered, the mortgage records showed a marginal release of C's mortgage signed "C, by J." It turned out that C's mortgage had never been paid, and was released by J without authority. *Held*, That D was not entitled to be subrogated to the lien held by B by virtue of his mortgage against the real estate.

3. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case. *South Omaha Nat. Bank v. Wright*, 45 Neb., 23, followed.

4. ——: VOLUNTARY PAYMENT. A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the

part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 534, followed.

5. ———: MORTGAGES: PRIORITY. The fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate to pay off the prior mortgage, is subrogated to the rights of the holder of such first mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage.

6. **Mortgages:** LIENS. When a first mortgage lien existing against real estate is paid off, the lien of a second mortgage thereon becomes at once by operation of law a first lien on the property, and this first lien and the right to enforce it as such are vested rights.

7. **Subrogation.** Courts of equity will not apply the doctrine of subrogation where to do so would be to deprive a party of a legal right.

8. **Mortgages:** ABSTRACTS OF TITLE. An intending purchaser or mortgagee of real estate relies and acts upon the recitals of an abstract made of the title to such real estate at his peril.

9. ———: ———: RECORDS: NOTICE. An abstract of title of certain real estate recited that a mortgage recorded thereon in favor of C had been released on the margin of the record where recorded. *Held*, (1) That an intending mortgagee of the property was bound to take notice of the mortgage records, and if C's mortgage had not in fact been released and the mortgagee was prejudiced by relying upon the recital of the abstract, that his injury was the result of his negligence; (2) that if C's mortgage appeared released, on the margin of the record where recorded, by some one else purporting to act for him, the intending mortgagee was bound to know at his peril that the party pretending to act for C had authority to do so; (3) that whether the mistake of the mortgagee was one of law or fact, or both, whatever injury he sustained by reason of such mistake, was attributable to his lack of care, and afforded no reason for subrogating him to the rights of the holder of a mortgage on the premises prior to C's, which the said mortgagee had paid off with the proceeds of a mortgage he took on said property, relying upon the correctness of said abstract.

APPEAL from the district court of Buffalo county. Heard below before NEVILLE, J.

The facts are stated by the commissioner.

Calkins & Pratt, for appellants:

The appellants contend that the appellee, not being a surety or guarantor of the defendant Winters, nor having any junior lien upon the premises of any kind to protect, and not being under any obligation, moral or legal, to pay the notes and mortgages executed by Winters to Moore, was a stranger. (*Suppiger v. Garrels*, 20 Ill. App., 625; *Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S., 549.)

When appellee loaned Winters the money with which to liquidate, he was a volunteer. (*Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S., 549; *Suppiger v. Garrels*, 20 Ill. App., 625; *Richards v. Griffith*, 28 Pac. Rep. [Cal.], 485.)

There being no agreement or understanding between Winters and the appellee that the Moore mortgages were to be assigned to the appellee or that they were to be kept alive and on foot for his use and benefit, he is not entitled, as a matter of course, in equity to be subrogated. (*National Bank v. Cushing*, 53 Vt., 326; *Dering v. Earl of Winchelsea*, 1 L. Cas. Eq. [6th ed., Eng.], 14; *Watson v. Wilcox*, 39 Wis., 643; *Downer v. Wilson*, 33 Vt., 1; *Guy v. Du Uprey*, 16 Cal., 196; *Sandford v. McLean*, 3 Paige Ch. [N. Y.], 122; *Wormer v. Waterloo Agricultural Works*, 14 N. W. Rep. [Ia.], 332; *Fort Dodge Building & Loan Association v. Scott*, 53 N. W. Rep. [Ia.], 282; *Bunn v. Lindsay*, 7 S. W. Rep. [Mo.], 473; *Grady v, O'Reilly*, 22 S. W. Rep. [Mo.], 798; *Kleiman v. Geiselman*, 21 S. W. Rep. [Mo.], 796; *Kitchell v. Mudgett*, 37 Mich., 81; *Shinn v. Budd*, 14 N. J. Eq., 237; *Curtis v. Kitcher*, 8 Mart. [La.], 706; *Hough v. Ætna Life Ins. Co.*, 57 Ill., 318; *Small v. Stagg*, 95 Ill., 39; *Wentworth v. Tubbs*, 55 N. W. Rep. [Minn.], 543; *Appeal of McCleary*, 12 Atl. Rep. [Pa.], 160; Sheldon, Subrogation, secs. 2, 3, 240; *Cox v. Baldwin*, 1 Miller [La.], 147.)

Winston & Meagher, also for appellants:

The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. (*Pearce v. Bryant Coal Co.*, 121 Ill., 590; *Swan v. Patterson*, 7 Md., 164; *Bank of United States v. Winston*, 2 Brock. [U. S.], 254; *Burr v. Smith*, 21 Barb. [N. Y.], 262; 1 Jones, Mortgages, 877; *Collins v. Adams*, 53 Vt., 433; *Gadsden v. Brown*, 1 Speer's Eq. [S. Car.], 37; *Bishop v. O'Conner*, 69 Ill., 431; *Sandford v. McLane*, 3 Paige Ch. [N. Y.], 117; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 384; *Wilkes v. Harper*, 1 Comst. [N. Y.], 586; *Douglass v. Fagg*, 8 Leigh [Va.], 588; *Young v. Morgan*, 89 Ill., 199; 2 May, Insurance, sec. 558; *Erb's Appeal*, 2 P. & W. [Pa.], 296; *Goswiler's Estate*, 3 P. & W. [Pa.], 200; *McGinnis' Appeal*, 16 Pa. St., 445; *Lloyd v. Galbraith*, 32 Pa. St., 103; *Richmond v. Marston*, 15 Ind., 134; *Marvin v. Vedder*, 5 Cow. [N. Y.], 671; *Clark v. Moore*, 76 Va., 262; *Hooper v. Robinson*, 98 U. S., 539.)

Where the demand of a creditor is paid by the money of a third person, not himself a creditor, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the demand is absolutely extinguished. (*White v. Cannon*, 125 Ill., 412; *Bayard v. McGraw*, 1 Ill. App., 134.)

A mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights, in respect to the security, by the real debtor; but if the person who pays the debt is compelled to pay for the protection of his own interests and rights, then subrogation should be made. (*Beaver v. Slanker*, 94 Ill., 183; *Downer v. Miller*, 15 Wis., 677; *Wilkes v. Harper*, 1 N. Y., 586; *Van Winkle v. Williams*, 38 N. J. Eq., 105; Paige, Modern Equity Jurisprudence, p. 875; *Wadsworth v. Blake*, 43 Minn., 509; *Evans v. Rhea*, 14 S. W. Rep. [Ky.], 82.)

Where the creditor of a debtor, out of necessity to protect his own interest, purchases a prior lien or incumbrance he will be entitled in equity to be subrogated; but the mere volunteer or a stranger will not be. (*Beaver v. Slanker*, 94 Ill., 175.)

Where there was an agreement, the doctrine of subrogation is recognized. (*Gans v. Thieme*, 93 N. Y., 225; *Tradesmen's Building Association v. Thompson*, 32 N. J. Eq., 133; *Detroit Fire & Marine Ins. Co. v. Aspinwall*, 12 N. W. Rep. [Mich.], 214; *Sidener v. Pavey*, 77 Ind., 241; *New Jersey M. R. Co. v. Wortendyke*, 27 N. J. Eq., 660; *Shinn v. Budd*, 14 N. J. Eq., 234.)

Where there is no agreement that the party so advancing the money shall be subrogated to the prior lien-holder, there can be no subrogation in equity. (*Small v. Stagg*, 95 Ill., 39; *White v. Cannon*, 125 Ill., 412; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383.)

Even where there is an agreement it has been held that a volunteer cannot be subrogated to the position of a prior claimant. (*Mather v. Jenswold*, 32 N. W. Rep. [Ia.], 512; *Wormer v. Waterloo Agricultural Works*, 62 Ia., 699; *Weidner v. Thompson*, 28 N. W. Rep. [Ia.], 422.)

The mere fact that a party is a subsequent mortgagee does not entitle him to an assignment of a prior mortgage. There must be some peculiar equity. (*Vandercook v. Cohoes Savings Institution*, 5 Hun [N. Y.], 641; *Dings v. Parshall*, 7 Hun [N. Y.], 522.)

R. A. Moore, contra, cited as to plaintiff's rights to subrogation: *McKenzie v. McKenzie*, 52 Vt., 271; *Cobb v. Dyer*, 69 Me., 494; *Levy v. Martin*, 48 Wis., 198; *Blodgett v. Hitt*, 29 Wis., 169; *Crippen v. Chappel*, 35 Kan., 495; Harris, Subrogation, secs. 811, 816; *Betts v. Sims*, 35 Neb., 840; *Cheesebrough v. Millard*, 1 Johns. Ch. [N. Y.], 412; *Everston v. Central Bank of Kansas*, 6 Pac. Rep. [Kan.], 611.)

Marston & Nevius, also for appellee.

RAGAN, C.

From the transcript of the record and the briefs of counsel we understand the facts in this case to be substantially these: On the 15th of June, 1887, William Winters became indebted to one R. A. Moore, and as an evidence of such indebtedness executed and delivered to Moore on said date two notes of $700, each due respectively on the 15th days of June, 1888 and 1889, and secured said debt by a mortgage upon certain real estate. On the 30th day of April, 1888, Winters also became indebted to Grommes & Ullrich in the sum of $3,829.76, and as an evidence of said debt gave to them a series of notes, the last two of which were for $600 and $429.76, respectively, and due October 31 and November 30, 1888. To secure this debt Winters executed to Grommes & Ullrich a mortgage upon the same real estate which he had previously pledged to Moore; the Grommes & Ullrich mortgage became a second lien upon the property, the incumbrance of Moore being a first lien. Winters subsequently paid all the mortgage debt owing to Grommes & Ullrich except the aforesaid last two notes of the series. In June, 1889, one John M. Lay, resided in the city of Kearney, Nebraska, and was in the habit of taking applications of persons desiring to borrow money and of referring such applications to one W. B. Rice, who, if the security proved acceptable, would make the loan applied for. About this date one E. B. Jones, an attorney at law at Kearney, seems to have had in his possession for collection the Moore mortgage, at least he was then pressing Winters for its payment. Lay, learning of this fact, took Winters' application for a loan of $1,300, to be secured by a first mortgage on the premises already mortgaged by Winters to Moore, such loan to be used for the purpose of paying the Moore mortgage. June

1, 1889, Rice accepted Winter's application and loaned him $1,300, taking his note therefor, secured by a mortgage on the same premises mortgaged by Winters to Moore, and with the $1,300 the Moore mortgage was paid off and by Moore duly discharged of record on the 6th of June, 1889. About the same date said Jones released and discharged on the margin of the record where it was recorded the Grommes & Ullrich mortgage, or attempted to do so. It seems also that an abstract of the title of the real estate mortgaged was furnished to Rice before he parted with the money loaned to Winters, and that this abstract contained a notation of the abstracter that the Grommes & Ullrich mortgage had been released on the margin of the record where recorded. Rice brought this suit in equity in the district court of Buffalo county to foreclose the mortgage given him by Winters on the 1st of June, 1889, prayed for an accounting of the amount due him on said mortgage from Winters, and that he might be given a first lien upon the real estate described in said mortgage to secure the payment of the amount found due. Winters was made a party defendant to this action, but his connection with the case need not be further noticed. Grommes & Ullrich were made or became parties to the suit, and filed an answer in the nature of a cross-petition, setting out the execution and delivery to them of the mortgage, above mentioned, by Winters; that the last two notes which the mortgage was given to secure, namely, the notes for $600 and $429.76, with interest, remained past due and wholly unpaid; they prayed for an accounting of the amount due them from Winters, and that they be given a first lien upon said mortgaged premises for its payment. To this answer and cross-petition of Grommes & Ullrich, Rice replied: (1) That the Grommes & Ullrich mortgage had been fully paid and that there was nothing due thereon; (2) that it had been duly released and discharged of record by one E. B. Jones, acting as the agent and attorney for Grommes & Ullrich; (3) the execution of

the mortgage of the 15th of June, 1887, by Winters to Moore; that the mortgage he, Rice, sought to foreclose in this action was made for the purpose of and the proceeds used in paying off this Moore mortgage; and he prayed as in his petition he had already, and further, that he might be subrogated to the lien which Moore held against the premises by virtue of the mortgage which Winters had given him thereon, and which had been paid by the proceeds of the mortgage now sought to be foreclosed. The district court made, among others, the following special findings:

"The court further finds that one E. B. Jones, an attorney at law, undertook to release the security mortgage of Grommes & Ullrich by a release entered upon the margin of the record, but that the said Jones undertook to release said mortgage without first obtaining authority therefor, and that said Jones never was authorized by the said defendants, Grommes & Ullrich, to release said mortgage, and that said mortgage was never released, and has been at all times since the recording thereof, and now is, a valid and subsisting mortgage lien against said premises; that there is due to the said defendants Grommes & Ullrich, from the said defendant William Winters, upon their mortgage the sum of $1,455.39, with interest thereon at the rate of eight per cent per annum from this date, and that the same is a valid and second mortgage lien against said premises.

"The court further finds that the proceeds obtained from the mortgage given by the said defendant Winters to the said plaintiff Rice were used to pay off and obtain a release and discharge of the mortgage executed by the said defendant William Winters to the said R. A. Moore.

"The court further finds that there is due to the said plaintiff Rice from the said defendant William Winters upon his said mortgage the sum of $1,600.65, with interest thereon from this date at the rate of ten per cent per annum; and the court finds as a matter of law that the plaint-

iff is, by reason of the facts found above, entitled to be subrogated to the lien of the mortgage so as aforesaid executed by the said William Winters to the said R. A. Moore, and that the plaintiff's lien is accordingly prior and superior to the lien of the said Grommes & Ullrich, and is a valid first mortgage lien against said premises."

To reverse this decree Grommes & Ullrich have appealed.

1. The bill of exceptions in this case was settled by the clerk of the district court of Buffalo county in pursuance of a written stipulation that he might do so, signed by the counsel for the parties to this action; but said stipulation does not recite that what purports to be is in fact the correct bill of exceptions in the case. The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or the parties to the litigation, or their counsel, must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. (*Scott v. Spencer*, 42 Neb., 632.) We are therefore precluded from looking into the evidence which accompanies the record of this case.

2. The sole question remaining is whether the pleadings in the case support the finding and decree of the district court. Had the finding of the district court been a general one, then it is clear that a decree based on such finding would have found ample support in the pleadings, and been conclusive upon this court; but the court has found specially that the Grommes & Ullrich mortgage was never released, that it is a valid and subsisting lien upon the premises, and as it stands of record, superior to the mortgage lien of Rice; but the learned court concluded as a matter

of law that solely because the Moore mortgage, which was a lien upon the premises superior to the mortgage of Grommes & Ullrich, was paid off and discharged with the money which the mortgage of Rice was given to secure, therefore Rice was entitled to be subrogated to the lien which Moore held against the premises by virtue of his mortgage thereon. Is this conclusion of law of the learned district court correct? The proposition may be thus stated: A owns real estate on which B has a first and C a second mortgage. D loans A money to pay off B's mortgage. A agrees to and does secure D's loan by an apparent first mortgage on the real estate. The loan made by D is used in paying off the mortgage of B, and he releases the same. When the mortgage of A to D is delivered, the mortgage records show a marginal release of C's mortgage signed "C, by J." It turns out that C's mortgage has never been paid, and was released by J without authority. Is D entitled to be subrogated to the lien B held, by virtue of his mortgage, against the real estate? There is some conflict in the authorities.

In *Emmert v. Thompson*, 52 N. W. Rep. [Minn.], 31, it was held: "Where one loans money upon real estate security for the express purpose of paying off and discharging liens or incumbrances on the same property, expecting and believing, in good faith, that his security will, of record, be substituted in fact in place of that which he discharges, he is not a volunteer, a stranger, or an intermeddler, nor is the original debt or lien or incumbrance considered extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money." The facts in this case were very much like those in the case at bar, and the court answered the question we have propounded above in the affirmative. There are other authorities of eminent respectability which by their decisions have given the same answer to the question; but we are persuaded that the decided weight of authority affords a negative answer to the question.

In *South Omaha Nat. Bank v. Wright*, 45 Neb., 23, this court said: "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."

In the article entitled "Subrogation," 24 Am. & Eng. Ency. of Law, at page 281, the authorities are collated, and the result of their holding is thus stated: "One who advances money to pay the debt of another, in the absence of agreement, express or implied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid, unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded."

In *Fort Dodge Building & Loan Association v. Scott*, 53 N. W. Rep., 283, the supreme court of Iowa said: "One who loans money to satisfy several mortgages on property, and takes another mortgage on the property, without examining the records, and relying merely on an abstract not entirely up to date, which fails to notice the rendition of a recent judgment, is not entitled to subrogation under said mortgages to rights paramount to the judgment."

In *Kitchell v. Mudgett*, 37 Mich., 81, it was said: "K. paid off and discharged the first two out of three mortgages on certain property, and then took a new mortgage for the amount paid. Held that this was subsequent to the one left unpaid, and that K. was not entitled to be subrogated to the rights of the first two mortgagees."

In *Watson v. Wilcox*, 39 Wis., 643, that court held:

"One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein." Ryan, C. J., speaking for the court, said: "Before the appellant took his own mortgage from George and Harriet Harvey, he was a stranger to the title, and had no connection with the mortgage debt due to Sarah Ann Hodson. His action in the premises was voluntary. He first proposed to purchase the Hodson mortgage, but subsequently abandoned that intention and advanced the amount due upon it for the Harveys, for the express purpose of satisfying and canceling the Hodson mortgage. This was done. The appellant thereupon took a new mortgage for his own security. It is difficult to see how the doctrine of subrogation can aid him."

In *Sandford v. McLean*, 3 Paige Ch. [N. Y.], 116, the chancellor, speaking to the point under consideration, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect."

In *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 534, the supreme court of the United States, discussing the doctrine of subrogation, held: (1) That the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.

In *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383, the facts are thus stated in the syllabus: "B. loaned money to G. to pay off a mortgage on the security of a new mortgage on the same lands. The old mortgage was paid off, and a discharge of the same duly executed. W. recovered a judgment against G., which was docketed after the first mortgage, and on which the lands were sold to him by the sheriff, prior to the mortgage to B. This sale was overlooked in B.'s examination of the records for liens. Held that B. was not entitled to be subrogated to the old mortgage, or to set it up in order to give him a lien prior to the judgment and sheriff's sale."

It is argued by counsel for Rice that the facts here make a proper case for the application of the doctrine of subrogation by a court of equity, for the reason that while Moore's mortgage remained unsatisfied Grommes & Ullrich's lien upon the mortgaged premises was subject thereto, and they would not be injured or prejudiced if Rice should be subrogated to the lien which Moore held, as their lien would occupy the same relation to the property after subrogation that it did prior to the satisfaction of the Moore mortgage. In *Bohn Sash & Door Co. v. Case*, 42 Neb., 281, a mortgage lien existed against an owner's real estate. He entered into a contract with B. to furnish certain labor and material and erect for him certain improvements on said real estate. B. complied with his contract and furnished labor and material to a considerable amount. After B. had furnished the labor and material the owner procured a loan from C. with which to pay off and discharge the mortgage on his real estate, agreeing to secure such loan by a first mortgage. C. made the loan to the owner and the latter executed to him a mortgage, which was duly recorded, and the prior mortgages were released and discharged of record. The owner not having paid for the labor and material furnished by B., the latter brought suit to obtain a lien against the property

under the mechanic's lien statute. C. was made a party to the action and asked the foreclosure of his mortgage, and sought to be subrogated to the liens held by the mortgagees whose mortgages had been paid and discharged with the proceeds of C.'s loan made to the real estate owner. It was urged in that case as a reason why the doctrine of subrogation should be applied that B.'s lien for labor and materials, when the same were furnished, was subject to the then existing mortgages on the real estate, and that he would not be prejudiced by allowing C. to be subrogated to the liens of the mortgagees whose mortgages he had discharged. The district court adopted this view, but this court on appeal reversed the decree of the district court, and held that C. was not entitled, under the facts, to subrogation. The fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate, to pay off the prior mortgage is subrogated to the rights of the holders of such mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage. When the Moore mortgage was voluntarily paid off and discharged the mortgages of Grommes & Ullrich became at once a first lien upon the mortgaged premises, and they thereby acquired the legal right to hold and enforce said lien as a first lien against the mortgaged premises. This right and lien were property, and the mere fact that the money which Rice's mortgage secures was used to pay off and discharge the Moore mortgage affords no reason, not the slightest, why a court of equity should deprive Grommes & Ullrich of the legal right which they had acquired by the voluntary act of Rice and Moore. Neither Grommes nor Ullrich said or did anything, or omitted to say or do anything, which caused Rice to make this loan and pay off the Moore mortgage, and the saying or doing, or omitting to say or do, which estops Grommes

& Ullrich from asserting the lien which they have acquired against this property by operation of law in consequence of the release of the Moore mortgage. What right has a court of equity, even under the guise and in the name of subrogation, to deprive Grommes & Ullrich of the vested rights which they have acquired against this property, simply because to do so would be a benefit to Rice? Courts of equity apply the doctrine of subrogation to subserve the ends of justice and to do equity in the particular case under consideration. Would it be doing justice in this case to deprive Grommes & Ullrich of the lien they have acquired against this property by operation of law resulting from the voluntary act of Rice and Moore and without the consent, request, knowledge, or solicitation of Grommes & Ullrich? We confess that to our minds to do this would be to do injustice, and furthermore, it would be using the powers of a court of equity to strike down a legal right, and deprive a citizen of his property. Equity follows the law, it does not thwart it. It enforces and gives effect to the legal rights of parties when the law is powerless to afford a remedy. It does not take away these legal rights.

The second argument of counsel for Rice in support of the decree is that the mortgage records were not in fact in the condition they appeared to be; that is, as we understand it, that the record in which the Grommes & Ullrich mortgage was recorded showed on its margin a release signed by one Jones, and that the abstract of title made of this property, and on which Rice acted in making this loan, recited that the Grommes & Ullrich mortgage had been released on the margin of the record where it was recorded. In other words, that Rice in making this loan acted at a disadvantage and under a mistake; but the mistake of Rice, whether of law or fact, was the result of his own negligence. He was bound to know the law, and if the record showed that the Grommes & Ullrich mortgage had been released by Jones, he was bound to know whether Jones had authority

to execute that release. If the abstract had recited that the Grommes & Ullrich mortgage had been released and it had turned out that in fact no release had ever been made or attempted to be made, then he would have acted under a mistake of fact; but if he suffered an injury from acting on such mistake, the injury would have still been the result of his own negligence. An intending purchaser or mortgagee of real estate relies and acts upon the recitals of an abstract made of the title to such real estate at his peril. In *Fort Dodge Building & Loan Association v. Scott, supra*, the court, speaking to this point, said: "The only question in the case is whether the plaintiff is entitled to have the satisfaction of the Simmons mortgage set aside, and that he be subrogated to all the rights of Simmons. It seems to us that he is not entitled to such relief. The plaintiff made the loan to Lord for the express purpose of paying the Simmons mortgage. It was well understood that the plaintiff was to accept a new mortgage, and plaintiff got all he bargained for. There was no mistake, except that the plaintiff failed to exercise the diligence required in the examination of the records, and therefore failed to discover the existence of the judgment and the sale thereunder. No one can be blamed, but he must suffer loss, simply because he was negligent. There is no principle that will allow him to take advantage of that to the injury of the diligent." In *Kitchell v. Mudgett, supra*, the supreme court of Michigan, speaking to the same point, said: "It is said, with great show of reason, that complainant would never have taken up those mortgages had she not supposed she was to have a first lien, for the land was then worth only about the amount of the three mortgages. Now this may be true, and still it may be equally true that if she has taken a mortgage negligently on land covered by another she can have no relief. Now complainant was notified by the record and by the Phibbs mortgage that Mrs. Mudgett also held one on the same lands, yet it is not claimed that she

required Mrs. Mudgett to release hers or to postpone the lien. How can the court know that Mrs. Mudgett would have consented to release or postpone if it had been required of her? And how can the court compel her to do that which, with competent authority to assent to or reject, she might perhaps at the time have rejected?" And in *Banta v. Garmo, supra,* the assistant vice-chancellor, speaking to the question under consideration, said: "A further argument is made in behalf of the complainant, on the ground of mistake in canceling the prior mortgage. This is not strictly the fact, as that act was done intentionally, and the mortgagee in that mortgage is content. The mistake consisted in the belief that the complainant was acquiring an unincumbered title by his mortgage. This kind of mistake is of frequent occurrence, but I never heard of an instance where the suffering lender was permitted to trace back his money into the hands of a stranger who had received it in discharge of an elder lien than the one newly discovered, and thereupon to set up such stranger's lien to overreach the intervening incumbrance. * * * No case can be found where a third person, after voluntarily and intentionally discharging a lien in which he had no prior interest, and on the faith of another security, has been permitted, as against other incumbrancers, to revive such lien on ascertaining that his own security was worthless." In the case at bar Rice knew, and was bound to know, when he loaned Winters the money to pay off the Moore mortgage, that Grommes & Ullrich had mortgage liens upon this real estate, and the very moment that the Moore mortgage was satisfied of record that the Grommes & Ullrich mortgage would become a first lien upon the premises. Had he exercised ordinary care and diligence he would have secured from Grommes & Ullrich a valid release and discharge of their mortgage before he advanced the money and paid off and allowed to be satisfied the Moore mortgage. If he has suffered loss or shall suffer

loss, he has no one to blame but himself, and a court of equity will not apply the doctrine of subrogation to a case, where to do so would be to deprive one party of a legal right and at the same time reward the other party for his negligence.

The decree, in so far as it postpones the lien of Grommes & Ullrich to that of Rice, is reversed, the cause remanded to the district court with instructions to enter a decree giving Grommes & Ullrich a first lien upon the mortgaged premises for the amount found due them by the district court, and give to Rice a second lien upon the premises for the amount found due him by the court.

REVERSED AND REMANDED.

STATE BANK OF CRAWFORD, APPELLEE, V. JOHN OWENS, APPELLANT, ET AL.

FILED JUNE 19, 1895. No. 5680.

Review: SUFFICIENCY OF EVIDENCE. This appeal presents no question of law. The evidence examined, and *held* to support the finding of the district court, and its decree affirmed.

APPEAL from the district court of Dawes county. Heard below before BARTOW, J.

Spargur & Fisher, for appellant.

Albert W. Crites and *D. B. Jenckes, contra.*

RAGAN, C.

This is an appeal from a decree of the district court of Dawes county rendered in an ordinary action of real estate mortgage foreclosure. The appeal presents no question of law whatever. We have examined the record, and ascer-

tained that the finding of the district court is supported by sufficient evidence. Its decree is, therefore,

AFFIRMED.

EDWARD F. GALLAGHER ET AL. V. ST. PATRICK'S CHURCH OF O'NEILL, NEBRASKA.

FILED JUNE 19, 1895. No. 5907.

Building Contracts: CHURCH PROPERTY: INSURANCE: BREACH BY OWNER OF AGREEMENT TO INSURE: LOSS BY FIRE: LIABILITY OF SURETIES ON CONTRACTORS' BOND. Meals & McVea, contractors, entered into a writing with St. Patrick's Church, in and by which they agreed to furnish the labor and material and construct for said church a certain building. The contract provided (*a*) that the building should be completed by December 31, 1890; (*b*) that, if the building should not be completed by that time, the contractors should forfeit to the church the sum of $10 for each day that the building remained unfinished thereafter; (*c*) that if the contractors should neglect or refuse to comply "with any of the articles of this agreement" the church might take possession of the premises, after giving three days' notice in writing, complete the building, and charge the cost thereof to the contractors; (*d*) that the architect should make estimates on the last days of August, September, October, and November, of the value of the material and labor furnished by the contractors, and the church at said dates should pay to the contractors three-fourths of the amount of such estimates; (*e*) that the church should protect by insurance to cover its interest in the property when payments had been made to the contractors. To secure the performance of their agreement the contractors executed a bond to the church, signed by themselves as principals and a number of other parties as sureties. The building was not completed by December 31, 1890, and the contractors were proceeding with its construction on February 18, 1891 when it was totally destroyed by fire. Prior to December 31, 1890, the church had paid to the contractors for labor and material the sum of $12,440. Prior to the day of the destruction of the building, the church had paid to the contractors

$14,489.59. The church took out insurance on the property in the sum of $10,000 and no more. The church sued the contractors and the sureties on their bond to recover the money paid to the contractors under the contract. *Held*, (1) That the failure of the church to keep the building insured to the extent of its interest therein was a complete defense for the sureties on the bond of the contractors; (2) that the object of the provision in the contract requiring the church to insure its interest in the property was to lessen the risks taken by the sureties; (3) that the sureties were under no obligation to make inquiries from time to time to ascertain if the church had complied with its contract to insure its interest in the property; (4) that the sureties had a right to suppose that the church would comply with its contract in that respect, and that if the building should be destroyed before its acceptance by the church and they were called upon to and did make good the loss, they would be entitled by subrogation or otherwise to the benefit of the insurance effected on the property by the church; (5) that the question as to whether the destruction of the building was the result of the negligence of the contractors was an immaterial issue; (6) that the church could not excuse its failure to comply with its part of the contract on the ground that its performance would have been of no value to the sureties, because the loss of the building through the negligence of their principals would defeat a recovery of the insurance if it had been effected; (7) that its duty was to insure the property, and when the loss sued for occurred and was paid by the sureties, to transfer to them the insurance contracts, and leave the sureties and the insurance companies to litigate the question of the latter's liability; (8) that the fact the church was unable to procure responsible insurance companies to write insurance on the building to the extent of its interest therein did not relieve it from the performance of its agreement to insure the property to the extent of its interest; (9) that it is evident from the contract that it was within the contemplation of the parties thereto at the time it was made that the building might not be completed at the very day fixed by the terms of the contract, and that if it was not, the church had the option to permit the contractors to finish the work and to recover from them whatever damages the church might sustain by reason of the building not being completed in time, or the church might, at its option, exclude the contractors from any further connection with the work and complete it itself; (10) that the church by permitting the contractors, without protest or objection, to continue the work after the date when the building was to be completed, recognized the

contract as in full force, and as long as it was in force the church was under obligation to perform its part of it; (11) that by such act it waived, as it had a right to do, the completion of the building on the day named in the contract, and reserved the right to recover damages from the contractors for the delay.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

See opinion for statement of the case.

B. G. Burbank, for plaintiffs in error:

The church failed to keep its interest in the building insured as required by the contract, and the sureties are released. (*Watts v. Shuttleworth*, 5 Hurl. & N. [Eng.], 235, 7 Hurl. & N. [Eng.], 353.)

Kennedy & Learned, also for plaintiffs in error:

Where a party has undertaken to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible. (*School District v. Dauchy*, 25 Conn., 530; *Beebe v. Johnson*, 19 Wend. [N. Y.], 500.)

R. R. Dickson and *Blair & Goss*, also for plaintiffs in error.

E. Wakeley, *M. F. Harrington*, and *Thomas Carlon*, *contra*, cited in support of their argument on the question of insurance: 1 Wood, Fire Insurance, 377, 634, 817; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y., 619; *Sansom v. Ball*, 4 Dallas [U. S.], 459; *Putnam v. Mercantile Marine Ins. Co.*, 5 Met. [Mass.], 386; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St., 13.

RAGAN, C.

St. Patrick's Church is a religious corporation organized under the laws of the state and situate at O'Neill, Ne-

braska. Meals & McVea, in August, 1890, were contractors and builders, and will hereinafter be referred to as the contractors. In the said month of August said contractors entered into a written agreement with said church, in and by the terms of which they agreed to furnish all the material and erect an academy or school building for said church at said city of O'Neill, according to certain plans and specifications. The contract price for this building was $16,160.94. The contract contained the following provisions: (*a*) The architect was required to make estimates on the last days of August, September, October, and November, of the value of the material furnished and labor performed by the contractors towards the erection of the building, and thereupon the church was to pay to the contractors at said date three-fourths of the amount of such estimates; (*b*) the building was to be completed by December 31, 1890, at which time the church was to pay to the contractors the balance of the contract price; (*c*) that if the contractors "shall neglect and refuse to carry on the work at any time for two days in the manner required by the architect, or shall neglect or refuse to comply with any of the articles of this agreement," then the church "is hereby empowered to enter upon and take possession of the premises, with the materials and apparatus thereon, after giving three days' notice in writing," and complete said building, charging the costs thereof to the contractors; (*d*) that if the contractors should fail to complete the building by the time agreed they should forfeit and pay to the church the sum of $10 a day for every day that the building remained unfinished; (*e*) that "the owner, the church, shall protect by insurance to cover its interest when payments have been made to contractor." To secure their performance of this contract the contractors gave a bond to the church, signed by themselves and a number of other persons, hereinafter denominated the sureties. Immediately after the execution of this contract the

contractors began the erection of the building and continued working upon the same until February 18, 1891, when the building, almost completed, was wholly destroyed by fire. Prior to December 31, 1890, the church had paid to the contractors for labor and material furnished by them towards the erection of said building the sum of $12,440. Prior to the time of the destruction of the building the church had paid to the contractors the sum of $14,489.59. The church took out insurance to protect its interest in the building being constructed to the extent of $10,000, and no more. The church brought this suit in the district court of Holt county against the contractors and sureties on their bond, and in its original petition claimed a judgment for the sum of $14,489.59, the total amount paid by the church to the contractors prior to the destruction of the building, but by an amended petition, on which the action was tried, the church claimed a judgment for the sum of $12,440, the amount paid by it on the contract prior to December 31, 1890. The contractors were not served with process in the action and made no appearance therein. The church had a verdict and judgment against the sureties, to reverse which they have prosecuted to this court a joint petition in error.

There are numerous assignments of error here that the district court erred in giving all of certain named instructions and that it erred in refusing to give all of certain named instructions. We have examined these instructions so far as to discover that some of the instructions given by the court were properly given, and that some of the instructions refused by the district court were properly refused. The assignments of error, then, as to the giving and refusing of instructions are overruled.

Certain assignments of error relate to the action of the district court in the admission and rejection of evidence, but in view of the conclusion reached by us these assignments will not be noticed.

One of the defenses interposed to the action was that the church had failed and neglected to insure the building to the extent of its interest therein according to the terms of the contract, and that such failure and neglect on the part of the church had released and discharged the sureties. The church met this defense by replying that it had no insurable interest in the building being constructed, and that the amount of insurance which it had taken out on the building was as large a sum as was practicable, or as any responsible insurance company would carry. It is not disputed that the church never had over $10,000 of insurance on this property. The allegations in the church's reply that it had no insurable interest in the building being constructed is not urged by its counsel here. Is the failure and neglect of the church to insure the building to the extent of its interest therein a defense to these sureties? In *Watts v. Shuttleworth*, 7 Hurl. & N. [Eng.], 253, a contractor had agreed to furnish the material and to "execute the fittings of the first and second floors of a warehouse for the owner" by a certain date, and for a certain sum, payable in installments of not less than twenty per cent as the work progressed. The contractor further agreed that he would provide a store-room for the express purpose of the reception of the fittings from time to time as they were completed and until they were ready to be used in the warehouse; and the contract further provided that the owner should insure these fittings from risk or accident by fire. The contractor entered upon the performance of his contract, and, it appears, had a large number of fittings completed and stored; and while thus in store, and before they were placed in the warehouse, the fittings were destroyed by fire. The owner had neglected to take out any insurance on the fittings. The contractor failed to perform his contract, became insolvent, and the owner brought this suit on the bond to recover the amount of money which he had paid the contractor on the contract. The surety on the con-

tractor's bond interposed the defense that the owner had failed and neglected to insure the fittings as he had agreed. The court, in discussing this defense, said: "The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guarantied does not act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged." Judgment was entered for the surety. This judgment was affirmed on appeal, the court holding that the owner was bound to insure the fittings, and that his omission to do so discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but *in toto*. (See *Watts v. Shuttleworth*, 7 Hurl. & N. [Eng.], 253.) Applying the rule announced by these cases to the facts of the case at bar we conclude that the failure of the church to insure its interest in the building being constructed is a complete defense for the sureties on the bond of the contractors. To overthrow this defense counsel for the church make several arguments.

The first argument, as we understand it, is that the only damages which the sureties and contractors suffered by reason of the failure of the church to insure its interest in the property is the amount of premium which it would have required to effect this insurance; that the contractors, having ascertained that the church had not insured the property to the extent of its interest, should themselves have taken out the insurance and charged the cost thereof to the church. We do not think this argument is tenable, whether applied to the contractors or sureties, but we are quite clear that it is not sound when applied to the latter. The very object of having the church insure its interest in the property was to lessen the risks taken by the sureties. The sureties were under no obligations to make inquiries

from time to time to ascertain if the church had complied with its contract to insure its interests in this property. They had a right to suppose that the church would comply with its contract in that respect; and that if the building should be destroyed before its acceptance by the church, and they were called upon to make good the loss, they would be entitled, by subrogation or otherwise, to the benefit of the insurance effected on the property by the church. By the terms of the contract it was the duty of the church to keep this property insured to the extent of its interest in it. On December 31 it had an interest in the property to the extent of $12,440. When the property was destroyed its interest in the property was $14,489.59, or a sum greater than the judgment rendered against the sureties. By the express terms of the contract it was the duty of the church to keep this property insured to the extent of its interest therein, and had it done so, and had the property been destroyed as it was, the sureties, on paying the judgment here, would have been entitled to an assignment of the insurance policies, by subrogation or otherwise, to reimburse themselves for their loss.

Another argument is that the destruction of this building was the result of the negligence of the contractors, and that, therefore, they and their sureties are estopped from insisting upon the defense that the church failed to insure the property to the extent of its interest therein. The reply pleaded by the church to the defense of its failure to insure the property has already been set out. In this reply the church did not plead as an estoppel against the sureties that the property had been destroyed through the negligence of the contractors. It seems, however, that the question as to whether the destruction of the building was the result of the negligence of the contractors was made an important question before the jury. We are at a loss to understand how this question could have been material under the pleadings in the case. The sureties by their

contract agreed that the contractors should furnish material and erect this building according to the plans and specifications and turn it over to the church. The building having been destroyed before it was delivered to the church, the liability of the sureties attached, and whether the building was destroyed by fire, or the act of God, or otherwise, afforded them no defense. (*School District v. Dauchy*, 25 Conn., 530.) It is argued that the destruction of the building by the negligence of the contractors would be a defense to the insurance company in a suit against it on the insurance policies, had the church taken them out; but it is sufficient answer to this argument to say that that is not the case on trial. Whether the negligence of the contractors would be a defense for the insurance companies when sued upon the policies is to be determined when such defense is presented by the insurance companies in such suit. The church cannot excuse its failure to comply with its part of the contract by saying that its performance would have been of no value to the sureties. Its duty was to insure the property, and when the loss sued for occurred and was paid by the sureties, to turn over to them the insurance contracts and leave the sureties and the insurance companies to litigate the question of the latter's liability.

Another argument of the church is that the amount of insurance that it effected on the property was as much as any responsible insurance company would insure the property for. This, as already seen, was a part of the reply of the church to the defense of its failure to insure the property. We do not think this reply a good one in this respect. The church unconditionally contracted to insure the building to the extent of its interest. Having made this agreement, it was bound to perform it; and the fact that it was unable to procure insurance companies to write insurance on the building to the extent of its interest therein does not relieve it from the performance of its agreement. (*Beebe v. Johnson*, 19 Wend. [N. Y.], 500.)

The final argument relied upon by counsel for the church to overthrow this defense is that since by the terms of the contract the building was to be completed and delivered to the church by December 31, and that as it was not finished by that time, the building from that date was at the sole risk of the contractors. This argument, in effect, is that because the contractors failed to complete the building by December 31 the church was released from its part of the contract to keep its interest in the building insured. To sustain this argument it is insisted that the church never granted to the contractors any extension of time for completing the building beyond December 31. Under the contract, if the building was not completed by December 31, the contractors were to forfeit to the church the sum of $10 per day for each day it remained unfinished; and the contract further provided that in case the contractors failed to comply with "any of the articles of this agreement," one of which was to complete the work as agreed, the church might take possession of it after giving certain notice thereof to the contractors. Reading these two provisions of the contract together, it is evident that it was within the contemplation of the parties at the time the contract was entered into that the building might not be completed at the very day fixed by the terms of the contract, and that if it was not, the church should have the option to permit the contractors to finish the work and to recover from them whatever damages it might sustain by reason of the building not being completed in time; or the church might, at its option, exclude the contractors from any further connection with the work and complete it itself. The building was not completed by December 31, but after that date the contractors were allowed to continue the work without protest or objection, or, at least, the church did not exercise its right to exclude the contractors from the work and finish it itself. After December 31 the church paid to the contractors for labor and material furnished for this building after that date some-

thing over $2,000. By these acts the church recognized the contract as in full force; and as long as the contract was in force, it was under obligation to perform its part of it. It is very strenuously insisted by counsel for the church that the payments made to the contractors for labor and material furnished after December 31 were made without any authority from the church and not binding upon the church, and that, therefore, the contract was not extended after December 31. It appears from the record that the party who made the payments after December 31 on behalf of the church is the same party who made the payments before that time; but we do not think it is material here whether there was a valid agreement entered into between the church and the contractors to extend time for the completion of this building. By the contract the church had the option, when the 31st of December passed and the building was not completed, to charge the contractors with the penalties provided in the contract for non-completion of the building on time, or to declare the contract at an end so far as the connection of the contractors with the work was concerned, take possession of the building, and finish it itself. It did not exclude the contractors from the work, nor attempt to do so. It permitted them to go on and furnish labor and material, and it made payments to them for such labor and material, and it thereby elected to regard the contract as in full force and effect, and waived, as it had a right to do, the completion of the building on the day named in the contract, reserving the right to recover damages from the contractors for the delay. We conclude, therefore, that the failure of the church to keep the property insured to the extent of its interest therein was a complete defense to the sureties on the bond of the contractor, and that the judgment rendered against the sureties is contrary to law. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CITY OF BEATRICE V. MICHAEL KNIGHT.

FILED JUNE 19, 1895. No. 6146.

Municipal Corporations: DRAINAGE FOR PRIVATE PROPERTY. The law does not impose upon a municipal corporation the duty of providing drainage for private property within its limits to prevent an inundation thereof caused by the owner of another lot obstructing a water-course by filling his own lot to conform with the established grade of a street.

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

E. O. Kretsinger, for plaintiff in error.

Hugh J. Dobbs, contra.

IRVINE, C.

The defendant in error recovered a judgment against the plaintiff in error on account of damages sustained by the overflowing of a lot of the defendant in error. It will be necessary to consider only one of the errors assigned. At the opening of the trial the city objected to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled, and is the foundation of one of the assignments of error.

The petition averred the corporate existence of the city; that plaintiff was the owner of the south half of lot 6, in block 27; that in 1887, after plaintiff purchased said premises, and while he was occupying the same, the city established a grade for the streets and alleys for that portion of the city, leaving plaintiff's property far below such grade; that one Swigart was the owner of lots 11 and 12, in block 26, which were also below the grade of 1887, and situated on a water-course immediately below the premises

of plaintiff. The petition then proceeded as follows: "That there is a large natural ravine or water-course running down through that portion of said city where plaintiff's premises are situated, and across said blocks 26 and 27 of said city; that said ravine or water-course has its source about two miles east of plaintiff's said premises, and flows in a southwesterly direction through the greater portion of the city of Beatrice into the Big Blue river, and following the channel thereof is about six miles in length from source to mouth; that it has numerous tributaries and has large steep banks on sides and a well defined channel, and with its tributaries forms a natural drainage for all the surface water which falls or accumulates on a large area of land both within and without the corporate limits of said city of Beatrice; that during portions of each year said water-course discharges a large amount of water into the Big Blue river and has existed as a natural water-course from time immemorial, and that the premises of this plaintiff and said Uriah Swigart lie almost wholly within said ravine and are far below the grade established by the engineers of said city; that some time in the spring of 1890 the said Swigart notified the city authorities of said city, and particularly the street committee and street commissioner appointed by the city council of said city, that he desired and intended to fill up and raise the said lots to proper grade, and requested said city council and the said street committee and commissioner to make proper provision to drain off and remove the water whose flow would naturally be impeded and interfered with by his proposed improvements and which would constantly accumulate on the surrounding premises, including the premises of this plaintiff; that thereafter the said Uriah Swigart filled up and raised his said lots to proper grade, and thereby checked, interfered with, impeded, and completely stopped the natural flow of the surface water in said slough or ravine and caused the same to accumulate in large quantities

on the streets, alleys, and lots lying to the east and north of said block 26, and to completely submerge, inundate, and overflow the said premises of this plaintiff from about the first day of February, 1890, to about the first day of June, in said year, to plaintiff's damage in the sum of $200; that said city, notwithstanding the notification herein alleged to have been given the proper city authorities by said Swigart, and notwithstanding the repeated notifications given by this plaintiff of the damage and inconvenience to which he was put by the overflowing of said premises as aforesaid, neglected and refused to provide any means of escape for the water so accumulated on plaintiff's said premises, but negligently and carelessly allowed said water to increase and accumulate on the premises of plaintiff aforesaid in large quantities and to stand and become stagnant and to overflow and submerge the said premises of plaintiff from about the first day of February to the first day of June, 1890, to plaintiff's damage to the full amount of $200 as aforesaid." The petition closed with an averment of the filing of a claim against the city and its rejection.

The petition, it will be observed, amounts to this and nothing more: That the city established a grade for its streets, which, when carried into execution, would leave both plaintiff's and Swigart's lots below grade; that these lots were situated in a water-course, Swigart's below the plaintiff's; that Swigart filled his lots so as to make their surface conform to the established grade of the streets; that by so doing he obstructed the water-course, and thereby caused plaintiff's lot to be inundated, and that the city, although notified of Swigart's proposed action, failed to provide any means for the water whose flow was obstructed by the filling of Swigart's lots to escape. This states no cause of action against the city. Whether Swigart was liable to the plaintiff for his acts, is not involved in this case. To charge the city under this petition it would be

necessary to hold that there is imposed upon the city, in favor of a property owner, the active duty to provide drainage for his lots, or, in the case of a water-course, the duty to provide an outlet for it, when an individual has obstructed its natural flow. There is no such obligation resting upon the city. It is not charged that the city by any act of its caused the obstruction, merely that it failed to provide means to obviate the damage caused by the obstruction by an individual of the water-course.

REVERSED AND REMANDED.

W. C. TILLSON ET AL. V. GEORGE H. DOWNING.

FILED JUNE 19, 1895. No. 6083.

1. **Corporations:** INSOLVENCY: PREFERENCE IN FAVOR OF DIRECTORS. Directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Ingwersen v. Edgecombe*, 42 Neb., 740, followed.
2. ———: ———: ———. Neither can they prefer debts to third persons for which they are obligated as sureties.
3. ———. These rules do not apply to a solvent corporation. On the contrary, such corporations have the same dominion over their property as individuals.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiffs in error.

R. A. Moore, contra.

IRVINE, C.

This action was replevin by Tillson and Osborn against the sheriff of Buffalo county, the property in controversy

being certain machinery and other chattels appertaining to a brick yard. The plaintiffs claimed title through a sale made under foreclosure of a chattel mortgage. The sheriff claimed under a writ of attachment by virtue of which he had seized the property in question as the property of the mortgagor. The attaching creditor was substituted for the sheriff as defendant in the action. The controversy turned upon the validity of the mortgage. There was a verdict and judgment for the defendant. The plaintiffs prosecute error.

The facts which the evidence tends to show are as follows: The Kearney Brick Company was in September, 1890, the owner of the property. It was then indebted to the Kearney National Bank in the sum of $15,000, represented by notes, upon which M. E. Hunter, G. W. Frank, Jr., and S. Y. Osborn, the last named being one of the plaintiffs, were sureties. Frank was vice president, Osborn, secretary and treasurer, and Hunter, general manager of the brick company. The bank insisted upon further security for its claim; whereupon the directors of the brick company authorized notes for $15,000 to be made to the order of Hunter, Osborn, and Frank, to be secured by a mortgage on all the effects of the company, except brick on hand. These notes and this mortgage were executed, and the notes were indorsed to the bank by the payees and the mortgage assigned to the bank. The persons who conducted the transaction testify that the object of these proceedings was to secure the bank's debt, and that it was given the form it took in order to obtain the indorsement of Hunter, Frank, and Osborn. In January, 1891, the bank proceeded to foreclose the mortgage, and in February the property was sold to Osborn and Tillson, the latter being cashier of the bank. At a later period, not shown very distinctly by the evidence, but presumably after the attachment had been levied, and after the plaintiffs had regained possession of the property by the writ of replevin in this

case, the property was sold to the Electric Brick Company, a new corporation, whose stock was, for the most part, held by Frank and other stockholders of the late company, and organized apparently with a view to making the purchase. Tillson and Osborn paid at the foreclosure sale $6,000 for the property, which was applied on the brick company's notes; they sold the property to the new company for $17,000, Frank and another borrowing the money from the bank to make the purchase. Out of this money Tillson and Osborn repaid themselves the amount of their investment with interest, and with the remainder discharged the remaining indebtedness of the late company to the bank. No question of the rights of a purchaser without notice at the foreclosure sale can well enter into this case, because Tillson, as cashier of the bank, and Osborn, as an officer and director of the brick company, had notice of the transaction, and because it was evident from the way in which the property was handled that in purchasing, holding, and disposing thereof they were in reality acting on behalf of the bank and not in their own interest.

Among the instructions was the following, given at the request of the defendant: "You are instructed that a director of a corporation, or a number of directors, cannot convey the property of a corporation to themselves for the purpose of securing them for indorsing notes for the corporation to the exclusion of other creditors." The giving of this instruction is assigned as error. Standing alone, the instruction would be open to the objection that it would lead the jury to believe that the fact that the mortgage was made to Hunter, Frank, and Osborn, instead of to the bank directly, might be of controlling force. But by other instructions the jury was told, and, we think, correctly, that the mortgage might still be valid if made to secure the bank, notwithstanding it took the form of a mortgage to the indorsers, by them assigned to the bank. The principal question arising in regard to this instruction is, how-

ever, one of much more importance, and calls for a consideration of nearly the whole case on its merits. Is it true that directors may not convey the corporate property to themselves, to the exclusion of other creditors, for the purpose of indemnifying themselves as sureties for the corporate debts? This court has held that contracts between a corporation and its directors, while they will be carefully scrutinized, are not necessarily void. (*Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548.) In that case the corporation mortgaged its property to certain of its directors to indemnify the latter as accommodation makers of notes for the corporation. The transaction was upheld, its good faith being established. On the other hand, it has been held that the directors of an insolvent corporation cannot take advantage of their position to secure a preference for themselves, and a mortgage given to directors under such circumstances was held void. (*Ingwersen v. Edgecombe*, 42 Neb., 740.) We think both these cases are in line with the great weight of modern authorities. If, then, the brick company were insolvent and the mortgage had been made to secure a debt then owing by the brick company to Hunter, Frank, and Osborn, it would be void. Is there a distinction between a mortgage given to secure a debt to the director and a mortgage given to secure a debt to a third person for which the director is surety? In *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep., 615, a very similar state of affairs existed. Hook, the president of a railroad company, having indorsed its note to a bank, made its drafts on another company owing it money for the purpose of securing this note. Soon after the railroad company went into the hands of a receiver. The drawee of the drafts paid the money to the receiver, and the bank filed a petition asking that the receiver be required to pay the amount of the drafts over to the bank. The court held that this was an illegal preference. It will be observed that here the relation of the president to the debt due to the bank was that

of surety, and the case is, therefore, on this feature, precisely in point. The court held "that this difference in Mr. Hook's relation to the railroad company, as compared to that of a creditor proper, would make no difference in the application of the rule in regard to giving preference." *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep., 577, is to the same effect, as is also *Howe v. Sanford Fork & Tool Co.*, 44 Fed. Rep., 231. (See, also, *Adams v. Kehlor Milling Co.*, 35 Fed. Rep., 433; *Gottlieb v. Miller*, 39 N. E. Rep. [Ill.], 992; *Lowry Banking Co. v. Empire Lumber Co.*, 17 S. E. Rep. [Ga.], 968.) Most of the foregoing are quite recent cases, and as they cite prior authorities, we will not repeat the citations. To the contrary is *Worthen v. Griffith*, 28 S. W. Rep., 286, but that is an Arkansas case governed, evidently, to a large extent, by former Arkansas decisions construing the powers of corporations in the matter of preferences more liberally than they have been construed in most other states; and it is based entirely upon reasoning directly contrary to that upon which *Ingwersen v. Edgecombe* is based. We hold that an insolvent corporation may not convey its property to a creditor for whose debt directors of the corporation are sureties, and that the rule in *Ingwersen v. Edgecombe* forbids not only preferences by directors of their own debts, but also of all debts in which they are interested, and which they would reap a personal advantage by preferring. The instruction, however, is vicious in applying the rule to all corporations, without regard to the question of insolvency. The solvency or insolvency of the brick company was by the instruction entirely withdrawn from the consideration of the jury. *Gorder v. Plattsmouth Canning Co.* and *Ingwersen v. Edgecombe* mark the distinction in such cases. In *Sutton Mfg. Co. v. Hutchison*, 63 Fed. Rep., 496, the opinion is by Mr. Justice Harlan, and is too long for quotation here, but its effect is that so long as a corporation is in active exercise of its functions

it may, having due regard to the objects of its creation, exercise as full dominion over its property as an individual, but when it becomes insolvent and has no purpose of continuing business its powers are more limited. In the former case it may accept assistance from its directors, and by mortgage, or otherwise, protect them against liability, but in the latter case it will not be permitted to mortgage its property to secure a liability previously incurred to its directors.

The questions we have discussed cover the salient points of the case, and the considerations referred to will be sufficient, we think, to govern further proceedings. Consequently, no further assignments of error will be considered.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY v. WILLIAM FALLON.

FILED JUNE 19, 1895. No. 5882.

1. **Insurance**: APPLICATION: MISSTATEMENTS: ESTOPPEL. An insurance company is liable on its policy issued on a written application misstating the facts, where such misstatements were written in the application by the company's agent, the insured having correctly stated the facts and acted otherwise in good faith, not consenting to or knowing of the misstatement.

2. ———: SIXTY DAYS' LIMITATION OF ACTION: WAIVER. Where an insurance company, either before suit brought or by answer in the action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment.

3. ———: AGENCY: EVIDENCE. Evidence set out in opinion *held* sufficient to establish an agency and also a denial of liability before action brought.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

A. S. Churchill, for plaintiff in error.

M. F. Harrington, contra.

IRVINE, C.

The defendant in error was the owner of certain grain in a warehouse in O'Neill. The warehouse and grain were destroyed by fire January 6, 1892. The defendant in error held a policy of $1,200 in the Home Fire Insurance Company on this grain, and February 1, 1892, brought this action to recover on the policy. He obtained judgment, and the insurance company brings the case here on error.

Plaintiff in error argues in its brief several questions in regard to the admission of evidence. The only assignments of error relating to the subject are as follows: "2. For errors committed on the trial in the admission of the evidence of plaintiff as a witness on his own behalf and at the time duly excepted to by the defendant. 3. The court erred in refusing to strike out the evidence of the plaintiff as a witness upon the motion of the defendant upon his cross-examination, it having been shown by such cross-examination that such evidence was incompetent, to the overruling of which motion the defendant at the time excepted." These assignments are too general to present any questions to this court for review. They do not point out the particular rulings complained of. There were a great many objections overruled during the progress of the plaintiff's examination. There were three motions made to strike out his testimony during his direct examination after questions interposed by the defendant. There was none during his cross-examination proper, although the defendant itself interposed a number of "objections" during the cross-exami-

nation, which so-called "objections" were perhaps in the nature of motions to strike out his direct testimony.

The evidence showed that the policy was based on a written application signed by the insured, wherein, among other things, appeared the following interrogatories and answers: "The stock of merchandise. * * * Average value? $1,900. How often is inventory taken? Know at all times. Amount of last inventory? $1,950." One of the defenses pleaded was that these statements were false. The evidence showed that the insured was engaged in buying grain from a number of different persons down to the latter part of December, and that during the same period, and later, he from time to time shipped grain to Chicago. The evidence as to purchases and shipments is very voluminous; and we have not entered upon the calculation necessary to determine just what amount of grain was on hand at different times. Nor is there sufficient evidence as to the value from time to time to enable us to make such a calculation with any degree of exactness. For the purpose of considering the case, we shall assume that the company's contention is true, and that the evidence discloses that there was not $1,950 worth of grain on hand when the application was made, and that the average amount kept on hand did not reach in value $1,900. It seems that a Mr. Lyons was the company's agent at O'Neill. He signed the agent's certificate on the application, and he signed the policy. The plaintiff, however, testifies that he applied to James Harrington for the insurance, when he stated to Harrington the amount of grain on hand, but not its value; that Harrington inserted the answers to the questions in the application; that Fallon signed the application without having it read over to him, and without knowing that these representations as to value were contained in it. But evidence as to Harrington's relations to the company is very meager. Fallon speaks of him as the agent of the company, and there is certainly sufficient similarity in the handwriting in the

application, in the agent's certificate on the application, and in the body of the policy itself to warrant the jury in believing that it was all done by the same person. It appears that Harrington lived at O'Neill; it does not appear as stated in the company's brief that he had left the country. Both Lyons and the company's adjuster were on the witness stand, and do not contradict Fallon's statement that Harrington was an agent, nor his statement that the application was made to Harrington. Harrington seems to have been enough the company's agent to procure the policy to be issued. The company, on an application to Harrington, issued the policy and received the premium, and we think that, in the absence of any evidence to the contrary, the foregoing was sufficient to establish the fact of his agency for the company in writing policies.

The court instructed the jury, in effect, that the plaintiff could not recover if he authorized the statement as to the value of the grain, or if he knew when the application was delivered; that it contained such statement; but that the plaintiff was responsible for the statement if Harrington was not the agent of the company, or assisting or cooperating with Lyons. The court refused to instruct, at the request of the company, that unless the representations were substantially true there could be no recovery. The refusal of this instruction is assigned as error. To have given it would have bound the insured by the statements in the application, even if they had been made by the agent of the company without the consent or knowledge of the insured. This is not the law. Indeed counsel for the insurance company frankly admit "that there are many decisions holding that where a party applies to an agent for insurance, and correctly states the facts, the company is liable, although the agent may not write in the application the answers given by the insured." *State Ins. Co. of Des Moines v. Jordan*, 29 Neb., 514, recognizes this principle. It is true that in that case it appeared that the in-

sured was unable to read. But we do not think the distinction in the cases material. When the insured states the facts correctly to the company's agent, he is not bound to exercise vigilance thereafter to determine whether the agent is exercising care or good faith in his transactions on behalf of the company. In other words, the company is estopped from seeking to avoid its contract because of a mistake or fraud committed by its own agent, the insured having acted in good faith, although, perhaps, somewhat negligently.

In this connection it is also argued that the court erred in permitting the plaintiff to amend his pleading so as to introduce this issue in the case. But there is no assignment of error reaching this point.

The policy contained a provision that the loss should be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss had been received by the company, and that no action should be maintained within that time. This suit was brought in less than thirty days after the fire. The jury found specially that prior to the commencement of the action the company had denied all liability upon the policy. It is clearly the law that such denial of liability prevents the company from insisting on this provision. (*Hoffecker v. New Castle County Mutual Ins. Co.*, 5 Houst. [Del.], 101; *Allegre v. Maryland Ins. Co.*, 6 H. & J. [Md.], 408; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564; *Williamsburg City Fire Ins. Co. v. Carey*, 83 Ill., 453; *Cobb v. Ins. Co. of North America*, 11 Kas., 93; *California Ins. Co. v. Gracey*, 15 Col., 70.) The company, however, while tacitly recognizing this principle, contends that the proof was insufficient to sustain the special finding of the jury. The plaintiff testifies that he gave immediate notice of loss to the company; that sometime afterwards he was accosted by one Denman, who is shown to be the company's adjuster, and after some talk about the fire, Denman said, to use Fallon's language, "He was onto me;" that he had been in O'Neill several days investigat-

ing the matter, and had affidavits of thirty-two men to prove that there was not the amount of grain there which was claimed, and that Fallon had left for the purpose of having the building burned, and he also told Fallon that the latter knew who did burn the building, and that he afterwards made the proposition "that if you let this case go by —if you would not bother with the Home Fire Insurance Company—I will give you the affidavits of these thirty-two men to show who are your friends." Fallon met him again and asked him "Will you admit that I had any loss?" He said, "I will if you will admit that Mr. Hayes had an interest in the property." According to the terms of the policy this fact, if established, would defeat a recovery. On the 12th day of January Fallon executed an affidavit in the nature of proofs of loss. This affidavit stated "that the property destroyed and its cash value was as follows:

481 bushels of rye, worth.....$322.27
870 bushels of oats, worth..... 174.00
477 bushels of corn, worth..... 119.25
748 bushels of wheat, worth..... 501.16

that all of said property was insured by said policy, and was totally destroyed; that there were no incumbrances on said property, and that there was no other insurance on said property, that he was the only person who occcupied the building described in said policy, and in which the property destroyed by said fire was situated at the time of the fire." It was after this proof was furnished that the adjuster appeared. The policy required that the proofs should state, among other things, the "cash value of each item thereof [meaning the property destroyed], and the amount of loss thereon. * * * Any change in the title, use, occupation, location, position, or exposures of said property since the issuing of this policy. By whom, and for what purpose any building herein described and the several parts thereof were occupied up to the time of

the fire." So far as we can see, the proofs furnished by Mr. Fallon answered these requirements. But the company returned them for the very absurd and untenable reason "that they do not show the market price of the various kinds of grain at O'Neill, Nebraska, claimed to have been damaged or destroyed by said fire, nor the purpose for which the building containing such grain was used." It is true that this last letter was not written until after the suit was brought, but it indicates the disposition of the company in regard to the loss. The adjuster demanded an inspection of Fallon's books and papers. Fallon testifies that he said he would submit them for examination if liability under the policy were admitted. The adjuster would not admit liability, but insisted upon ascertaining the amount of the loss before doing so. In one letter from the company Mr. Fallon is told that it is absurd in him to assume that the company must admit liability before ascertaining whether any liability exists. This hardly states Mr. Fallon's position correctly. The absurdity was rather in the company's insisting upon examining Mr. Fallon's private accounts without admitting a contractual relation with him which would justify such an examination. On the whole evidence there can be no doubt that what had occurred prior to the bringing of the suit was sufficient to convey to Mr. Fallon the information that the company did not intend to pay the loss. It justified the jury in reaching the same conclusion, and we think the special finding was amply supported. It has been held that when a company denies liability on the ground that the policy was not in force when the loss occurred, this is a waiver of all requirements as to notice or proofs of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, 569; *German Insurance & Savings Institution v. Kline*, 44 Neb., 395; *Dwelling-House Ins. Co. of Boston v. Brewster*, 43 Neb., 528.) So held where the denial of liability is contained in the answer, and was not made before action

brought. (*Omaha Fire Ins. Co. v. Dierks, supra.*) The reason of this is that the company cannot be permitted at the same time to say that the policy was not a valid and existing contract, and claim privileges derived only under the contract. We think the same principle applies to this case. The company showed by the action of its agent before the suit was brought that it was endeavoring to escape liability, and intended to avoid its obligations if possible. When sued it pleads that the policy was procured through misrepresentation, and was, therefore, not a valid contract. As said by Judge Brewer in the Kansas case already cited, the sixty days provision is merely a contract for credit, and the company certainly cannot avail itself of a provision for such credit when that provision is a part of a contract which the company claims is not in force.

JUDGMENT AFFIRMED.

GEORGE THOMPSON, APPELLEE, V. JOHN C. LUKE, APPELLANT, ET AL.

FILED JUNE 21, 1895. No. 5908.

Conflicting Evidence: REVIEW. A judgment or decree based upon conflicting evidence will not be disturbed by this court unless clearly wrong.

APPEAL from the district court of Douglas county. Heard below before SCOTT, J.

Montgomery, Charlton & Hall, for appellant.

F. W. Fitch, contra.

POST, J.

This is an appeal from a decree of the district court for Douglas county, the facts essential to an understanding

of the questions at issue being as follows: On the 23d day of December, 1891, the plaintiff, as assignee of Robertson & Harris, commenced this action in the district court to enforce a mechanic's lien against certain lots in Luke & Templeton's addition to the city of Omaha for labor furnished and performed by his assignors under a contract with the defendant, John C. Luke. Henry & Frey, who claim as subcontractors under Robertson & Harris, and Allen A. Lambert, who claims under a contract with Luke, were made defendants, and filed cross-bills for the purpose of asserting liens against the property described in the petition. There was a finding and decree against Luke in favor of the several parties claiming adversely to him, from which the former has appealed to this court.

The petition and several cross-petitions are based upon verbal contracts with Luke for the furnishing by Robertson & Harris, and Lambert, of labor in the erection of buildings on the lots above mentioned. Luke answered the several petitions (1) by a specific denial of the alleged verbal agreement, and (2) by an allegation that all labor furnished and performed by said contractors was under and by virtue of written agreements, which are set out at length. Plaintiff in reply admits the written agreement alleged, but says: "That after the memorandum or contract in defendant's answers set forth was signed and entered into, the same was wholly set aside, rescinded, destroyed, and made null and void by agreement of the parties thereto, and before any work or labor was done and performed as set forth in the plaintiff's petition, and thereupon, shortly thereafter, a verbal contract was made and entered into between the said J. C. Luke and Robertson & Harris, whereby said houses were to be built on other and different lots, * * * whereby other, larger, and more expensive houses were to be built, and more and extra work required and done, and whereby said J. C. Luke promised and agreed to pay the said Robertson & Harris for the time they and their em-

ployes put in, used, and labored in the construction of said buildings." The cross-petitioners in reply deny the several allegations of the answers.

The question first presented relates to the agreements under which the labor was performed. It is earnestly contended that the finding for the appellees upon that issue is against the weight of the evidence; but an examination of the record fails to sustain that contention. The claim of the plaintiff is sustained by a decided preponderance of the evidence, while the most that can be claimed as to the finding for the cross-petitioners is that the evidence is conflicting, but not warranting a reversal on this appeal. An analysis of the evidence in connection with the statement of the accounts by counsel for the respective parties has satisfied us that all items not clearly chargeable under the contracts were rejected by the district court and that the decree should accordingly be

AFFIRMED.

CITY OF WAHOO, APPELLEE, V. NATHAN D. THARP ET AL., APPELLANTS.

FILED JUNE 21, 1895. No. 5758.

1. **Towns and Villages:** EXTENSION OF BOUNDARIES. The boundaries of a town or village may, under the provisions of section 99, chapter 14, Compiled Statutes, be extended so as to include adjacent lands, provided said territory is in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. (*State v. Dimond*, 44 Neb., 154.)

2. ———: ANNEXATION OF TERRITORY: EVIDENCE. Evidence examined, and *held* to sustain the judgment of the district court annexing certain adjacent lots and subdivisions of land to a city of the second class.

APPEAL from the district court of Saunders county. Heard below before BATES, J.

Good & Good and *Simpson & Sornborger*, for appellants.

H. Gilkeson, contra.

POST, J.

This was a proceeding in the district court of Saunders county by the city of Wahoo, under the provisions of section 99, chapter 14, Compiled Statutes, having for its object the annexation to said city of certain adjacent lots and subdivisions of land. The basis of the proceeding is a resolution of the city council, wherein is recited that "it is deemed by the city of Wahoo to be advisable and for the best interests of said city that said contiguous territory be annexed to and made a part of the city of Wahoo; that we demand as of right the annexation to said city of the contiguous territory described as follows: * * * ." Upon the adoption of said resolution a petition was presented to the district court by the city, praying for an order extending its boundaries so as to include the lots and subdivisions therein described and alleging, as grounds therefor, that "said property, or a large part thereof, is laid out and platted into building lots, and largely occupied by residents thereon, who, if annexed as prayed, will receive the police protection and the protection of the fire department of said city; * * * that the lands and lots aforesaid contiguous to the plaintiff have been greatly enhanced in value by reason of their proximity to said city, but that the owners and residents thereon have not borne any of the expenses and burdens incident to the city government, although deriving great advantage therefrom." The numerous answers contain substantially the same allegations, viz., that the several lots and subdivisions are used for the purpose of agriculture, pasture, and gardening; that they would be in

nowise benefited by being annexed to said city, and that it would be inequitable and unjust to charge the owners and residents thereof with the expenses of city government. It is also alleged that in the year 1887 a like proceeding was had by the city for the purpose of annexing the same territory; that the city therein alleged the same facts as are now charged, and that said allegations were all put in issue by answers as in this case; that upon final hearing the issues were all determined in favor of the defendants, and the petition dismissed at the cost of the city, which judgment has never been reversed or modified. The city, by way of reply, admitted the former proceeding and judgment, but alleged that subsequent to the date of said judgment the city has constructed an extensive and complete system of water-works, ample for the supply and protection of the city and the territory sought to be annexed; that it has since said date extended its streets, sidewalks, and crosswalks to and in the near proximity to said territory; that it has within said time extended its street lights to the vicinity of said property at great expense, and that the population of said city has, during said period, greatly increased. A hearing was had, resulting in a general finding for the city, and a judgment thereon, from which the defendants have prosecuted an appeal to this court.

As the principal reliance of the appellants is upon the former judgment it is pertinent to inquire what is the effect of the allegations of the pleadings so far as they relate to that subject. It is conceded that the doctrine of estoppel by judgment is applicable to the case at bar, provided the present conditions are substantially the same as those existing at the date of the judgment relied upon. It seems, therefore, that the answer is sufficient as a plea of *res judicata*. The allegations of the reply amount to no more than a denial of the plea of the answer, leaving the burden of that issue upon the defendants.

It is shown by the plat accompanying the record that the

tracts of land in question are lots ranging in size from one and a half to eight acres, all adjoining the city and contiguous to platted additions thereto. The evidence adduced on the part of the city tends to prove that subsequent to the former judgment it has constructed a system of waterworks, including four or five miles of mains, with forty-seven fire hydrants; that it has the customary fire department which is supplied with carts, hose, etc., and that the buildings situated on said lots are, with few exceptions, within the protection afforded thereby; that there has been a considerable increase of the city's population, resulting in an extension of the streets and sidewalks, which are in constant use by the owners and residents of said tracts. Some of the foregoing propositions are controverted by the defendants, but the court evidently found that the former judgment was based upon conditions substantially different from those disclosed by the proofs, and that conclusion has ample support in the record. It was held in *State v. Dimond*, 44 Neb., 154, that lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity to the platted portions as to have some unity of interest in the maintenance of municipal government, and such, judging by the record, is the rule which was recognized by the district court.

It is argued that there is no competent evidence of the adoption of the necessary resolution by the city council. The record introduced in evidence over the objection of the defendants shows the adoption of a resolution in due form, but it is contended that there was no foundation therefor, since it does not appear that the meeting in question was a regular one, or, if a special meeting, that it was called in the manner prescribed by law; but by reference to the record of said meeting we observe: "The council met in regular session. On roll call the following members were found to be present." We can conceive of no foundation which could be laid to add authenticity to the record re-

quired by law to be kept, and which is the best, if not the only, evidence of the proceedings of the city council. There being no error apparent from the record the judgment will be

AFFIRMED.

JACOB RIPP V. DAVID A. HALE.

FILED JUNE 21, 1895. No. 6201.

1. **Contracts:** AGREEMENTS FOR BENEFIT OF THIRD PERSONS: ACTIONS. As to the points decided in this case on a former hearing in this court, opinion reported in the 32 Neb., 259, the conclusion and rule therein announced are at this time followed and adhered to.
2. **Trial.** A ruling of the trial court excluding certain evidence examined, and *held* not erroneous.
3. **Sufficiency of Evidence.** Evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Platte county. Tried below before MARSHALL, J.

Albert & Reeder, for plaintiff in error.

Robinson & Reed, contra.

HARRISON, J.

This case was commenced in the district court of Platte county by D. A. Hale to recover from Jacob Ripp the amount of a subscription alleged to have been made by him in favor of one Henry Gebecke and assigned to D. A. Hale. The case was tried before the court and a jury, and at the close of the testimony a verdict was directed for the defendant. The case was brought to this court for review and the judgment reversed and the case remanded. The decision then filed is reported in 32 Neb., 259, and to it we

refer for a statement of the cause of action. It was then held: "That the questions of fact involved in the case should have been submitted to the jury, and the court erred in directing a verdict. Where a party makes a promise to another for the benefit of a third person, such third person may avail himself of the promise and bring an action thereon, although the consideration did not move directly from him." At a second trial of the case in the district court, by agreement of parties the cause was submitted upon the evidence taken during the former trial, no new evidence being offered by either party, the only change made being, that on objection by plaintiff, "Exhibit E," page 367 of the deed record, a copy of a deed from plaintiff and wife to the Fremont, Elkhorn & Missouri Valley Railroad Company, conveying to it some seven acres of the land deeded by Gebecke to Hale as agent for the company and which had been admitted at the former trial, was at the time excluded. There was a verdict by the jury in favor of the plaintiff, and after motion for new trial on behalf of defendant was heard and overruled, judgment was rendered in accordance therewith. To review the proceedings during the second trial the case is again presented to this court.

The district court in the second trial of the case obeyed the direction of this court as embodied in its opinion rendered at the former hearing, and its action in so doing was the only correct and proper one, and in so far as the former adjudication of the case in this court related to the facts developed during the trial, and their sufficiency to require a submission of the issues to the jury for their consideration and determination, it will not now be re-examined but will be adhered to. The rule of law which was announced in the former decision as being applicable to the facts became the law of the case and must now be allowed to govern in its disposition, and, viewed in the light of such rule, the evidence was sufficient to sustain the verdict rendered.

It is insisted that the trial court erred in excluding from the evidence the page of the deed record which, if admitted, would have shown that the plaintiff executed a conveyance to the Fremont, Elkhorn & Missouri Valley Railroad Company of about seven of the forty acres of land conveyed to him as agent for the company. We do not think the court erred in its action as to this piece of evidence. The land was conveyed to plaintiff, not for himself, but as agent for the railroad company. What they did with it or in relation to it afterward could not and did not affect the liability of the defendant upon this subscription, nor tend in any manner nor to any extent to aid the jury in a determination of any of the issues submitted to them. Hence, what would have appeared had this evidence been received, would have been without weight in deciding the questions passed upon by the jury, and it was not error to exclude it.

It is urged that the court erred in refusing to give paragraphs 1, 2, 3, 4, 5, and 6 of instructions asked by defendant. It is the established rule of this court, that under such an assignment, the instructions refused will be examined no further than to ascertain that the action as to any one of them was proper or correct. The instructions referred to were mainly directed to presenting to the jury the contrary view of the law applicable to the case from the one stated in the former decision, and two or three, if not all of them, were clearly erroneous.

Another assignment of the motion for a new trial was as follows: "The court erred in giving paragraphs 2, 3, and 4 of its charge to the jury." Instruction numbered 3 is not erroneous. This being determined, we need not examine the instructions further, as an assignment that the trial court erred in giving a group of instructions will be considered no further when it appears that any one of them was properly given. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JOHN W. HOWARD.

FILED JUNE 21, 1895. No. 6295.

1. **Fellow-Servants**: BRAKEMEN: NEGLIGENCE: DAMAGES. A brakeman is a fellow-servant of another brakeman when both are employed upon the same train; and an accident which happens to one solely by reason of the negligence of the other does not render liable for consequent damages the common employer of both.
2. ———: DEFECTIVE APPLIANCES: NEGLIGENCE OF SERVANT. The happening of an accident through the displacement of a draw-bar or coupler of a designated kind or design, is not sufficient proof that such kind or design of appliance is defective, when the displacement complained of is clearly shown to have been caused by the negligent and reckless manner in which the car equipped with such coupler or draw-bar was violently pushed against another car.
3. **Physicians and Surgeons**: EMPLOYMENT BY VOLUNTEER: MALPRACTICE: LIABILITY OF EMPLOYER FOR DAMAGES. A surgeon is required in the exercise of his profession to employ only that degree of knowledge and skill ordinarily possessed by members of the same profession. Where one as a volunteer undertakes to provide necessary surgical services for another, he cannot be held liable in damages for the negligence or malpractice of such surgeon as he summons, provided such surgeon possesses the knowledge and skill ordinarily possessed by other surgeons, and the employer had no reason to suspect that such surgeon would neglect or fail to use his knowledge and skill to the advantage of his patient.

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

The facts are stated by the commissioner.

T. M. Marquett, J. A. Kilroy, and *J. W. Deweese,* for plaintiff in error:

We contend that under the evidence and the findings of

the jury the plaintiff below was not entitled to recover anything. It is clear that the accident was caused solely by reason of the fact that the plaintiff himself left the coal car too close to the switch track, and being thus the efficient cause of the accident himself, he cannot recover for the result of the injury. If plaintiff was free from fault he cannot recover, because the brakemen were fellow-servants. (*Newman v. Chicago, M. & St. P. R. Co.*, 44 Am. & Eng. R. Cases [Ia.], 555, and authorities cited; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 258; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 222; *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep., 906; *Highland Avenue & B. R. Co. v. Walters*, 8 So. Rep. [Ala.], 360; *Muldowney v. Illinois Central R. Co.*, 36 Ia., 466; *Davis v. Detroit & M. R. Co.*, 20 Mich., 128; *Brady v. Ludlow Mfg. Co.*, 28 N. E. Rep. [Mass.], 901.)

The jury made a special finding to the effect that the cause of the accident was the fact of leaving the coal car so close to the switch that the stock car would not pass, and that otherwise the accident would not have happened. We claim that the special finding governs in preference to the general verdict, and that the court should have rendered judgment in favor of the defendant below on the special finding of the jury. (*Baird v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 460; *Korrady v. Lake Shore & M. S. R. Co.*, 29 N. E. Rep. [Ind.], 1071; *Rice v. City of Evansville*, 108 Ind., 7; *Lake Shore & M. S. R. Co. v. Pinchin*, 13 N. E. Rep. [Ind.], 677; *Thompson v. Cincinnati L. & C. R. Co.*, 54 Ind., 201; *Ogg v. Sheehan*, 17 Neb., 323; *Marx v. Kilpatrick*, 25 Neb., 118; *Bierbower v. Polk*, 17 Neb., 275.)

After the testimony of plaintiff was in, showing the accident would not have happened but for the fact that he had left the coal car too close to the switch track, and showing that was what caused the collision and the injury, the defendant moved the court for a nonsuit, which the court

erroneously overruled. (*Flemming v. Western P. R. Co.*, 49 Cal., 257; *Davis v. Detroit & M. R. Co.*, 20 Mich., 128; *Hart v. Peters*, 13 N. W. Rep. [Wis.], 219; *Hobson v. New Mexico & A. R. Co.*, 11 Pac. Rep. [Ariz.], 545; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Manzy v. Hardy*, 13 Neb., 36; *Osborne v. Kline*, 18 Neb., 314.)

We do not concede that there was maltreatment on part of the physicians, but if there was, the company is not liable for damages. (*City of Crete v. Childs*, 11 Neb., 252; *Union P. R. Co. v. Artist*, 60 Fed. Rep., 365; *Atchison, T. & S. F. R. Co. v. Zeiler*, 38 Pac. Rep. [Kan.], 282; *Pullman Palace Car Co. v. Bluhm*, 109 Ill., 24; *Lyons v. Erie R. Co.*, 57 N. Y., 489; *Stover v. Bluehill*, 51 Me., 443; *Loeser v. Humphrey*, 41 O. St., 378.)

Dilworth & Smith, also for plaintiff in error.

Capps & Stevens, contra:

In support of the argument that there was such negligence on part of the company in failing to furnish proper machinery and appliances as to make it liable for damages, counsel for defendant in error cited the following authorities: *Grand Trunk R. Co. v. Cummings*, 106 U. S., 700; *Delude v. St. Paul City R. Co.*, 56 N.W. Rep. [Minn.], 461; *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49; *Cayzer v. Taylor*, 10 Gray [Mass.], 274; *Hamilton v. Rich Hill Coal Mining Co.*, 18 S. W. Rep. [Mo.], 977; *Houston & T. R. Co. v. Oram*, 49 Tex., 341; *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep., 723; *Taylor v. Missouri P. R. Co.*, 16 S. W. Rep. [Mo.], 206; *Galveston H. & S. A. R. Co. v. Garrett*, 13 S. W. Rep. [Tex.], 62; *McCully v. Clarke*, 40 Pa. St., 402; *Salmon v. Delaware, L. & W. R. Co.*, 9 Vroom [N. J.], 11.

As to the liability of the company for the malpractice of the physicians the following authorities were cited by defendant in error: *Mowrey v. Central City R. Co.*, 66 Barb.

[N. Y.], 46; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis., 633; Shearman & Redfield, Negligence, secs. 438, 439, 441.

RYAN, C.

1. This action was brought by the defendant in error in the district court of Adams county for the recovery of damages alleged to have been sustained by defendant in error solely through the negligence of the plaintiff in error. In the petition two railroad companies were named as defendants, but as these designations seem to refer to but one company, we shall hereafter speak of the defendants as a single entity. Plaintiff in the district court was a brakeman on a freight train, of which the runs, always made in daylight, were between Hastings and Lincoln. On June 29, 1891, this train, on its way from Hastings to Lincoln, stopped in the afternoon at Dorchester. There it was required that a loaded thirty-ton coal car should be switched from a side track into the train to be hauled to Lincoln. This was done by placing the coal car upon the main track and, after the switch had been turned for the purpose, shoving the coal car back upon the main track beyond the switch. The place where the coal car could be safely left on the main track was, by signals, indicated by brakeman Morledge, who turned the switch as required, and the coal car was left at a point thus indicated by him. Owing to some inadvertence, or perhaps some miscalculation of this brakeman, the coal car was permitted to come to a stop at a point so near the switch that a car passing on the side track would not clear it. It is claimed it was not known to plaintiff that the coal car was left at such a point as to render probable an injury to any one riding on a car along the side track, and that if to such a person an injury happened by reason of a collision with the coal car the railroad company should be liable for resulting damages.

2. After the coal car had been disposed of, the plaintiff,

under directions of the conductor, undertook to place a stock car opposite a certain chute on the side track. Mr. Morledge, after adjusting the switch, signaled for the engine to be backed rapidly. This signal was communicated to the fireman, who in turn signaled to the engineer, and the backing was promptly done as required. Plaintiff stepped upon the platform of a car between the stock car and the engine, known as the "show car." This was an old passenger car equipped with a Miller coupler and was used by a traveling party of show people. Mr. Morledge, when the nearest platform of the show car reached him, stepped upon said platform just as plaintiff, having reached the stock car just ahead of the show car, was attempting to reach the ladder for the purpose of climbing to the top of the stock car that he might there manage its brakes. His right foot was on the hand-rail on the corner of the stock car. At this instant there was a collision between the corner of the stock car moving at the rate of about seven miles per hour and the coal car standing on the main track. By the resulting jolt the draw-bar of the show car was bent out of shape, and for some reason, not satisfactorily explained, the Miller coupler struck the iron rod on which rested the plaintiff's foot in such manner as to catch plaintiff's said foot between said iron rod and the end of the show car, and at the same time bent the rod against said foot and greatly bruised it. In argument it is urged that the railroad company was negligent in permitting to be placed in its train the show car, equipped as it was with a Miller coupler.

3. The injured man was taken to Hastings on the first passenger train going westward. In the petition it was alleged that immediately after plaintiff's arrival in Hastings the railroad company's yardmaster at that place summoned Dr. Chapman, who made an examination of plaintiff's injuries and said he thought he could save the foot, and that "thereafter Dr. Chapman, of Hastings, Dr. Livingstone,

of Plattsmouth, and Dr. Denny, of Lincoln, both and all of whom were duly authorized agents, physicians, and surgeons of and in the employ and pay of defendants, then and thereafter, as will be more fully told herein, took full and complete charge of plaintiff's injury and case. Plaintiff further alleges the fact to be that the said Chapman, Denny, and Livingstone, the physicians and surgeons above named, agents of defendants, are each and all of them men who possess as well as profess a high degree of skill, ability, and knowledge of medicine and surgery." Following the above quoted language it was averred, in effect, that by reason of the neglect of said surgeons to amputate his injured foot, plaintiff was caused to suffer much pain, and that finally the said amputation was negligently performed. On account of the aggravation of plaintiff's sufferings through the alleged negligence of the aforesaid surgeons he claimed he should recover damages against the railroad company. On his aforesaid causes of action there was a verdict and judgment for $6,000.

4. It is observable that there was no complaint in the petition that Mr. Morledge was not a careful, competent brakeman. From the fact that this brakeman did not signal so that the coal car should be placed on the main track beyond the reach of a car on the side track, it is however urged that the railroad company should be held liable. That this proposition must have been approved by the district court is evident from the fact judgment was rendered on the general verdict, notwithstanding the answers of the jury to special interrogatories numbered 1 and 3. These are as follows:

"1. Was the plaintiff injured by reason of the coal car being left on the main track so close to the switch as not to leave room for the cars to pass by on the switch without collision? Ans. Yes."

"3. Would the accident have happened if the coal car had been left at a sufficient and safe distance from the

switch so as to leave room for the cars to pass in on the side track without striking the coal car? Ans. No."

There is no question made, nor is there room for doubt, that Mr. Morledge and the defendant in error were fellow-servants in the strictest legal sense of that term. They were employed in the management of the same train, and every consideration which operates to exonerate the employer from liability for an injury sustained by an employe, owing entirely to the negligence of a co-servant, applies with full force. (See *Youll v. Sioux City & P. R. Co.*, 66 Ia., 346; *Chicago & A. R. Co. v. Rush*, 84 Ill., 570; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan., 188; *Besel v. New York C. & H. R. R. Co.*, 70 N. Y., 171; *Houston & T. C. R. Co. v. Gilmore*, 62 Tex., 391.) The fact that there was negligence, and that it was the sole cause of the injury, was fixed beyond peradventure by the above special findings of the jury. It is provided by section 294 of the Code of Civil Procedure: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Under the admitted facts, and those which, with the same binding effect, had been established by the above special findings of the jury, there was error in rendering judgment in accordance with the general verdict.

5. There was no evidence that the railroad company was guilty of negligence in permitting to be placed upon its line of railroad the show car, on account of any of its parts being out of repair. Such criticism as has been offered has been with reference to the alleged fact that the Miller coupler was one of bad design. There was no proof of this claim other than such inferences as were drawn from the fact that at the time the stock car, moving at the rate of seven miles per hour, was suddenly brought to a stop by the loaded coal car, it caused the Miller coupler, or rather the draw-bar connected with it, to become bent, and

to this circumstance the injuries of the defendant in error were attributable. There was no evidence whatever that any other kind of a coupler or draw-bar would have sustained, without displacement, the shock to which this was subjected. What we are asked to sanction is, the proposition that when this accident happened, the mere fact that the Miller coupler or draw-bar struck the foot of the defendant in error justified an inference that this coupler or draw-bar was therefore dangerous. There was undisputed testimony given by Mr. Morledge that, in view of complaints of the inmates of the show car as to the rough handling of their car, defendant in error had suggested to this witness that said show people be given "a damn good shaking up." It would seem that, speaking after the manner of men, this was quite successfully accomplished; and yet there is no known rule which requires that railroad companies, by the use of appliances of unusual design or strength, should anticipate and provide against the result of such pranks. It was laid down by the majority opinion in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, that the inference of negligence against a railroad company must be a reasonable one, and that, where it is impossible to infer negligence from established facts without reasoning irrationally and contrary to common sense and the experience of average men, there is no question for the jury, and the court should direct a verdict for the defendant. In *Kilpatrick v. Richardson*, 40 Neb., 478, it was held that the presumption of negligence, where entertained, must be from proved and conceded facts, and from such, must be the logical, reasonable, and probable deduction. There was no evidence which justified the submission of this case to the jury because of negligence on the railroad company's part, which caused or contributed to the infliction of the injury complained of.

6. It is, however, urged that the railroad company should be held liable for the alleged malpractice of its sur-

geons. The fifth and sixth special interrogatories, with their respective answers thereto by the jury, were in this language:

"5. Do you find that the plaintiff is entitled to recover on account of the medical treatment that he received after the accident? Ans. Yes.

"By court: Do you find that the plaintiff is entitled to recover for both the accident and the medical treatment? Ans. Yes."

It has already been shown that the railroad company had been guilty of no negligence contributing to the accident whereby the defendant in error was injured, wherefore, at the time when its alleged surgeons were called in a professional capacity to attend upon the defendant in error, the situation was as though the summoning of these professional gentlemen had been by an individual or corporation not engaged in operating a railroad. It was alleged in the petition that the surgeons, who in an alleged unskillful manner amputated the foot of the defendant in error, were at that time "duly authorized agents, physicians, and surgeons of and in the employ and pay of defendants, then and thereafter." This, if true, entitled the railroad company to demand the rendition of such surgical aid for its employes as it chose to require in their behalf. Since it was alleged in the petition that the yardmaster was duly authorized to call in Dr. Chapman, it may be assumed that the services of this surgeon were rendered upon the special request of the railroad company. As to the services of the other two, the entire dependence seems to be upon the fact alleged generally, that they, as well as Dr. Chapman, were its authorized agents, physicians, and surgeons. At the time they assumed the control of Mr. Howard's case, the most that can be said is, that they were required so to do by their employer, the plaintiff in error. It was alleged in the petition that these physicians and surgeons professed to possess, and in fact did possess, a high

degree of skill, ability, and knowledge of medicine and surgery. In *Hewitt v. Eisenbart*, 36 Neb., 794, a malpractice case, the following rule was recognized: "The law requires of a surgeon, in the treatment of his patient, the exercise of that degree of knowledge and skill ordinarily possessed by the members of the medical profession." In the case at bar there was no attempt to prove what particular degree of knowledge and skill was possessed by the surgeons who performed the amputation of which complaint is now made. It was by plaintiff alleged, and therefore, as against his present contentions it must be accepted as true, that they possessed a high degree of skill, ability, and knowledge. When the railroad company required services to be performed for the defendant in error by these surgeons, it is not under the circumstances of this case liable for more than a judicious selection, and this it made without question. It would be absurd to insist that not only this selection should be prudent, but, that the company should guaranty that the surgeons selected would make no mistake and be guilty of no negligence. The very fact that there was required of the surgeons in the line of their duties the possession of a superior degree of skill and of knowledge of medicine, precludes the possibility that the officers or employes of the railroad company should have exercised a supervisory control and direction of the time when, and the mode in which, the necessary surgical operation should be performed. It was required only that the surgeons selected should possess that degree of knowledge and skill ordinarily possessed by members of the same profession. A fair construction of the language of plaintiff's petition more than met this requirement, and the plaintiff in error was not responsible for the manner in which such knowledge and skill were employed, in the absence on its part of any express limitations or directions to their surgeons, and of the possession of such knowledge as would lead a reasonable, careful person to suspect that there would probably be negligence or malpractice.

7. From a full consideration of all the facts we are satisfied that the defendant in error was not entitled to a verdict, and that upon the request made the court should have so instructed the jury. The questions considered arose naturally in order before the alleged release of the railroad company executed in consideration of the payment to defendant in error of certain sums by the Burlington Relief Association, of which he was a member. The conclusion that plaintiff was not entitled to recover upon the facts pleaded and proved has relieved us of the necessity of considering the effect of the release alleged and established. The judgment of the district court is

REVERSED.

BALDWIN INVESTMENT COMPANY, APPELLEE, V. J. A. BAILEY ET AL., APPELLANTS.

FILED JUNE 21, 1895. No. 6249.

1. **Mortgages:** WAIVER OF RIGHT OF FORECLOSURE: CONSIDERATION. Where the defendant pleaded the waiver of the stipulated right of a mortgagee, upon failure to pay interest as it fell due, to foreclose for the entire amount secured, *held*, that such waiver was not binding, because the sole consideration to support it was the making of payment of another sum of interest past due, than the sum of interest not paid when due, which gave the right of foreclosure insisted upon.
2. **Conflicting Evidence:** REVIEW. A finding of fact made upon conflicting evidence will not be disturbed on appeal to the supreme court.

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

Webster, Rose & Fisherdick, for appellants.

F. A. Boehmer, N. Rummons, Harwood, Ames & Pettis,

J. P. Maule, Lamb, Ricketts & Wilson, and *A. J. Cornish, contra.*

RYAN, C.

The dispute to be settled by this appeal is between the Baldwin Investment Company, the appellee, and James A. and Hester A. Bailey, the appellants. There was a decree of foreclosure in the district court of Lancaster county in favor of the appellee, the mortgagee, against the appellants, the mortgagors.

There were three notes each of $1,400, and each secured by a mortgage which described a lot different from that included in either of the other mortgages. There was in each note the following condition: "If any part of the interest shall remain unpaid thirty days after due, the principal note shall become due and payable at once, or at any time while said default continues, at the option of the holder without notice." By the terms of the mortgage it was agreed that "upon the failure of said mortgagors to make any of the payments secured by this mortgage promptly when due * * * the legal holder thereof may declare the full amount of said principal debt due and payable forthwith, without notice, and cause the mortgage to be foreclosed at any time while such default continues," etc. Default was made in the payment of the interest due October 1, 1890, April 1, 1891, and October 1, 1891. As against the right of the mortgagee to avail itself of the above condition by a foreclosure of the entire debt secured, the appellants, by answer, pleaded that on July 15, 1891, the mortgagee waived the right to foreclose for non-payment of interest which had fallen due on April 1 preceding, in consideration of the payment of the interest which had fallen October 1, 1890, with the interest which was due on said interest up to July 1, 1891. This was treated as denied by reply, and the evidence in reference to the existence of a waiver was conflicting. Under these circum-

stances it must be accepted as established that the defense was not sustained by proofs. At any rate there was no sufficient consideration to sustain the contract of waiver pleaded, for the payment was only such as the mortgagors were under obligation to make at the time they made it.

In argument there is discussed the effect of exacting usury in the original transactions, but as this defense was not pleaded it cannot be considered. The judgment of the district court is

AFFIRMED.

W. S. MCAULEY ET AL. V. J. H. COOLEY.

FILED JUNE 21, 1895. No. 5305.

Partnership: DISSOLUTION: ACTION AT LAW BETWEEN PARTNERS. Where a partnership business has been fully settled upon an agreed basis furnished by the books kept by one partner, and all its assets by agreement have been turned over to the other partner, and afterward it transpires that by reason of the failure of the partner who kept the aforesaid books to enter therein items showing his own receipt of money of the firm his partner has suffered damage to the extent of such items, an action at law may be maintained for such damage against the partner who caused such injury, and against such sureties as have agreed to be responsible for damages of the character described.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

John M. Ragan, *J. B. Cessna*, and *Capps & Stevens*, for plaintiffs in error.

Dilworth, Smith & Shockey, contra.

RYAN, C.

On the 12th day of October, 1888, J. H. Cooley and George A. Bentley entered into a written agreement whereby

they associated themselves as partners under the firm name of J. H. Cooley & Co., for the purpose of dealing in lumber. By the terms of this agreement George A. Bentley's obligations were as follows: "The said George A. Bentley shall and he is hereby firmly bound to give all of his time and use his best efforts to promote the interest of their business. The said George A. Bentley is to keep the books of the firm in a careful and workmanlike manner and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be done equally out of the business. And George A. Bentley to be allowed to draw his personal expense a sum not to exceed forty dollars ($40) for each month, which amount shall be charged to his personal account and come out of his share of the profits." The plaintiffs in error, by their written undertaking in relation to the above contract, bound themselves as follows: "Whereas, on the 12th day of October, 1888, the above bounden George A. Bentley and the said J. H. Cooley entered into a copartnership for the purpose of carrying on the business of lumber and coal, etc., in the village of Holstein, in the county of Adams, and state of Nebraska: therefore, the condition of this obligation is such that if the above bounden George A. Bentley shall do and perform all the acts and requirements of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly to its spirit and terms, then this obligation to be void, otherwise to remain in full force and effect." The firm of J. H. Cooley & Co. was dissolved about July 31, 1889. On the date last named it is clear from the evidence that the lumber owned by the firm was measured and an invoice made. There was a settlement made between the individual members of the firm at or

about that time, and the entries in the firm books by Bentley being assumed to be correct, were acted upon by both parties as a reliable basis for a full settlement of the partnership matters. Not only was a settlement made at this time, but pursuant thereto all the assets of the partnership firm were turned over and transferred to J. H. Cooley. Upon the basis assumed, it was agreed between the partners that there was due from Bentley to Cooley the sum of $13. This action at law was brought for the most part to recover upon the bond signed by the plaintiffs in error the several amounts which Bentley had been paid and had failed to make a record of in the books of the copartnership in any way. The allegations of the petition were very general, but were based upon the theory that for whatever sums Bentley had received to his own use and made no entry of in the books (which it was his duty accurately to keep), the plaintiffs in error were liable. While the petition was perhaps less definite than it might have been, there was no objection made on that score; nor, indeed, do we understand that even now such objection is urged. The plaintiffs in error insist, however, that no suit at law could be maintained between the partners until a settlement had been had between them. There was just such a settlement and an adjustment of the liability of each upon a false, misleading basis furnished by the partner, for the faithful performance of whose duties in that very respect the plaintiffs in error were liable. This action was not to wind up a partnership, but was for the failure of one partner to perform certain duties as he had contracted with another person to do them. True, these duties pertained to partnership affairs between the contracting parties. The undertaking in this respect was none the less that of Bentley individually, and for faithful performance of such individual undertaking plaintiffs in error were liable. There was sufficient evidence to sustain a finding that the failure of Bentley to account for moneys received by him had resulted in damage to Cooley to the amount found by the court.

There was a claim made in argument that because the articles of copartnership provided that the partnership investment should not exceed $3,000, whereas in fact $5,000 was invested, therefore plaintiffs in error were released from their guaranty. We fail to see why this result should follow, for the gravamen of this action was the failure of Bentley to perform his duties, and his failure in this respect had no relation to the investment in the business of more than was contemplated by the articles of agreement. It is quite likely that the limitation of $3,000 would have prevented a recovery of more than that amount in case Bentley had misappropriated a sum in excess thereof, but such a liability would be much in excess of that for which Bentley and his sureties were, in fact, found answerable. The mere fact that more had been advanced than the defendant in error was bound to furnish would not discharge the sureties. (*Clagett v. Salmon*, 5 G. & J. [Md.], 314; *Morris Canal Co. v. Van Vorst*, 1 Zabr. [N. J.], 100.) The judgment of the district court is

AFFIRMED.

RAGAN, C., having been of counsel in this case, took no part in its consideration or determination.

CHARLES E. WILEY, APPELLANT, V. GERTRUDE M. WILEY ET AL., APPELLEES.

FILED JUNE 21, 1895. No. 6168.

Quieting Title: DECREE FOR DEFENDANT: SUFFICIENCY OF EVIDENCE: REVIEW. The evidence in this case examined, and *held* sufficient to sustain the findings and decree of the district court.

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

M. A. Hartigan, for appellant.

A. N. Sullivan, contra.

RYAN, C.

The appellant in this case brought an action in the district court of Cass county against his brothers and mother and sisters for a decree which would vest in himself the title to a certain described 160 acres of land. His allegations and testimony were that in 1877 his father, since deceased, placed him in possession of the land and agreed to convey it to him; that until the death of his father in April, 1886, and afterward until the commencement of this action, he had continuously retained the possession given him by his father, and as expectant owner had made valuable and permanent improvements. In respect to some of these facts his witnesses corroborated his testimony,—the continuity of his possession, however, they rendered doubtful. It was not disputed that the appellant's father left a will which was duly probated without objection on the part of the appellant. This will bore date August 23, 1878, and was probated on the 18th of February, 1887. By its terms there was devised to appellant the tract involved in this litigation. This, however, was subject to the use and full control of said land by appellant's mother during her life. The testimony which was at all corroborative of that of the appellant was that his father had frequently said that he designed this land for appellant and accordingly had placed him in possession of it, but that he did not intend that appellant should be vested with the ownership while his parents were living. It is more than doubtful whether this last statement of the ancestor was corroborative of the claim of the appellant, for it was as consistent with the provisions of the will as with appellant's theory, and perhaps more so. The testimony of appellant's mother

was that her husband placed appellant in possession of the land in controversy and gave him the use of it, and that during the lifetime of her husband he frequently spoke of his son's bad management and said he ought to have a guardian; that on this account the title was withheld, and to be withheld, until the death of both appellant's father and mother; that her husband while he lived paid the taxes on said land, and after his death she had paid them, and in corroboration of these facts the tax receipts (except one which she testified had been loaned appellant) were introduced in evidence. These receipts on their face showed payment to have been made by appellant's father and mother. Mrs. Wiley further testified that no claim had ever been made by appellant that he was the owner of the property, until, tired by his refusal to pay rents which were necessary for her subsistence, she gave him a notice for the purpose of terminating his possession. She also testified that in 1883 the appellant with his family left the aforesaid land and went to Denver with no intention of returning, and remained absent from March till August, when he returned. This witness also testified that there was never a year, after the appellant was placed upon the 160 acres which he now claims, that his father, until his death, did not crop a part of it. There is involved in this action solely the right of the appellant to deprive his mother, during her lifetime, of the rent, upon which she is largely dependent for her means of support. The district court very justly, and, upon consideration of all the evidence, very correctly, found adversely to appellant. Its judgment is accordingly, therefore,

AFFIRMED.

HATTIE BLAZER V. JOHN J. ROGNER.

FILED JUNE 21, 1895. NO. 5049.

1. **Mechanics' Liens:** SUFFICIENCY OF EVIDENCE TO SHOW CONTRACT. Where the testimony is uncontradicted, it is sufficient to show that the owner of the real property to be improved contracted with the claimants of a mechanic's lien for the work subsequently done, through a person in the employ of such claimants.
2. **Trial:** ADMISSION OF INCOMPETENT EVIDENCE: REVIEW. The admission of evidence which, though not competent, is immaterial affords no grounds for the reversal of a decree in equity.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

John P. Davis, for plaintiff in error.

B. G. Burbank, contra.

RYAN, C.

J. M. Stephens and Peter Rogner began this action for the foreclosure of a mechanic's lien against real property owned by the plaintiff in error. Afterward John J. Rogner was substituted as plaintiff and, upon a trial had in the district court of Douglas county, a decree was rendered as prayed. Hattie Blazer now prosecutes these proceedings in error for the reversal of this judgment.

The errors assigned are argued in the order in which they shall now be considered. It is insisted that there is not a word of evidence showing a contract between J. M. Stephens and Peter Rogner on one side and Hattie Blazer on the other. There was no oral testimony in the case save that of John J. Rogner, under whose charge the work for which this lien is sought to be enforced was done. He described how he made the contract, its terms, and what he

did under it. He testified he was working for J. M. Stephens and Peter Rogner. Under the circumstances this was sufficient. It is urged that there was incompetent testimony admitted as to the contents of a certain letter. At most, this was immaterial evidence, for it was simply to the effect that the witness John Rogner, after he had procured the claim for the mechanic's lien to be recorded, sent it to Peter Rogner, who wrote witness a letter in which he said that it was all right. There was no objection made until after the answer objected to had been made. It was then too late to be availing. At any rate this was an equitable action, and the admission of merely immaterial evidence affords no grounds for the reversal of the decree entered. The judgment was sustained by sufficient evidence and is

AFFIRMED.

EDGAR P. DAVIS ET AL. V. NATIONAL BANK OF COMMERCE.

FILED JUNE 21, 1895. NO. 5624.

Election of Remedies: FRAUDULENT CONVEYANCES: AGREEMENT TO PAY GRANTOR'S DEBTS: ATTACHMENT. Where one has received a conveyance of certain property in consideration of which he absolutely agreed to pay the debts of the grantor, it is no defense to the suit brought by the holder of such debt to allege that such holder has previously brought suit against the party originally owing the same, aided by an attachment which has been levied upon the property conveyed as still that of the aforesaid grantor.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

R. S. Ervin, for plaintiffs in error, cited: *Wilson v. Wilson*, 30 O. St., 365; *Milroy v. Spur Mountain Iron Min-*

ing Co., 43 Mich., 231; *Buchanan v. Dorsey*, 11 Neb., 373; *Trimble v. Strother*, 25 O. St., 378; *Judson v. Gray*, 17 How. Pr. [N. Y.], 289; *Auburn City Bank v. Leonard*, 40 Barb. [N. Y.], 119; *Brewer v. Maurer*, 38 O. St., 543; *Wood v. Moriarty*, 14 Atl. Rep. [R. I.], 855; *Romain v. Judson*, 26 N. E. Rep. [Ind.], 563; *Parmalee v. Wiggenhorn*, 6 Neb., 322.

A. C. Troup, contra.

RYAN, C.

On the 8th day of February, 1888, plaintiffs in error entered into a written agreement with the firm of Kaufman Bros., by the terms of which the said plaintiffs in error agreed to pay certain debts of Kaufman Bros. The consideration upon which the agreement was based was the transfer of all the property of said firm and its members, subject to certain exemptions of homestead rights enumerated, to the plaintiffs in error. The defendant in error holds certain notes which the plaintiffs in error by the terms of the above agreement were bound to pay. For the purpose of this case it may be assumed that the defendant in error is subject to the same rules as would have been its predecessor in right as to the above notes, which predecessor was the Bank of Commerce. When the above transfer was made by Kaufman Bros. the Bank of Commerce held the notes herein sued upon by the defendant in error. This bank at once began proceedings for the collection of said notes against the firm of Kaufman Bros., the maker thereof, aided by an attachment which was levied upon the goods transferred to plaintiffs in error. In this attachment case the alleged *mala fides* in the above transfer was the particular fraudulent intent, because of which the aid of an attachment was invoked. The cases of *Kaufman v. Coburn*, 30 Neb., 672, and *Kaufman v. United States National Bank*, 31 Neb., 661, were out-

growths of litigation over the same questions as were raised in the above attachment suit. In one of these cases the Bank of Commerce was involved, and it was determined that the transfer assailed as such was not fraudulent as against Kaufman Bros. The sole question now presented is whether or not the attachment proceeding was such an election of remedies and raised such an estoppel that the defendant in error cannot now avail itself of the undertaking of the plaintiffs in error to pay the debt due to it. The commencement of the suit by the defendant in error against Kaufman Bros. for the collection of this debt was not inconsistent with the claim against the plaintiffs in error created by an agreement to which the defendant in error was not a party. In aid of this suit the defendant in error was entitled to avail itself of the remedy of attachment in a proper case. If the fraud alleged should be sustained, the attached property would be subjected to the debt of the attachment plaintiff. If not sustained, there might nevertheless be a judgment against Kaufman Bros., and this, as we understand it, was the course taken in said attachment case. In any event, this was not a choice of remedies against the plaintiff in error. The debt due the Bank of Commerce was one which the plaintiffs in error absolutely undertook to pay. With reference to that indebtedness the beneficiaries were entitled to hold the plaintiffs in error to the same liability as they could have held the original makers of such notes. As was said in *Kaufman v. United States Nat. Bank, supra*, this was not a case of trust where the plaintiffs in error agreed to sell the property and pay the debts, but one in which they agreed, on consideration of receiving the property, that they would pay the debts specified. It was immaterial, therefore, what course was taken with reference to the property conveyed to the plaintiffs in error, for this was not a case wherein an interest in a trust fund created for the benefit of the defendant was repudiated. The plaintiffs in error, upon a sufficient valu-

able consideration, absolutely agreed to pay this debt, and nothing short of a satisfaction of it in some manner will meet this undertaking. It is deemed sufficient, so far as the alleged estoppel is concerned, to say that the plaintiffs in error were not parties to the suit wherein the conduct of the defendant in error is claimed to have created an estoppel, neither had they any privity with the parties with respect to the subject-matter thereof. The judgment of the district court was right and is

AFFIRMED.

IRVINE, C., took no part in the determination of this case.

B'NAI ISRAEL V. JOSEPH GARNEAU, SR.

FILED JUNE 21, 1895. No. 5228.

Review: CONFLICTING EVIDENCE. In this case there is presented solely a question of fact determined by a jury upon the consideration of conflicting evidence. The judgment upon the verdict will not be disturbed under such circumstances.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Ambrose & Duffie, for plaintiff in error.

J. W. West and *Charles Ogden, contra.*

RYAN, C.

The defendant in error sued the plaintiff in error in the county court of Douglas county for rent alleged to be due at the rate of $50 per month. Upon appeal from the judgment of the county court there was a verdict and judgment for $66.65, which was upon the basis of $50 per month.

In the fall of 1888 a parol lease was made between the parties to this suit, for the use of the building leased for church purposes. The rate per month was $35. The lessee insists that there was a contract of lease for the term of one year. The lessor contends that there was no fixed term other than from month to month. The plaintiff in error paid at the rate of $35 per month up to June 1, 1889. The evidence adduced by the defendant in error was to the effect that in the early part of May of the year just named plaintiff in error by its agent paid the rent for that month; that this agent was then informed by the agent of the defendant in error that the monthly rental for June and thenceforward would be $50; that the plaintiff in error could not have the property at a less rate, and that, upon this proposition being submitted to the assembled members of the plaintiff in error, it was assented to, and that the use of the building afterwards was by virtue of the new agreement as to monthly rentals. The theory in support of which the plaintiff in error introduced its evidence was that the original lease was for the term of one year from October 1, 1888, at the rate of $35 a month, payable monthly; that the change to $50 a month was but an arbitrary attempt on the part of Garneau to exact the additional $15 per month, and that this was never assented to by the plaintiff in error. On this theory there is argued the necessity of notice to terminate the original tenancy, and other kindred propositions. By the instructions of the court the law applicable to the theory of each party was fairly stated, and the verdict settled the contested question of fact, approved as it was by the ruling made upon the motion for a new trial. The judgment of the district court is

AFFIRMED.

A. B. SLATER ET AL. V. JAMES SKIRVING ET AL.

FILED JUNE 21, 1895. No. 5970.

1. **Judgments: PROCEDURE TO VACATE: LACHES.** After the close of the term in which a judgment was rendered against him, a judgment defendant filed a petition in equity to vacate the same on the ground that it was irregularly obtained. The irregularity complained of was that the clerk of the court omitted to journalize the judgment immediately upon its rendition. It appears from the evidence that the failure of the judgment defendant to file a motion to set aside the judgment rendered against him during the term at which it was rendered was not caused by the failure of the clerk to journalize the judgment when rendered, but resulted from the laches of the judgment defendant's counsel. *Held.* That he could not be permitted to deny the correctness of the judgment or to renew the controversy.
2. **Judgment Entry.** Whether the neglect or failure of the clerk of a district court to journalize a judgment immediately upon its rendition is an irregularity within the meaning of subdivision 3 of section 602 of the Code of Civil Procedure, not decided.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

H. C. Brome and *H. M. Uttley*, for plaintiffs in error.

M. F. Harrington, contra.

RAGAN, C.

On the 4th day of November, 1891, James Skirving brought a suit at law in the district court of Holt county against the copartnership of Slater, Savage & Kelly and one D. Kemp. A summons was issued and duly served on Kemp in Holt county, and within the time fixed by said summons Kemp appeared and filed his answer. A summons was also issued for Slater, Savage & Kelly, directed to the sheriff of Douglas county for service, and

was duly returned served on them. The February, 1892, term of said district court convened early in that month and adjourned without day on the 22d of the following September. On the 18th of February, 1892, the attorney of Slater, Savage & Kelly procured the summons served on them in Douglas county to be quashed on account of some informality therein, and on the same day Skirving's counsel, by leave of court, so amended his petition as to make Slater, Savage & Kelly, individually, parties defendant to the suit. On the 29th of February a summons was issued for said parties directed to the sheriff of Douglas county and duly served on them on the 1st and 2d days of March. The answer days for these parties as fixed by the summons was April 4. Slater, Savage & Kelly forwarded the copy of the summons served on them to their attorney at O'Neill with instructions to look after their interests. The attorney received this summons on the 10th of March. He did not appear in the case in any manner, nor file any pleadings therein, and on the 31st day of May, 1892, the court entered the default of Slater, Savage & Kelly, heard the evidence, and rendered a judgment against them for the amount prayed for by Skirving in his petition. At this same term of court, but prior to that time, the case had been continued as to the defendant Kemp. After the adjournment of this February term Slater, Savage & Kelly filed a motion to vacate the judgment, which was by the court overruled, and on the 8th of October, 1892, Slater, Savage & Kelly filed a petition in equity in said court against said Skirving to vacate said judgment. The court, after hearing the evidence, entered a decree dismissing the petition. Slater, Savage & Kelly bring this ruling of the court here for review.

We shall assume for the purposes of this case that the answer tendered by Slater and others to the court at the time they filed their petition in equity to vacate the judgment, stated a meritorious defense to the suit of Skirving,

and that the proofs offered by Slater and others supported the allegations of said answer, and confine ourselves solely to the question as to whether the district court erred in holding that Slater and others had failed to show any equitable or legal reasons why said judgment should be vacated, aside from the fact that they had a meritorious defense to the action in which the judgment was rendered.

In their petition in equity to vacate the judgment Slater and others alleged the following grounds therefor:

1. That the judgment was irregularly obtained. This is one of the grounds provided by the third subdivision of section 602 of the Code of Civil Procedure, authorizing district courts to vacate their judgments after the term at which they were rendered. The evidence in the record does not sustain this averment of the petition. The judgment sought to be vacated was rendered in open court on one of the days of the regular February, 1892, term thereof; but it is argued that the clerk of the court omitted to journalize this judgment at the time it was rendered, or within a reasonable time thereafter, and that Slater and others were thereby prevented from filing a motion to set aside such judgment and default during the February term. It appears from the evidence in the record that the judgment was not journalized on the day it was rendered, nor for considerable time afterwards, but the evidence does not show that Slater and others were prevented by that fact from filing their motion to set aside such judgment and default during the February term. The attorney of Slater and others had already appeared in this case as early as the 18th of February. He had received the summons on the 10th of March, which showed on its face that his clients were required to answer the petition of Skirving by the 4th of April. He made no appearance whatever in the case before the judgment was rendered. He had no consultation, conversation, or agreement with counsel for Skirving for a continuance of the case over the term. He was present in court during

a part of the February term, and just prior to the time the judgment was rendered he absented himself from the court and the county without making any arrangement with the court or opposing counsel as to any disposition of this case, or leaving it in charge of any other counsel. He says, however, that on two different days between the 20th of May and the 30th of June he went to the court house and examined the judgment record, journal entries, and general index, and at these times there was nothing upon any of those records showing that his clients had been defaulted and judgment rendered against them. If counsel had looked at the trial docket he would have seen the minutes made by the trial judge on the 31st of May, 1892, and this would have advised him at the time he visited the court house that his clients had been defaulted and judgment rendered against them, and he would have had ample time from the 1st day of June to the 22d of September, when the court adjourned without day, to have filed his motion to set aside said default and judgment. It appears, then, that the failure of Slater and others to file their motion to set aside the judgment rendered against them during the term at which it was rendered was not caused by the failure of the clerk of the district court to journalize the judgment when rendered, but resulted from the laches of their counsel, and they cannot now be permitted to deny the correctness of the judgment rendered or to renew the controversy.

2. Another reason alleged in the petition for setting the judgment aside is that the petition of Skirving does not state facts sufficient to constitute a cause of action against Slater and others. It would subserve no useful purpose to quote this petition or any part of it. It must suffice to say that in our opinion the petition stated a good cause of action.

3. A third reason assigned in the petition for setting aside the judgment is that Kemp was made a party defendant with Slater and others to Skirving's action for the sole

purpose of procuring service upon Slater and others and compelling them to come to Holt county for the trial of the case, and with no intention on the part of Skirving to prosecute his action to a judgment against Kemp. If these facts were made to appear, we have no doubt that they would themselves be sufficient to authorize a court of equity to set aside this judgment, as they would amount to a fraud upon Slater and others and the court; but no such facts appear, and in the answer tendered by Slater and others to the court at the time of the filing of this petition no such defense is interposed. The decree of the district court is

AFFIRMED.

BEN M. SIGLER V. SARAH MCCONNELL.

FILED JUNE 21, 1895. No. 6405.

1. **Admission of Evidence:** ASSIGNMENTS OF ERROR. An assignment of error here that the district court erred in admitting the evidence of a named witness will be overruled if any of the evidence of said witness was properly received.
2. **Instructions:** ASSIGNMENTS OF ERROR. An assignment of error that the district court erred in giving or refusing certain instructions will be overruled where it appears from the record that no exception was taken to the action of the court in giving or refusing the instructions complained of.
3. **Order Overruling Motion for New Trial:** ASSIGNMENTS OF ERROR. An assignment of error in a petition in error that the court erred in overruling the motion for a new trial, such motion containing seven separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous. *Glaze v. Parcel*, 40 Neb., 732, followed.

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

T. Fulton Gantt and *Joseph G. Beeler*, for plaintiff in error.

Grimes & Wilcox, contra.

RAGAN, C.

Sections 108 and 109, chapter 78, Compiled Statutes, 1893, provide:

"Section 108. That from and after the passage of this act it shall be unlawful for any person to build a barbed wire fence across or in any plain traveled road or track in common use, either public or private, in this state, without first putting up sufficient guards to prevent either man or beast from running into said fence.

"Sec. 109. Any person violating the provisions of the foregoing section shall be guilty of a misdemeanor and fined not less than five dollars nor more than twenty-five dollars, and shall be liable for all damages that may accrue to the party damaged by reason of said barbed wire fence."

Ben M. Sigler sued Sarah McConnell in the district court of Lincoln county, and alleged in his petition that on the 19th of June, 1892, McConnell had built a barbed wire fence on the north line of her land across and in a plain traveled road in common use without putting up any guards "whatsoever as required by law;" that on the night of said 19th of June, Sigler was driving a span of horses attached to a buggy upon said "plain traveled road" and one of said horses became entangled in said barbed wire fence and was injured, for which injury he prayed damages. The answer of McConnell admitted the building of the fence; pleaded that the injury to Sigler's horse was the result of his own negligence, and denied all the other allegations in the petition. There was a trial to a jury, with a verdict and judgment in favor of McConnell, and Sigler prosecutes to this court a petition in error.

1. The first assignment of error is that "the court erred

in admitting the evidence of the witness John McConnell." Under any view of the case some of the evidence given by this witness was competent and proper; and again, it appears from an examination of the bill of exceptions that no objection was made by Sigler on the trial to any of the evidence of this witness. The assignment must therefore be overruled.

2. The second assignment is that the court erred in giving the second, third, fourth, fifth, and sixth paragraphs of the instructions given by the court on its own motion. Some of these instructions were properly given, and as the assignment is that the court erred in giving all of them, we cannot consider it any further than to ascertain whether any one of the instructions objected to was properly given. Again, it appears from the transcript that Sigler took no exception to the giving of either of the instructions complained of at the time they were given. The assignment, then, must fail.

3. The third assignment is that the court erred in giving the fifth and sixth paragraphs of the instructions asked by McConnell. What has been said under the second assignment of error is applicable to this; and for the same reason the assignment must be overruled.

4. The remaining assignment is that the court erred in overruling the motion for a new trial. In *Glaze v. Parcel*, 40 Neb., 732, it was held: "An assignment of error in a petition in error, that 'the court erred in overruling the motion for a new trial,' such motion containing five separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous." In the case at bar the motion contained seven distinct grounds; and it further appears from the record that Sigler took no exception to the order of the court overruling his motion for a new trial.

The petition in error presents nothing for review. The judgment of the district court is

AFFIRMED.

KEARNEY LAND & INVESTMENT COMPANY, APPELLEE, v. C. I. ASPINWALL ET AL., APPELLANTS.

FILED JUNE 21, 1895. No. 6386.

1. **Executions:** APPRAISAL: OBJECTIONS. Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement, before the sale occurs.

2. ———: ———: ATTACK. Appraisers of property for sale under execution act judicially, and on motion made after such sale to vacate the same, the value fixed by them on the property appraised can only be assailed for fraud.

3. ———: ———: SALES. To justify the setting aside of a sale on the ground that the property was appraised too low the actual value of the property must so greatly exceed its appraised value as of itself to raise a presumption of fraud in the making of the appraisement. *Vought v. Foxworthy*, 38 Neb., 790, followed.

4. ———: ———: MORTGAGES: DUTY OF OFFICER. It is the duty of an officer holding an execution for the sale of real estate to cause said real estate to be appraised and forthwith—immediately—deposit a copy of the appraisement made with the clerk of the court issuing the order of sale, in order that parties interested in the property may know what value has been placed thereon by the appraisers, and if they think such appraisement too high or too low, that they may have an opportunity to file objections to the appraisement on that ground before the sale occurs.

5. ———: ———: ———: OBJECTIONS. After such sale is made it is too late for the parties for the first time to question the correctness of the appraisement made on any other ground than that of fraud.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

Willis L. Hand, for appellants.

Calkins & Pratt, contra.

RAGAN, C.

This is an appeal from the district court of Buffalo county confirming a sale of real estate made in pursuance of a decree of foreclosure of a mortgage thereon. The order of sale was issued on the 9th day of September, 1892. On the 21st of September, 1892, the sheriff caused the property to be appraised. On the 2d day of November, 1892, the sale was made. On the 22d of December, 1892, the appellants, defendants to the mortgage foreclosure suit in the court below, filed objections to the confirmation of the sale, the grounds of said objections being that the appraisement of the property was unjust and too low. The property consisted of twelve lots in additions to the city of Kearney, Nebraska, and the interest of the appellants in said property was appraised at $2,348.70. At the sheriff sale the property was sold to the appellee for $1,600. When the case came on for hearing on the motion to confirm the sale and the objection of the appellants thereto, the appellee voluntarily raised its bid $748, and thereupon the court overruled the objection of the appellants to the confirmation of the sale and confirmed the same. We cannot disturb this decree. The appellee was entitled to a confirmation of the sale on its first bid of $1,600. Appraisers of property sold on execution or in pursuance of a decree in equity act judicially. This property was appraised and, we presume, the appraisement forthwith returned and deposited with the clerk of the court who issued the order of sale on the 21st of September, 1892. The appellants then knew on that date what the appraisement made was. If they thought that it was too high or too low they should at once have filed objections to the appraisement for that reason, and such objection would have arrested the sale until after such objections were disposed of by the court, or the plaintiff in the decree would have made the sale at his peril. The appellants, however, did

not do this, but waited until after the sale was made on the 2d of November, and for more than one month after that time before they filed any objection to the appraisement made. After the sale was made it was too late for the appellants, for the first time, to question the correctness of the appraisement made of the property on any other grounds than that of fraud. In *Vought v. Foxworthy*, 38 Neb., 790, it was held: "Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement, before the sale occurs. The party seeking the sale of the appraised property would thus have notice of the objections to its appraised value, and he could either proceed to sale and take his chances of the appraisement being finally set aside, or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made." Appraisers of property for sale under execution act judicially, and on motion made after such sale to vacate the same the value fixed by them on the property appraised can only be assailed for fraud. Objection that the appraised value of the property is too high or too low should be made and filed in the case with a motion to vacate the appraisement before a sale occurs thereunder. (*Smith v. Foxworthy*, 39 Neb., 214.) The decree of the district court is

AFFIRMED.

S. H. GRAVES ET AL. v. W. V. MORSE & COMPANY.

FILED JUNE 21, 1895. No. 6410.

Sales: MERCHANDISE: TIME TO DELIVER: ACCEPTANCE: EVIDENCE: REPLEVIN. A merchant ordered some rubber goods from a wholesale house, but the goods were not shipped when ordered. The merchant was called away from home, and before leaving instructed his clerk, whom he left in charge of his business, not to receive the rubber goods if they should come as they had not been shipped in a reasonable time after they were ordered. While the merchant was absent the rubber goods arrived, and the clerk paid the freight on them and stored them not unpacked in a warehouse belonging to the merchant. A day or two after the merchant returned home he sold his entire stock of merchandise, without an inventory thereof, and delivered possession of it to one G. At the time of this sale the merchant was not aware that the rubber goods had arrived. The wholesale merchant brought replevin for the rubber goods against the merchant's vendee. The jury found a verdict in favor of the wholesale merchant. *Held*, (1) That the evidence sustained the finding; (2) that the sole question was whether the rubber goods had been accepted by the merchant, and the title to said goods vested in him prior to the time he made the sale of his stock of merchandise to G.; (3) that the test was whether, if the wholesale merchant had sued the merchant for the price of the rubber goods, the evidence would sustain a finding in favor of the merchant; (4) that it was the duty of the wholesale merchant to deliver the quality and quantity of goods ordered, and to deliver them within a reasonable time, and the wholesale merchant not having done this the merchant had a right to decline to receive the goods; (5) whether, under all the facts and circumstances in evidence in the case, the merchant did accept the goods and become liable for their payment to the wholesale merchant, was a question for the jury, and properly submitted by the instructions of the court.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Dryden & Main, for plaintiffs in error.

Calkins & Pratt, contra.

RAGAN, C.

In this case the finding of the jury enables us to say that the following facts are established: On and prior to the first of November, 1890, H. H. Matteson was engaged in the mercantile business in the town of Shelton, this state. On or about that time he ordered certain rubber goods from W. V. Morse & Co., of Omaha, Nebraska. These goods were not shipped to him when ordered. About the 16th of November Matteson went to the state of Iowa on business, leaving his wife and a clerk named Lilly in charge of the store. Before Matteson left he instructed them if the rubber goods previously ordered from Morse & Co. should arrive not to accept them, as Morse & Co. had delayed their shipment too long. On the 20th or 21st of November, and while Matteson was absent, the rubber goods arrived, and the clerk Lilly, without the knowledge of Mrs. Matteson, paid the freight on them and stored them not unpacked in a warehouse in which Matteson was accustomed to keep flour, provisions, hardware, etc. Matteson returned on the 22d or 23d of November and sold his entire stock of merchandise to S. H. Graves and George Mortimer. The consideration for this sale was a debt of $2,500, which Matteson owed a bank in Shelton, $1,500 which he owed J. B. Farwell & Co., and which debt was assumed by Matteson's vendees, and a half section of real estate lying near said town of Shelton. At the time this sale was made possession of the stock of merchandise was given to Graves and Mortimer. At the time of the sale no invoice of the property was made, and Matteson did not know that the rubber goods ordered of Morse & Co. had arrived. In a day or two after said sale Morse & Co. replevied from Graves & Mortimer the rubber goods mentioned above, still remaining in boxes unpacked in said warehouse, Morse & Co. claiming to be the owners of said goods. There was a trial to a jury,

with a verdict and judgment in favor of Morse & Co., and Graves & Mortimer have prosecuted to this court a petition in error.

1. The first assignment of error is that the district court erred in permitting Morse & Co. to prove on the trial the value of the stock of merchandise at the time it was sold by Matteson to Graves & Mortimer. On the trial H. H. Matteson was examined as a witness in behalf of Morse & Co., and was asked by their counsel this question: "What was the value of the stock at the time of the transfer?" To this question counsel for Graves & Mortimer objected, as incompetent, immaterial, and irrelevant. The court overruled the objection and they excepted, and the witness answered: "About $13,000." We think this evidence was incompetent, immaterial, and irrelevant under the issues, but we do not think that Graves & Mortimer were prejudiced by its admission.

2. The remaining assignment of error is that the court erred in giving to the jury the following instruction: "4. The real question for you to determine is whether or not the witness Matteson had received and accepted the goods in question after they were shipped by the plaintiff. If he did receive and accept the goods, then the title would pass from the plaintiff to Matteson and he could pass a good title to the defendant; but if the witness Matteson did not receive and accept the goods from the plaintiff he has no title to the goods, and none could pass to the defendant, and the plaintiff could maintain replevin therefor. If the witness Lilly received the goods on behalf of the witness Matteson, but without authority from the said Matteson, or against his express directions, then this would not be an acceptance of the goods, and no title would pass unless the said Matteson afterwards ratified or consented to the action in that respect of the witness Lilly. If you find from the evidence that the witness Lilly was authorized by the witness Matteson to receive and accept the goods for him, and

that he did receive and accept the goods in question, and was not directed by Matteson, or his wife acting for him, not to receive the goods, then if he accepted the goods it would be an acceptance by Matteson, and the title thereto passed from plaintiff to Matteson, and would pass to the defendant in the sale of the stock of goods to him, unless expressly reserved by Matteson when he made the sale. If from the evidence you find that the witness Lilly had no authority to receive and accept the goods, or was directed not to do so by Matteson, or his wife acting for him, and the goods were not in fact received by Matteson, then the title never passed from the plaintiff and they are entitled to recover in this action." We do not think the court erred in giving this instruction. The sole question litigated at the trial was whether the rubber goods had been accepted by Matteson and the title of said goods vested in him prior to the time he made the sale of his stock of merchandise to Graves & Mortimer. The case must be looked at as though this was a suit by Morse & Co. against Matteson to recover the purchase price of these rubber goods. It was the duty of Morse & Co. to deliver the quality and quantity of goods ordered and to deliver them within a reasonable time. They not having delivered these goods when ordered, or within a reasonable time thereafter, Matteson had a right to decline to accept them; and whether under all the facts and circumstances in evidence in this case he did accept them so as to become liable for their payment to Morse & Co. was a question for the jury and properly submitted by the instruction complained of. The criticism made by counsel for Graves on the instruction is that by it the court ignored the question of good faith on the part of Graves in purchasing these rubber goods from Matteson. Whether or not Graves & Mortimer knew that these rubber goods were in the warehouse at the time they purchased this stock was a question for the jury; and if we assume that they were aware of the presence of the rubber goods

there, and supposed they were buying those goods as well as the others, still the evidence of Matteson is that he did not know that those rubber goods had been received at Shelton until they were replevied by Morse & Co.; and the jury by its verdict has found this statement of Matteson to be true. The question of the good faith of Graves & Mortimer in making this purchase was not an issue in this case. If Matteson did not own the rubber goods he could not convey the title thereof to Graves. The whole question was a question of fact, namely, had Matteson accepted these goods at or prior to the time he made the sale to Graves? Had his conduct been such as to amount to an acceptance of the rubber goods on his part and estop him, in a suit against him by Morse & Co. for their price, from asserting the defense of non-delivery or non-acceptance? And this is in effect what the court told the jury by the instruction criticised. There is no error in the record and the judgment of the district court is

AFFIRMED.

NATHAN CAMPBELL V. H. L. MCCLURE.

FILED JUNE 21, 1895. No. 6134.

1. **Covenant Against Incumbrances: ACTION FOR BREACH: JURISDICTION OF JUSTICE OF THE PEACE.** In July, 1882, one Campbell sold and conveyed to one McClure certain real estate by general warranty deed. The deed contained a covenant that the real estate conveyed was free of incumbrances. At the time of the conveyance taxes had been assessed against the real estate for the year, but such taxes were not then due. Campbell neglected to pay these taxes after their maturity and McClure, to prevent the sale of the real estate, paid the taxes and sued Campbell before a justice of the peace to recover the amount so paid. *Held*, (1) That the covenant against incumbrances was a personal obligation, did not run with the land, and was broken at the

time the conveyance was made (*Chapman v. Kimball*, 7 Neb., 399, followed); (2) that the suit was not an action on a contract for real estate within the meaning of section 907 of the Code of Civil Procedure, nor was the action one in which the title to real estate was sought to be recovered or could be drawn in question; and that a justice of the peace had jurisdiction of the case.

2. TAXES: LIABILITY OF VENDOR FOR PAYMENT. A vendor who sells real estate after the first day of April in any year, in the absence of a contract to the contrary, is, under the statute, liable for the taxes on such real estate for that year. (*McClure v. Campbell*, 25 Neb., 57.)

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Calkins & Pratt, for plaintiff in error, cited: *Jones v. Gardner*, 10 Johns. [N. Y.], 266; *Van Dyke v. Rule*, 31 N. E. Rep. [O.], 882; 3 Washburn, Real Property [5th ed.], 479.

Marston & Nevius, contra, cited: *Brackett v. Evans*, 1 Cush. [Mass.], 79; *Sargent v. Currier*, 6 Am. Rep. [N. H.], 524; *Ticonic Bank v. Smiley*, 27 Me., 225; *Mushrush v. Devereaux*, 20 Neb., 50; *Nesbit v. Campbell*, 5 Neb., 433; *Chapman v. Kimball*, 7 Neb., 399.

RAGAN, C.

This action was brought by H. L. McClure against Nathan Campbell before a justice of the peace in Buffalo county. The case was afterwards tried on appeal in the district court of said county, where McClure had a verdict and judgment, to reverse which Campbell prosecutes to this court a petition in error. The case was before this court once before. (See *McClure v. Campbell*, 25 Neb., 57.)

On the 29th of July, 1882, Campbell sold and conveyed to McClure certain real estate by a general warranty deed. This deed contained a covenant that the real estate conveyed was free and clear of all incumbrances. At that

time taxes had been assessed against said real estate for said year, amounting to $51.46. These taxes were not due, however, until the first day of the following October. Campbell neglected and refused to pay these taxes after their maturity, and McClure was compelled to advance and pay the same to prevent the real estate from being sold. The object of this action was to recover back the taxes paid. The only question made by the district court, and the only one argued here, is that the justice of the peace before whom the action was originally brought had no jurisdiction of the case, because a covenant against incumbrances is a real covenant running with the land, and, therefore, necessarily draws in question the title to real estate. Section 44, chapter 77, Compiled Statutes, 1893, provides: "The owner of property on the first day of April in any year, shall be liable for the taxes of that year." "A vendor who sells real estate after the first day of April of any year, in the absence of a contract to the contrary, is, under the statute, liable for the taxes on such real estate for that year." (*McClure v. Campbell*, 25 Neb., 57.) Section 18 of article 6 of the constitution provides that justices of the peace shall "have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars; nor in a criminal case where the punishment may exceed three months imprisonment, or a fine of over one hundred dollars; nor in any matter wherein the title or boundaries of land may be in dispute." Section 1103 of the Code of Civil Procedure provides: "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed two hundred dollars except in cases limited in this title." The limitations alluded to above are found in section 907 of the Code of Civil Procedure, which provides that justices shall not have jurisdiction: "First—To recover damages for an assault, or

assault and battery. Second—In any action for malicious prosecution. Third—In actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this title. Fourth—In actions for slander, verbal or written. Fifth—In actions on contracts for real estate. Sixth—In actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for trespass on real estate, which are provided for in this title." It will thus be seen that unless this action is one on a contract for real estate, or is an action in which the title to real estate is sought to be recovered, or may be drawn in question, that neither the constitution nor the statute has denied to a justice of the peace jurisdiction of the case. Of course it is not an action on a contract for real estate within the meaning of section 907 of the Code of Civil Procedure.

In *Mushrush v. Devereaux*, 20 Neb., 49, it was held that a justice of the peace had jurisdiction of an action to recover back money paid upon an agreement for the purchase and sale of land where the defendant had refused to perform his agreement to convey. Nor is it an action in which the title to real estate is sought to be recovered, nor are we able to comprehend how the title to this real estate may be drawn in question in this action. The covenant against taxes or incumbrances was broken at the time it was made, as the taxes assessed against this real estate in the year 1882 were a lien thereon from the 1st day of April of that year. (Sec. 138, ch. 77, Compiled Statutes, 1893.)

In *Chapman v. Kimball*, 7 Neb., 399, the court held that where a covenant against incumbrances is broken at the time of the conveyance it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action on subsequent purchasers of the estate. In this case MAXWELL, C. J., speaking for the court, said: "The covenant against incumbrances is in the present tense, 'that said premises are

free from incumbrance.' If the taxes in question actually existed as a lien against the land in question, at the time of the conveyance, the covenant was broken at that time, and a cause of action at once accrued in favor of the covenantee for his damages." The justice of the peace in this case had jurisdiction of the action. The judgment of the district court is right and is

AFFIRMED.

C. A. MOORE v. G. E. HUBBARD.

FILED JUNE 21, 1895. No. 5967.

Review: CONFLICTING EVIDENCE: AFFIRMANCE OF JUDGMENT: PRACTICE. No question was presented in this case except a question of fact, and several questions of practice which have already been repeatedly passed upon.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

R. R. Dickson and *E. W. Adams*, for plaintiff in error.

M. F. Harrington, contra.

IRVINE, C.

In this case there are eight assignments of error. Of these the sixth is "Errors of law occurring at the trial, and duly excepted to by plaintiff." This, while sufficient in a motion for a new trial, is too general to present any question for review in a petition in error.

The seventh is that the court erred in overruling the motion for a new trial. As the motion for a new trial assigns six grounds, this assignment is too general.

The eighth is that the court erred in not considering newly-discovered evidence and affidavits in support thereof. Accepting this as a sufficient assignment that the court

erred in refusing a new trial on the ground of newly discovered evidence, we cannot consider it, because the affidavits in support thereof are not preserved by a bill of exceptions.

The remaining assignments call only for a consideration of the sufficiency of the evidence to sustain the verdict in its general character and as to its amount. No question of law is presented on this point. We have examined the evidence and find that while it is conflicting there is sufficient to sustain the verdict.

JUDGMENT AFFIRMED.

WILLIAM F. DENNEY ET AL. V. JEREMIAH DENSLOW.

FILED JUNE 22, 1895. No. 5940.

Affirmance of Judgment in Absence of Brief or Oral Argument.

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

John L. Webster, for plaintiffs in error.

Cowin & McHugh, contra.

PER CURIAM.

This is a petition in error to reverse a judgment of the district court of Douglas county. The judgment was rendered September 20, 1892. The petition in error was filed in this court January 12, 1893. The cause was submitted October 3, 1893. No briefs have been filed in this court by either of the parties and the judgment is therefore affirmed as of course.

JUDGMENT AFFIRMED.

EDWARD QUINN v. SOLOMON R. MOSS.

FILED JUNE 22, 1895. No. 5972.

1. **Guaranty for Payment of Goods**: CHANGE OF CONTRACT BY BUYER AND SELLER: LIABILITY OF GUARANTOR. In an action on a written guaranty to pay for a quantity of cigars sold to a third person it was *held* that the fact that by the agreement of the seller and purchaser, made after the execution of the guaranty, all the cigars of a particular brand named in the order were not sent, but in lieu thereof were substituted an equal number of the same quality, kind, style, and price, put up under another brand, did not constitute such a change in the contract as to release the guarantor from liability, especially where it was not shown that either of the brands had any special or commercial value, or that the brand upon the boxes containing the cigars affected the sale thereof.
2. **Judgment Against Guarantor**: SUFFICIENCY OF EVIDENCE. *Held*, That the verdict is supported by the evidence.
3. **Parol Evidence**: WRITTEN GUARANTY. Parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written contract.
4. **Assignments of Error.** An assignment of error is insufficient which fails to point out the particular error objected to.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

C. A. Baldwin, for plaintiff in error.

B. N. Robertson, contra.

NORVAL, C. J.

This action was brought by Samuel R. Moss against Edward Quinn, upon a written contract of guaranty for the payment of a bill of cigars sold by the plaintiff to one B. C. Foley. A verdict was returned for the plaintiff, and upon it a judgment was rendered. The defendant prosecutes error.

The plaintiff below is a manufacturer of cigars at Lancaster, Pennsylvania. In February, 1890, he sold, through his traveling salesman, one Rosenstine, to one B. C. Foley, on sixty to ninety days' time, the following bill of cigars: 5,000 New Arrival, at $15; 10,000 Otella, at $23; 10,000 La Rosa De Key West, at $23; 5,000 Sweet Buds, at $15. The following written guaranty was, at the time of the purchase, executed by the defendant and attached to the bill of goods:

"I hereby guaranty the payment of the above bill bought by B. C. Foley, Omaha, Nebraska, of S. R. Moss, Lancaster, Pennsylvania. EDWARD QUINN."

One of the defenses interposed is that after the guaranty was given Foley and Rosenstine changed the contract by the terms of which a new and different selection of cigars was made, and under which the cigars were furnished Foley. The evidence shows that after the signing of the contract it was agreed between Foley and Rosenstine but 5,000 Otella cigars should be sent and in lieu of the other 5,000 of that brand there should be shipped an equal number of Key West Extras; that 5,000 Three for a Quarter were substituted for the same number of the brand La Rosa De Key West. The goods were furnished and delivered in accordance with this arrangement. There was no change in the prices of the cigars or the aggregate amount of the bill. The plaintiff, by several witnesses, introduced evidence tending to establish that the 5,000 Key West Extras furnished were of the same quality, style, and make as the Otella, except the label on the box, and that in quality and in every other particular the 5,000 Three for a Quarter which were sent were the same as the La Rosa De Key West. There is an entire lack of any evidence that the brands under which cigars are put up have any special or commercial value. If they have any such value it is a matter of proof. Certainly it is not a matter of which the court can take judicial knowledge. The only change

made from the original selection, according to the proof submitted by the plaintiff, consisted in the brands or labels placed upon the boxes, and in the absence of any showing that brands affected the sales of the cigars, we cannot say that the original contract was in any material respect altered or changed. There being no substantial change in the agreement, it follows that the guarantor was not released from his liability. (*Fisherdick v. Hutton*, 44 Neb., 122; *Feustmann v. Estate of Gott*, 32 N. W. Rep. [Mich.], 869.)

At this point we may as well dispose of the assignment that the verdict is not sustained by the evidence. It is argued that the cigars delivered to Foley by the plaintiff below were not of the quality promised or equal to the samples from which the selections were made. There is an irreconcilable conflict in the testimony as to whether the cigars sent to Foley were of the kind and quality contracted for. The testimony of the defendant's witnesses is to the effect that the goods were not according to the contract, while the testimony on behalf of the plaintiff tends to show that the cigars delivered were of the style, quality, and kind purchased. It is true that the brands of some of the cigars delivered were different from those described in the original agreement; but, as we have already seen, this variance was immaterial and did not affect the validity of the contract. The jury by their verdict have said that Foley got the goods selected and purchased, and their finding is not without ample evidence to support it.

Another assignment is that the court erred in excluding testimony offered by the defendant below to show that at the time the goods were purchased and the guaranty given, the plaintiff agreed the cigars would be union made and union labeled. This testimony was properly excluded, as its admission would have been a clear violation of an elementary rule of evidence, to the effect, that parol contemporaneous evidence is inadmissible to vary or contradict

the terms of a written contract. The order for the cigars was a written one, signed by Foley; and the guaranty was likewise in writing. The purpose of the offered testimony was to add to or engraft upon the written contract a stipulation qualifying the terms thereof. Under the authorities such evidence was not admissible. (1 Greenleaf, Evidence, sec. 275; *Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216; *Kaserman v. Fries*, 33 Neb., 427; *Nichols v. Crandall*, 43 N. W. Rep. [Mich.], 875; *Brintnall v. Briggs*, 54 N. W. Rep. [Ia.], 531.)

Complaint is made in the brief of certain other rulings of the trial court on the admission and exclusion of testimony, but they will not be reviewed, inasmuch as the rulings are not assigned with sufficient particularity in the petition in error, the assignments being as follows:

"8. The court erred in refusing to permit the defendant to give to the jury certain other material and important evidence on his part, as fully appears in the record of the evidence kept by the official reporter, and which refusals were excepted to at the time by the defendant, as is shown by the record.

"9. The court erred in permitting the plaintiff below to give certain evidence to the jury on his part, against the objection and exception of the defendant, all of which appears in the record of the evidence as kept and reported by the official reporter.

"10. And for other and manifest reasons appearing of record in the case."

These assignments are too general and indefinite to present any question to this court for review. (*Wanzer v. State*, 41 Neb., 238; *Kirkendall v. Davis*, 41 Neb., 285; *Bloedel v. Zimmerman*, 41 Neb., 695; *Wonderlick v. Walker*, 41 Neb., 806; *Wiseman v. Ziegler*, 41 Neb., 886.)

The alleged errors in giving instructions are grouped in one assignment in the petition in error, and in like manner the alleged errors in refusing requests to charge are

grouped in the petition in error. Upon due consideration of the instructions given we find that one or more is free from criticism and that at least one of the instructions refused was faulty. Under the well settled rule the assignments relating to the instructions will be overruled. The judgment is

AFFIRMED.

JAMES HAROLD ET AL. V. MOLINE, MILBURN & STODDARD COMPANY.

FILED JUNE 22, 1895. No. 6375.

1. **Review: JOINT ASSIGNMENTS OF ERROR.** A joint assignment of error by several parties which cannot be sustained as to all who joined therein will be held bad as to all.

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

George W. Cooper, John W. Cooper, and *Stevens, Love & Cochran,* for plaintiffs in error.

Switzler & McIntosh and *Elmer E. Thomas, contra.*

NORVAL, C. J.

The Moline, Milburn & Stoddard Company brought two actions in justice's court against James Harold and J. C. Christensen, each suit being upon a promissory note executed by the defendants. Judgments were rendered against them, and thereupon they prosecuted appeals to the district court, where the suits were consolidated by stipulation of the parties. There was a trial in the court below to a jury, with a verdict in favor of the plaintiff in the sum of $260.23, upon which judgment was rendered on

May 26, 1893. Afterwards, on the 5th day of July, 1893, judgment for said amount, on motion of the plaintiff, was likewise rendered by the court against Swan Peterson and Mada D. Peterson, sureties on the appeal undertakings. J. C. Christensen, James Harold, and the Petersons prosecute error, they having filed in this court a joint petition in error. An examination of the several errors therein assigned discloses not one which affects all the plaintiffs in error jointly. The case is therefore controlled by *Gordon v. Little*, 41 Neb., 250, and *Small v. Sandall*, 45 Neb., 306, where it was held that a petition in error is indivisible, and when made jointly by several parties it will be overruled as to all if it cannot be sustained as to all.

JUDGMENT AFFIRMED.

JAMES W. STRATTON v. W. A. NYE ET AL.

FILED JUNE 22, 1895. No. 5691.

1. **Trial**: PROCEDURE: REVIEW. Considerable discretion is vested in the trial judge in controlling and managing the routine proceedings at the trial, and this applies to the opening statements of counsel as well as to other incidents of the trial. The discretion must be a reasonable one, and it is only where there has been a clear abuse of discretion that the error will be corrected by a reviewing court.

2. ———: MISCONDUCT OF ATTORNEY: GROUND OF REVERSAL. Where the defendant's attorney, in his opening statement to the jury, with the permission of the court, and against the objection of the plaintiff, rehearses matters wholly foreign to the issues in the case, and which are calculated to excite the prejudices of the jury, it will furnish good cause for reversing a verdict and judgment rendered for the defendant.

3. **Hearsay Evidence**: REVIEW. *Held*, That the admission of certain testimony referred to in the opinion was reversible error.

ERROR from the district court of Saunders county. Tried below before BATES, J.

Good & Good and *M. B. Reese*, for plaintiff in error.

George I. Wright, contra.

NORVAL, C. J.

This suit was brought by James W. Stratton against W. A. Nye and David Fraser upon a promissory note for $204, purporting to be signed by them, payable to the order of C. W. Sanford, and by him indorsed to the plaintiff. No service of summons was had upon Nye, nor did he appear to the action. Fraser answered by a general denial, his defense being that the note, as to him, was a forgery. There was a trial to a jury with a verdict and judgment in favor of the answering defendant, to reverse which the plaintiff brings the cause to this court on error.

Error is alleged in that the court permitted, over the objection and exception of the plaintiff, counsel for the defendant in his opening statement to the jury to say that "W. A. Nye in 1889 was the owner of one-half interest in a corn sheller, in connection with Robert Gilchrist; that some time in July of that year he sold that half interest to Mr. Gilchrist, and after this he came to town and mortgaged the same half interest which he had sold to Mr. Gilchrist." The foregoing matters rehearsed to the jury, even if true, were entirely irrelevant to the issues in the case. They could not, if established by evidence, in the least degree tend to show that the name of Fraser attached to the note was not his genuine signature. This is too plain for argument. It is not only the province, but the duty, of the trial court to see to it that counsel in his opening address to the jury confines his remarks to a statement of the nature of the issues to be tried and an outline of the evidence by which the cause of action or defense is to be established.

In such opening statement it is the duty of counsel to refrain from rehearsing irrelevant and prejudicial matters or facts which are foreign to the issues; and where counsel abuses the privilege of advocacy in his opening by rehearsing irrelevant and prejudicial matters, the court should, especially when objection is made, reprove the practice in the hearing of the jury, and as far as possible remedy the mischief by instructing the jury to disregard the prejudicial statements. The trial judge must necessarily have a broad discretion in such matters; but if counsel abuse their privilege, or the trial court its discretion, to the prejudice of a party, it is sufficient ground for a reversal of the case. (1 Thompson, Trials, secs. 264–266; *Scripps v. Reilly*, 35 Mich., 371; *Hennies v. Vogel*, 87 Ill., 242; *Ayrault v. Chamberlain*, 33 Barb. [N. Y.], 229.) In the case at bar, counsel for the defendant in his opening statement repeated before the jury,—and that too with the sanction and approval of the trial judge,—matters entirely foreign to the issues, which had a tendency to excite the prejudices of the jury. We deem this error good and sufficient cause for reversing the judgment.

Complaint is made because the court permitted the defendant's witnesses, Collins and Moss, to testify, over the objections and exceptions of plaintiff, that W. A. Nye, the principal maker of the note in controversy, disposed of certain mortgaged property during the existence of the lien and without the consent of the mortgagee. This testimony was clearly incompetent and prejudicial. What has been said in discussing the preceding assignment applies to this. From the fact that Nye disposed of mortgaged chattels contrary to law, the inference is not permissible that he forged the name of Fraser to the note, or that the latter did not execute the instrument. Equally erroneous was the admission over plaintiff's objection of the testimony of the witness T. L. Adams to the effect that Nye was financially bankrupt. The experience of the past has not

shown that the rich alone are honest. It is not a crime to be poor, nor can the insolvency of a person be shown for the purpose of establishing that he has committed a forgery.

It is also insisted that the court erred in permitting the witness Sams to testify to a conversation had with Nye to the effect that the latter stated to the witness he could imitate the signature of any person. We think the contention is well taken and that the objection to the testimony made when offered should have been sustained. The testimony was hearsay. Nye was not a party to the suit, not having been served. Moreover, had he been duly summoned, the evidence would have been irrelevant and incompetent, since it would be the proving by one defendant the declaration of a co-defendant made in the absence of the plaintiff. The evidence could not in the least tend to prove or disprove whether Fraser appended his name to the note in question, or whether or not his name was forged by Nye. The admission of this testimony was highly prejudicial to the rights of the plaintiff.

Other errors are assigned, both upon the admission and exclusion of testimony, and upon the giving and refusing of instructions, but the conclusion reached makes it unnecessary to consider them. For the errors pointed out the judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

CHARLES E. STRATTON V. GEORGE MEREDITH.

FILED JUNE 22, 1895. No. 5890.

Damages: VIOLATION OF PROMISE TO PURCHASE NOTES. Where one promises that he will, at a certain price, purchase certain notes, if the person to whom such promise is made shall procure

the title to said notes by an exchange therefor of other property, and by such promise causes the proposed exchange to be made, he is bound by his promise, and is liable for payment of such damages as by the violation of said promise he has caused to the promisee.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

C. A. Baldwin, for plaintiff in error.

Slabaugh & Rush, contra.

RYAN, C.

This action was brought in the district court of Douglas county for the recovery of damages which the plaintiff in said court averred that he had sustained by reason of the fraud and deceit practiced upon him by the defendants. It was alleged by the plaintiff in his petition that he had been the owner of a certain lot in Omaha; that the defendants conspired fraudulently to obtain from said plaintiff a conveyance of his interest in said lot, for which purpose defendant Wilkinson offered to exchange for plaintiff's said interest two notes of $400 each, secured by a mortgage on certain land in Brown county, and represented that said notes were of the value of $750, which sum defendant Stratton would be willing to pay for them if plaintiff would consent to exchange his interest in the lot which he owned for said notes. It was further averred in said petition that these representations were made for the purpose of inducing plaintiff to part with his lot without any intention or expectation on the part of the defendants that Stratton would purchase said notes from plaintiff; that the plaintiff, relying upon the aforesaid representations, made the exchange as he had been solicited, and duly conveyed his lot, receiving in exchange therefor the notes and mortgage aforesaid, and that thereafter defendant Stratton absolutely refused to purchase said notes. It was furthermore

alleged by the plaintiff that the notes and mortgage securing the same were worthless, and were so known to be by the defendants when by their representations and promises they induced plaintiff to exchange his lot for them. In his answer the defendant Stratton admitted that there were certain negotiations between himself and plaintiff about said notes, but he denied that he ever represented that he would purchase the same, or that said notes were of any value, and denied that, between himself and his co-defendant, there had been any agreement or conspiracy whatever. There was a verdict and judgment against both defendants for the sum of $877.60.

The defendant Stratton alone prosecutes error to this court. There was a sharp contradiction and irreconcilable conflict between the evidence adduced by one side and that submitted by the other. That for the plaintiff was of such a nature that, if believed by the jury, there was disclosed a design on the part of Stratton to procure Meredith to part with the title to his lot in exchange for the two notes secured by mortgage described in plaintiff's petition, which were worthless; that to accomplish this purpose he represented to Meredith that if by the exchange of his lot Meredith should become the owner of the aforesaid notes, he, Stratton, would purchase them for $750, a sum known by him to be satisfactory to Meredith, and that, relying upon the representations made by Stratton as of his own personal knowledge that the Brown county land mortgaged was very valuable, and that if Meredith secured the aforesaid notes in trade, he, Stratton, would pay the above proposed consideration for an assignment of them, plaintiff conveyed his lot and obtained the notes and mortgage aforesaid, which Stratton has ever since refused to purchase at any price whatever. It is doubtful whether, by direct proofs, there was shown an actual conspiracy between Wilkinson and Stratton to bring about the result which in fact was accomplished. There was, however, sufficient to es-

tablish a common purpose, and for its success the evidence was ample to justify the jury in finding that Stratton was directly and entirely responsible. The result testified to is that for the interest which the defendant in error once had in the lot exchanged for the above mentioned notes he has received absolutely nothing. There was evidence that the interest of which the defendant in error was deprived was of the value of $800. If these facts were established defendant in error was entitled to maintain an action against Stratton. The contradictory proofs made by plaintiffs in error were direct negatives of those presented by the defendant in error. From a consideration of the bill of exceptions alone it would appear that Stratton had successfully disproved the facts which the testimony against him tended to establish. The verdict of the jury was otherwise, and this verdict was sanctioned by the presiding judge when he overruled the motion of Stratton for a new trial. The deportment of different witnesses, especially when interested parties themselves take the stand, is often very convincing. There is no way known by which this disadvantage can be counterbalanced, and, under these conditions, the only course open in this court is to accord to the verdict of the jury, sanctioned by the approval of the trial judge, a conclusiveness little short of absolute verity as to facts in reference to which the evidence is found conflicting. (*Worthington v. Worthington*, 32 Neb., 334; *Brown v. Hurst*, 3 Neb., 353; *Helling v. New England Mortgage Security Co.*, 10 Neb., 611; *Courtnay v. Price*, 12 Neb., 188; *Jennings v. Simpson*, 12 Neb., 558.) There is found no error in the record and the judgment of the district court is

AFFIRMED.

CARL WALDOW ET AL., APPELLANTS, V. A. D. BEEMER, ADMINISTRATOR, APPELLEE.

FILED JUNE 22, 1895. NO. 6257.

1. **Administration of Estates:** ORDER OF SALE: REVIEW. An order of the district court licensing the sale by an administrator of mortgaged premises for the payment of debts of a decedent will not be reversed where the proofs fail affirmatively to show that such order was improper.
2. **Appointment of Administrator:** REGULARITY OF PROCEEDINGS. Whether or not an administrator has regularly been appointed such cannot be inquired into or determined in resisting his application for license to sell real property for the payment of debts.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J.

Uriah Bruner, for appellants.

M. McLaughlin, contra.

RYAN, C.

This is an appeal from an order for the sale of real property of William Waldow, deceased, for the payment of debts and costs of administration. There were many objections presented, of which such as are at all important shall be considered in a general way to avoid the confusion which a detailed history of all the facts pleaded and proved would necessarily involve.

The petition contained averments that there had been allowed against the estate of William Waldow debts to the amount of $1,230.50, and costs of administration to the amount of $250; that the real property necessary to be sold consisted of two tracts of land containing 160 acres each. In the objections filed to the petition it was asserted

that William Waldow left a will, which in the county court of Cuming county on April 28, 1888, was probated, from which order of probate an appeal was duly taken by the contestants to the district court of said county, wherein on March 22, 1889, a verdict was rendered in favor of the proponent, but that no judgment was rendered thereon until February 3, 1891—nearly two years after said verdict had been found. It was also alleged that on the 13th of February, 1889, T. M. Franse filed a claim in the aforesaid county court against said estate for the principal sum of $95, and interest $75, on a note made to him by William Waldow, which claim was allowed in the sum of $216.18. This claim it was alleged was assigned to Daniel C. Giffert, upon whose application A. D. Beemer was appointed administrator of the estate of William Waldow on December 2, 1889. The contention by appellants is, that as the claim of Franse was filed and allowed before administration granted that this allowance was without jurisdiction in the county court to make it, and furthermore it is insisted that until a judgment had been rendered upon the verdict sustaining the will in the district court the contest in respect thereto was pending, and that meantime an appeal undertaking having been given, the county court had jurisdiction neither to appoint an administrator of, nor to allow a claim against, the estate of William Waldow. From one of these premises it is argued that Mr. Beemer had no standing to act as administrator, and from the other that there was proved no claim rendering necessary the sale of the real property ordered by the district court. In respect to the first of these it is sufficient to say, Mr. Beemer's appointment and qualification as administrator were at most irregular and cannot be collaterally impeached in this proceeding. As to the insufficiency of the claim allowed in favor of Mr. Franse, it may be conceded that the statute requires the appointment of an administrator before such a claim can be allowed against an estate. In this case, however,

appellants themselves made proof that this claim had been filed and allowed. It is, to say the least, questionable whether they now should be permitted to assail its validity. We are not called upon, however, to determine this question, for upon the pleadings it must be accepted as a fact that there were costs of administration which justified a sale of real property since the proofs showed the want of any personalty. If too much was allowed sold the statute provides for such a contingency. As to the objection that the district court, after its license to sell for payment of debts incurred in administration, ordered that the proceeds should be "invested in some productive stocks," it is deemed proper to say that this does not affect the validity of the order of sale. There was a mortgage on each tract ordered sold, and we cannot say that the permission to sell, subject thereto upon a showing of $250 costs of administration, admittedly due, was erroneous or unjustifiable. The judgment of the district court is therefore

AFFIRMED.

ROSS R. MATTIS, TRUSTEE, ET AL., APPELLEES, V. JOHN CONNOLLY ET AL., APPELLEES, IMPLEADED WITH G. M. STECKMAN ET AL., APPELLANTS.

FILED JUNE 22, 1895. No. 6442.

Bill of Exceptions: ALLOWANCE BY CLERK: REVIEW. In this case there are discussed only questions of fact, and as the bill of exceptions was settled by the clerk of the district court without any agreement upon it, these questions cannot be considered.

APPEAL from the district court of Pawnee county. Heard below before BUSH, J.

H. C. Lindsay, *Humphrey & Raper*, and *Story & Story*, for appellants.

W. W. Giffen, G. E. Becker, and *J. J. Baker, contra.*

RYAN, C.

In this case the bill of exceptions was signed by the clerk upon a stipulation that he should settle and allow it. There was, however, no agreement upon the bill of exceptions, and following *Scott v. Spencer,* 42 Neb., 637, we cannot treat it as such. We find that the briefs of counsel, upon which, without oral argument, this cause was submitted, discuss only questions of fact. These we cannot advisedly consider, and the judgment of the district court is

AFFIRMED.

CHARLES E. STRATTON V. WILLIAM H. WOOD ET AL.

FILED JUNE 22, 1895. No. 5889.

Pleading: AMENDMENT DURING TRIAL. The giving of leave to make an amendment of a petition in the course of a trial, when such amendment does not substantially change the nature of the plaintiff's claim, is within the discretion of the district judge.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

C. A. Baldwin, for plaintiff in error.

Slabaugh & Rush, contra:

RYAN, C.

The plaintiff in error, with Stephen Milholm, were charged in a petition filed in the office of the clerk of the district court of Douglas county with having by a fraudulent conspiracy obtained from the defendants in error a

stock of groceries of the value of $275 without consideration. The manner in which it was charged that the wrong complained of was accomplished was this: Milholm agreed to purchase said groceries for $250 in cash, but, as he was unable to pay this amount at once, it was agreed between him and the defendants in error that certain notes secured by mortgages should be given the defendants in error as security until the morning following the day on which the agreement to sell was entered into; that Stratton agreed to pay said sum of $250 on said next day, if the defendants in error would deliver the goods already agreed to be purchased by Milholm, and by the means described it was charged that Stratton and Milholm were endeavoring to cheat and defraud the defendants in error of their stock of groceries and the pay therefor. It was further alleged that immediately thereupon the plaintiff in error took said groceries and removed them beyond the control and knowledge of the defendants in error; that plaintiff in error wholly refused to comply with their agreements; that in obtaining said groceries Milholm was but the tool of Stratton; that the notes and mortgages which Stratton promised to cash were worthless; that the defendants in error, believing the promises and representations of Milholm and Stratton to be true, transferred the aforesaid groceries as above described.

There is complaint made because during the trial the above petition was amended by the insertion of this language: "That said Stratton did not at the time he so agreed and represented so to do intend to carry out or fulfil said representations and agreements that he would buy said notes and mortgages and pay said amount for them as aforesaid, and said Milholm knew of said agreement and knew that said Stratton did not intend to do as he agreed." The plaintiff in error characterizes as unheard of, the submission of the case to a jury before this amendment had been made and two days before the answer to the amended peti-

tion was in fact filed. The amendment was made, as had been indicated that it would be made, before the submission of the cause. An answer was permitted to be filed *instanter*, but the actual filing was delayed two days. For this last circumstance the defendants in error were not responsible. The right to allow amendments which do not materially change the original claim of plaintiff is expressly recognized in the provisions of section 144 of the Code of Civil Procedure. There was no abuse of this discretion, as will readily be seen upon consideration of the averments originally made in connection with the above quoted amendment. There was a judgment by default against Milholm for the amount of damages claimed, and upon a trial to a jury of the issues presented by the amended petition and the answer thereto, there was judgment for a like amount on a verdict returned against Stratton. By the latter a petition in error has been filed, with a transcript of the record and the original bill of exceptions, in this court. It is not necessary to set out the evidence offered on either side. It is sufficient for every purpose to state that there was ample proof to justify the jury in finding every allegation of the amended petition was true. The conclusions of the jury upon the disputed questions of fact were approved by the refusal of the district court to grant a new trial. No proposition other than those already considered was argued by the plaintiff in error, and the judgment of the district court is

AFFIRMED.

GILMORE & RUHL, APPELLANTS, V. MARY M. SILVER, APPELLEE, AND SUTTON EXCHANGE BANK ET AL., APPELLANTS.

FILED JUNE 22, 1895. No. 5780.

Dismissal of Plaintiffs' Appeal: CONTEST BETWEEN DEFENDANTS: REVIEW: PRACTICE. Where the original plaintiff had dismissed his appeal, leaving a controversy solely between defendants as to respective priorities of mortgages, the defendants having stipulated, in effect, that the mortgage to one of their number was first recorded and that in terms every other mortgage was made subject to this particular one, *held*, in the absence of facts pleaded and corresponding relief prayed entitling to other relief, that this court should not reverse the judgment of the district court recognizing and confirming the priority of the mortgage as stipulated in the mortgages specially made subject thereto.

APPEAL from the district court of Clay county. Heard below before HASTINGS, J.

E. E. Hairgrove and *Leslie G. Hurd*, for appellants.

Thomas H. Matters, contra.

RYAN, C.

The petition of Gilmore & Ruhl was filed in the district court of Clay county on January 14, 1892, in which Mary M. Silver and others were named as defendants. The defendants joined with Mary M. Silver were the former members of the firm of Hayes & Silver, and a large number of the creditors of said firm. It was alleged in the petition that Edwin J. Hayes and Richard S. Silver had been doing business in Sutton under the firm name of Hayes & Silver; that on August 12, 1891, said firm had executed its note to plaintiff for $325.45 and secured it by giving a chattel mortgage on the merchandise of said firm,

which mortgage was filed for record on the 15th day of August aforesaid; that on August 12 aforesaid the firm of Hayes & Silver made to Mary M. Silver a chattel mortgage on the stock of goods above mentioned, which mortgage was recorded on the day of its execution. It was averred that at the time of making its mortgage to Mary M. Silver the firm of Hayes & Silver was not indebted to Mary M. Silver in any sum whatever; that on August 13th, 1891, there was executed by the firm of Hayes & Silver thirteen chattel mortgages on the aforesaid merchandise, each mortgage being made to a person or firm therein described, was filed for record on the day of its execution; that on August 15 aforesaid the firm of Hayes & Silver executed twelve more chattel mortgages on the same property as had before been mortgaged, and that these, on the same day they were made, were filed for record. There were described other and subsequent mortgages upon the merchandise above described. All parties referred to as mortgagees of the firm of Hayes & Silver were joined as defendants with Mary M. Silver and her husband, Richard S. Silver, and his former partner, Edwin J. Hayes. It was further alleged in the petition that, in accordance with a stipulation entered into by all the parties concerned, the merchandise aforesaid had been sold and the proceeds paid into the hands of the said clerk of the district court. The prayer of the petition was for judgment against Hayes & Silver, Edwin J. Hayes, and Richard S. Silver for the amount alleged to be due the plaintiff; that the mortgage made to Mary M. Silver be declared null and void; that the mortgage to Cohen Bros. be declared no lien on the mortgaged property, and that the proceeds of the sale aforesaid should be equitably distributed among the various mortgagees. The record does not show when the service of summons was made, either on the above mortgagors or on Mary M. Silver. The mortgagors made default and Mrs. Silver filed her answer to the above petition on February

16, 1892. It is not necessary to describe the answer, for, as between the defendant and plaintiff, a full settlement has been made of all matters in controversy between them and a stipulation of a dismissal accordingly has been filed in this court. The next pleading was filed February 26, 1892, and was in terms an answer of John L. Lemon, trustee, and R. B. Smith & Co. to the above petition, although within it were the averments that the mortgage given to Mary M. Silver "was obtained by fraud and misrepresentation as alleged in the third count of the aforesaid petition," and that Mrs. Silver had never taken possession under her mortgage. As to the mortgage to Mary M. Silver, it was prayed in the petition that said mortgage be declared null and void and of no effect, and in other respects the prayer was as in the plaintiff's petition already described. On February 26, 1892, there was filed an answer by twenty-five of the creditors of the firm of Hayes & Silver. These defendants admitted all the allegations of the petition to be true except as by said answer certain averments thereof should be specifically denied. The qualifications referred to were of no practical importance in the present condition of this controversy. As in the answer of John L. Smith, trustee, and R. B. Smith & Co., there were averments in this answer that the mortgage to Mary M. Silver obtained by fraud and misrepresentation as alleged in the third paragraph of the plaintiff's petition, and this was coupled with the allegation that Mrs. Silver was never in possession under her chattel mortgage. There was a prayer for the same relief as was prayed in the answer of John L. Lemon and R. B. Smith & Co., already described as being identical with that in the plaintiff's petition. Mrs. Silver had no notice of the answers of her co-defendants and there was no reply thereto by her. Since each of these answers was filed ten days after her answer to the original petition was filed, it might be safe to assume that they were filed after the answer day had passed. It is

doubtful whether in any event the co-defendants of Mrs. Silver, under these circumstances, could properly obtain affirmative relief as against the mortgage to her. The dates of the mortgages have already been sufficiently given to indicate that the one given Mrs. Silver was filed before any of those held by her co-defendants. On the trial it was stipulated that "all of the last-named mortgages are made subject in express terms to all mortgages, liens, and incumbrances at the time they were filed." It requires no argument to show that the issues between Mrs. Silver and her co-defendants were not such that the express provision referred to in the above stipulation as being contained in the mortgage to each of the said defendants could be ignored or set aside. Such facts as justified an avoidance of this kind, if any such existed, were not pleaded, neither was there prayer for such relief as would have been appropriate, even if proper averments of the facts had been contained in the aforesaid answers. Under these circumstances the judgment of the district court must be, and accordingly it is,

AFFIRMED.

KEARNEY CANAL & WATER SUPPLY COMPANY V. OLAFF AKEYSON.

FILED JUNE 22, 1895. No. 6220.

1. **Waters**: CANAL EMBANKMENTS: NEGLIGENCE: DAMAGES: EVIDENCE. A farmer sued a canal company for damages for the destruction of his crops, alleging that the canal company had failed to properly keep and maintain its canal embankments in good repair, by reason of which a large quantity of water ran over the banks of said canal on the farmer's crops. The evidence showed that the farmer's lands had never been overflowed prior to the construction of the canal; that after its construction his lands were overflowed in 1888, 1889, 1890, and 1891; that a

part of the embankment of the canal was washed away; that in the year 1891 farmers in the vicinity "cultivated the canal embankments, which lowered them so that the water would flow over more readily." *Held*, That the jury was justified in inferring from this evidence that the canal company had been guilty of negligence in the manner of maintaining the embankments of its canal.

2. **Negligence:** EVIDENCE. A verdict for negligence may be supported by inference when the inference is the logical, probable, and reasonable deduction from proved or conceded facts. (*Kilpatrick v. Richardson*, 40 Neb., 478.)

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Greene & Hostetler, contra.

RAGAN, C.

Olaff Akeyson brought this suit in the district court of Buffalo county against the Kearney Canal & Water Supply Company (hereinafter called the "Canal Company"). The Canal Company is a corporation organized under the laws of the state, and had constructed, owns, and at the time of the occurrence of the events of which this suit arose was operating, a canal from the Platte river to the city of Kearney. The canal tapped the Platte river some twelve miles west and southwest of the city of Kearney, and thence passed along in a northeasterly direction, leaving the lands of Akeyson about one and one-half miles south of the canal. The action of Akeyson was to recover damages which he alleged he had sustained by waters overflowing from this canal, running on his land, and destroying his crops. He had a verdict and judgment and the Canal Company has prosecuted to this court a petition in error.

1. The first assignment of error is that the verdict of the jury is not supported by sufficient evidence. We think

it is. The evidence is practically undisputed that the waters overflowed from this canal and damaged Akeyson's crops. But it is argued that the evidence fails to show this resulted from the negligence of the Canal Company. The record does not show just how the canal was constructed nor how it was operated; but it does show that west of Akeyson's farm the canal crossed a little stream called Beaver creek, and was constructed across the entire water-shed of Beaver creek; that Akeyson's land lies in this water-shed of Beaver creek, and that the canal was constructed of sufficient capacity to carry away one-third of the surface water resulting from rains and melting snows on this Beaver creek water-shed; and it is inferable at least from the evidence that the entire water-shed of Beaver creek slopes to the south and east towards the Platte river. The negligence charged by Akeyson to the Canal Company was that it had failed to carefully keep and maintain its canal and embankments in good repair and condition, and by reason of the insufficiency of the embankments, large quantities of water ran through and over said banks, and was carried down and discharged in a volume on Akeyson's lands. The evidence is practically undisputed that prior to the construction of this canal these lands of Akeyson's had never been overflowed, but that after the construction of the canal they overflowed in 1888, 1889, 1890, and 1891; and the witnesses for the Canal Company themselves testified that a part of the embankment of the canal was washed away; that there never had been but one or two breaks in the canal; that in the year 1891 the farmers cultivated the embankments, which lowered them so that the water would flow over more readily. Now from this testimony we think the jury was entirely justified in inferring that the Canal Company had been guilty of negligence in the manner of maintaining the embankments of its canal. A verdict for negligence may be supported by inference, but the inference must be the logical, probable, and rea-

sonable deduction from proved or conceded facts. (*Kilpatrick v. Richardson*, 40 Neb., 478.)

2. The second and third assignments of error argued relate to the action of the district court in admitting and rejecting evidence on the trial. We cannot review these assignments, for the reason that they are too indefinite. The assignments are: "The court erred in admitting improper evidence to go to the jury on behalf of the plaintiff;" and, "The court erred in excluding from the jury proper and competent evidence on behalf of the defendant."

3. The fourth assignment is that the court erred in giving to the jury an instruction in the following language: "The defendant could not be held responsible for any damage caused by the cutting of the embankment of the canal, until a reasonable time had elapsed in which to repair the same, after no ice of such cut; neither could it be held liable for overflows caused by unprecedented heavy rainfalls or any other unforeseen causes which could not be provided against by the exercise of a reasonable degree of care and caution." The criticism on this instruction is the use of the word "unprecedented." It is said that this really means such a rainfall as was never known before,—a rainfall without precedent. We think the instruction would have been better had the court used the word "extraordinary" or "unusual" instead of "unprecedented;" but the Canal Company was not prejudiced by the use of this word by the court, for in the sixth instruction given to the jury at the request of the Canal Company the court told the jury that if the overflow complained of was caused by unusual floods or from ice gorges which could not be prevented by the defendant in the exercise of ordinary care, it was not liable for any damages that resulted from such overflow.

4. The fifth assignment is that the court erred in refusing to give the jury the following instructions:

(1.) "If the canal was made and maintained of sufficient capacity to carry all the water it took from the Platte river and the overflow, if any has been proved, was caused by the natural rainfall in the water-shed and basin of Beaver creek, then the defendant would not be liable for damages caused by such overflow.

(2.) "If you believe from the evidence that the land of the plaintiff is located on Beaver creek, and that all the surplus natural rainfall on the water-shed and basin of said Beaver creek would be carried by said creek over and through the land of the plaintiff, as its natural and only course, and if you further believe from the evidence that the canal was of sufficient capacity to and did carry all the water it received from the Platte river, then you are instructed that if the volume of water in the canal was increased only by the natural rainfall on the water-shed of Beaver creek and therefore overflowed the banks of the canal anywhere within the water-shed drained by said creek, and then flowed over the land of plaintiff, the defendant would not be liable for damage caused by such overflow."

The court did not err in refusing to give the first of the two instructions complained of for this reason at least, there is no evidence in the record that the waters which destroyed Akeyson's crops were surface waters which accumulated on the water-shed or basin of Beaver creek; or, if it may be said that there is some evidence on that subject, it is not of such a character as enables us to say that the district court erred to the prejudice of the Canal Company in refusing to give the instruction.

The court did not err in refusing to give the second instruction of the two under consideration because there was no evidence in the record on which to base such an instruction. The evidence in this record does not show that the waters which damaged Akeyson's crop overflowed the embankment of the canal as the result of surface waters from

the water-shed and basin of Beaver creek flowing into the canal. The evidence, it is true, shows that such a thing might happen, that it could happen; but that it did happen is a mere conjecture. But if it appeared from the evidence that the waters which flowed from the banks of the canal and damaged Akeyson's crops were surface waters from the basin of Beaver creek which the canal embankment had stopped and accumulated in the canal, then of a certainty the instruction should not have been given, for that would show that the Canal Company, by building the embankment of the height and in the manner it did, had collected together the surface waters from the basin of Beaver creek, and thereupon discharged them in a body on Akeyson's land, and this would have rendered the Canal Company liable for the damages. (*Lincoln Street R. Co. v. Adams*, 41 Neb., 737.)

There is no error in the record, and the judgment of the district court is

AFFIRMED.

WILLIAM S. FLENTHAM, APPELLANT, V. DANIEL O. STEWARD ET UX., IMPLEADED WITH JAMES W. DAWES ET AL., APPELLEES.

FILED JUNE 22, 1895. No. 5693.

1. **Action Against Receiver Without Leave of Court:** VOLUNTARY APPEARANCE: WAIVER: JURISDICTION. D. & F., copartners, guarantied in writing the payment of a debt secured by a real estate mortgage. Litigation ensued between them, and a receiver was appointed to take charge of the copartnership property. The holder of the mortgage brought suit to foreclose the same, making D. & F. and their receiver parties defendant without leave of the court which appointed the receiver. D. & F. and the receiver entered their voluntary appearance to the foreclosure suit. The receiver filed an answer in the nature of a cross-petition setting up a second mortgage

belonging to D. & F., on the premises in controversy, and was by the decree of the court awarded a foreclosure of such mortgage. The property was duly sold, and after applying the proceeds of the sale to the satisfaction of the decree there still remained a considerable sum due thereon. The holder of the first mortgage then filed a motion for a personal judgment against D. & F. and their receiver for the balance due on his decree. This motion was resisted on the ground that the receiver had been sued without leave of the court which appointed him, and that therefore the court in which the mortgage foreclosure suit was pending had no jurisdiction over him. *Held*, (1) That the general rule is that a receiver may not be sued without leave of the court which appointed him; (2) but if this rule is applicable to such a case as the one at bar, then the fact that a receiver has been sued without leave is a matter of defense for him in the action where sued; (3) that the suing a receiver without permission does not render invalid the process of the court served on him nor prevent the jurisdiction of the court in which he is sued from attaching to his person; (4) that a judgment pronounced against a receiver so sued is not absolutely void for want of jurisdiction; (5) that the receiver having voluntarily entered his appearance in the action, and having asked the court for and obtained affirmative relief, must be presumed to have submitted himself to the jurisdiction of the court and to have waived the defense of being sued without leave of the court which appointed him.

2. **Mortgages:** DEFICIENCY JUDGMENTS. The district courts of this state in suits brought therein for the foreclosure of mortgages, on the coming in of the report of sale of the mortgaged premises, are authorized to render a personal judgment and award execution for any deficiency remaining unpaid on the decree. (Sec. 847, Code of Civil Procedure.)

3. **Courts of Equity:** JURISDICTION. When a court of equity acquires jurisdiction over a case for any purpose it may retain the cause for all purposes and proceed to a final determination of all the matters at issue in the case. *Morrissey v. Broomal*, 37 Neb., 766, followed.

4. **Guarantor of Note:** LIABILITY. One who before maturity unconditionally guaranties the payment of a promissory note becomes absolutely liable upon the default of the maker; and the neglect of the holder of such note to sue the maker does not discharge such guarantor, although the maker becomes insolvent during the time the holder neglects to sue. *Huff v. Slife*, 25 Neb., 448, followed.

APPEAL from the district court of Hitchcock county. Heard below before WELTY, J.

Sawyer & Snell, Victor Seymour, and *J. E. Cochran,* for appellant.

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

RAGAN, C.

On the 5th of August, 1889, one Daniel O. Steward made in writing of said date his promissory note for $500, due on August 1, 1894, with interest at the rate of seven per cent per annum, payable annually, such interest evidenced by coupons or interest notes of $35 each, attached to said principal note. This principal note and coupons were made payable to the order of one Dan. H. Cole. To secure the payment of said debt Steward executed to Cole a mortgage upon certain real estate in Hitchcock county. This mortgage debt Cole duly assigned to William S. Flentham. The notes and mortgages were executed by Steward to Cole in consideration of a loan of $500 made by the latter to Steward in August, 1889. The loan was negotiated by Dawes & Foss, copartners, and at the time of the delivery of the notes, coupons, and mortgage to Cole, Dawes & Foss, in writing, guarantied the payment of said principal note and the coupons. It appears also that Steward paid, or promised to pay, Dawes & Foss a certain compensation for procuring this loan for him, and to secure the compensation promised Steward gave Dawes & Foss a second mortgage upon the same real estate which he had pledged to Cole. It appears that trouble arose between James W. Dawes and Fayette I. Foss, the individuals composing the copartnership of Dawes & Foss, that litigation ensued, and that the court in which such litigation was instituted appointed one Charles C. White receiver of the effects of said copartnership of Dawes & Foss. Default hav-

ing been made in the payment of the mortgage debt, William S. Flentham, Cole's assignee, brought suit in the district court of Hitchcock county to foreclose the mortgage. Daniel O. Steward and his wife, James W. Dawes, Fayette I. Foss, and Charles C. White as receiver of the copartnership effects of Dawes & Foss, were made parties defendant to the action. The connection of Steward and wife with the case need not be noticed. Dawes & Foss and White, the receiver, entered their voluntary appearance to the suit of Flentham. In due time a decree was rendered finding the amount due Flentham on his mortgage debt and giving him a first lien upon the mortgaged premises to secure its payment. The court also found the amount due Dawes & Foss and the receiver on the second mortgage given to them by Steward, and that Dawes & Foss and the receiver had a second lien upon the mortgaged premises to secure the amount found due them. The real estate was then sold by the sheriff at public auction and purchased by Flentham. After applying the amount bid at the sale towards the payment of Flentham's decree and the costs of the foreclosure proceedings there still remained a balance due on his decree. Flentham moved the court for a personal judgment against Dawes & Foss and the receiver for the balance remaining unpaid on the decree. The district court denied this motion, and from this order Flentham has appealed. In the petition filed by Flentham for the foreclosure of his mortgage he averred that Dawes & Foss had guarantied in writing the payment of the mortgage debt, setting out a copy of the guaranty, and that White had been appointed receiver of the effects of the copartnership of Dawes & Foss; and prayed in the petition for a personal judgment against Dawes & Foss and White, as receiver, for any deficiency that might be due him after applying the proceeds of the sale of the mortgaged property towards the liquidation of the mortgage debt. To sustain this decree counsel for the appellees contend:

1. That as the copartnership effects of Dawes & Foss were in the hands of a receiver the latter could not be sued without leave of the court which appointed him, and as such leave was not obtained, the district court of Hitchcock county had no jurisdiction over the copartnership of Dawes & Foss, nor over the person of the receiver. The general rule undoubtedly is that a receiver may not be sued without leave of the court which appointed him; but if this rule is applicable to such a case as the one at bar it would seem that the fact that the receiver had been sued without leave of the court appointing him was a matter of defense for the receiver, and that the suing him without permission of the court which appointed him would not of itself render invalid the process of the court served on him, nor prevent the jurisdiction of the court in which he was sued from attaching to his person; and that a judgment pronounced against such receiver would not be absolutely void for want of the court's jurisdiction over him, because the record did not disclose that the party bringing the suit had first obtained leave of the court who appointed the receiver to sue him. The receiver having voluntarily entered his appearance in this action, and not having objected to the jurisdiction of the court over him in any manner, and having asked the court for and obtained affirmative relief in the action by taking a decree on the mortgage of Dawes & Foss, the question of the jurisdiction of the district court over the receiver comes too late, and he must be deemed to have submitted himself to the jurisdiction of the court and to have waived the defense of being sued therein without leave of the court which appointed him. (*In re Young*, 7 Fed. Rep., 855; *Naumburg v. Hyatt*, 24 Fed. Rep., 898; *Hubbell v. Dana*, 9 How. Pr. [N. Y.], 424; *Jay's Case*, 6 Abb. Pr. [N. Y.], 293.)

2. A second argument insisted on to sustain the correctness of the decree is that the record does not show that

Foss, of the firm of Dawes & Foss, ever guarantied the payment of the mortgage debt. This contention is wholly without merit. The guaranty made by Dawes & Foss of the payment of this mortgage debt was in writing and became and was a joint and several obligation of the members composing this copartnership.

3. A third contention is that the decree was correct because Dawes & Foss and the receiver had no notice of Flentham's application for a deficiency judgment. The recital in the record is as follows: "Now on this the 2d day of June, 1892, * * * this cause coming on for confirmation, * * * the defendants are allowed by the court until June 3, 10 o'clock A. M., to show cause why said sale should not be confirmed and deficiency judgment rendered against James W. Dawes and Fayette I. Foss, etc. * * * And now on this 3d day of June, 1892, the defendants having failed to show cause why said sale should not be confirmed, * * * it is ordered that said proceedings be and they are hereby approved, ratified, and confirmed. * * * And thereafter the same day the cause came further on for hearing on motion of plaintiff for deficiency judgment against the defendants James W. Dawes and Fayette I. Foss, in consideration whereof the court overruled said motion," etc. Here then is a recital in the record that Dawes & Foss had actual notice of the application by Flentham for a deficiency judgment; that they applied for and were given time in which to resist said application.

4. Another contention in support of the decree is that the rendering of a deficiency judgment in a mortgage foreclosure case is the exercise by the court of its legal functions; and that a court of equity has no jurisdiction to render such judgment. Section 847 of the Code of Civil Procedure expressly authorizes the district courts of this state, in a suit for the foreclosure of a real estate mortgage, on the coming in of the report of sale of the mortgaged premises,

to decree a judgment and award execution for any deficiency remaining unpaid on the decree after the sale of the mortgaged property. The familiar principle is that when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue in the case. (*Morrissey v. Broomal*, 37 Neb., 766; *Buchanan v. Griggs*, 20 Neb., 165.)

5. The final contention in support of the decree is that the record does not show that Flentham had exercised due diligence to collect the mortgage debt; and that therefore the guarantors of the debt had been released from their obligation. No such defense was interposed by Dawes & Foss or their receiver in the court below; nor is there in the record any evidence on the subject whatever. Nor do we think that any laches or want of diligence on the part of Flentham in his efforts to collect this mortgage debt would afford any defense to Dawes & Foss. In *Huff v. Slife*, 25 Neb., 448, this court held that one who before maturity unconditionally guaranties the payment of a promissory note becomes absolutely liable upon the default of the maker; and that the mere neglect of the holder of a note to sue the maker does not discharge the guarantor although the maker becomes insolvent.

The decree appealed from is reversed, and the cause remanded to the district court with instructions to render a personal judgment against James W. Dawes and Fayette I. Foss, and Charles C. White as receiver, for the amount remaining unsatisfied on the decree in favor of Flentham.

REVERSED AND REMANDED.

JAMES C. BRINKWORTH, APPELLANT, V. J. S. GRABLE ET AL., APPELLEES.

FILED JUNE 22, 1895. No. 6302.

1. **Municipal Corporations:** BONDS: REGISTRATION: DUTY OF STATE AUDITOR: INJUNCTION: INTEREST COUPONS: TAXES. Municipal bonds bearing date November 1, 1889, due in twenty years, drawing interest at the rate of six per cent per annum payable semi-annually, evidenced by coupons maturing May 1, 1890, and each six months thereafter, issued to aid in the construction of a railroad, were deposited with the auditor of public accounts on the 21st of December, 1889, for certification and registration. The auditor was prevented by injunction proceedings from registering and certifying the bonds until January 1, 1891, at which time they were registered and certified. *Held*, (1) That as a matter of law the bonds were registered and certified on December 21, 1889; (2) as taxes levied in counties under township organization become due on the 1st day of October after their levy (secs. 83, 91, ch. 77, Compiled Statutes, 1893), (3) therefore, the auditor, when he registered said bonds, should have detached therefrom the coupons thereon which by their terms matured prior to October 1, 1890. (Sec. 37, ch. 9, Compiled Statutes, 1893.)

2. ——: ——: TAXES. Said section 37 construed, and *held* that the object of its enactment was to prevent the municipalities of the state from executing and putting upon the market their obligations for the payment of money which would by their terms mature before a tax could be legally levied and become due for the payment of the same.

3. ——: ——. It is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. *Young v. Clarendon Township*, 132 U. S., 340, followed.

4. ——: ——: TAXES. The municipal corporation had authority to issue the bonds in question, but it had no authority to issue and deliver interest coupons which would mature before a tax could be lawfully levied and become due for their payment.

5. ——: ——: VALIDITY OF COUPONS. That the coupons attached to said bonds which matured prior to October 1, 1890, were issued without authority of law, and were void even in the hands of an innocent purchaser.

APPEAL from the district court of Gage county. Heard below before BABCOCK, J.

E. O. Kretsinger, for appellant.

Gardiner Lathrop and *Griggs, Rinaker & Bibb, contra.*

RAGAN, C.

In 1889 and 1890 the city of Beatrice was a city of the second class having more than 5,000 and less than 25,000 inhabitants, situate in Gage county, then under township organization. In August, 1889, at an election held for that purpose, the electors of the city of Beatrice voted to issue its bonds in the sum of $50,000, to aid in the construction of the Kansas City & Beatrice railroad. In August, 1889, the proper authorities of said city duly executed fifty of the bonds of said city, of $1,000 each, drawing interest at the rate of six per cent per annum, payable semi-annually. The bonds were to run twenty years and bore date November 1, 1889. The interest was evidenced by coupons attached to the bonds. One thousand five hundred dollars of these coupons matured on the 1st of May, 1890, and a like sum at the beginning of each six months thereafter. The bonds were a donation on the part of the city to the railroad company. There is no question in the case as to the validity of these bonds, nor that the railroad company was entitled to them. In December, 1889, the bonds were presented to the auditor of state for registration and certification. About this time an injunction suit was instituted by a taxpayer of the city of Beatrice, and the auditor and the secretary of state, the city of Beatrice and its mayor and council were enjoined,—the auditor and secretary of state from registering and certifying the bonds, and the city and its officers from levying a tax to pay the interest thereon. This injunction continued in force until January 1, 1891, when it was dissolved.

And thereafter on the 2d of January, 1891, the auditor and secretary of state duly registered and certified the bonds. When the bonds were first presented to the auditor for registration in December, 1889, there were $1,500 of coupons attached to said bonds which would mature before a tax could be lawfully levied and become due with which to pay the same, and when the auditor and secretary of state actually registered and certified the bonds, January 2, 1891, there were $3,000 of matured coupons on said bonds, and $1,500 of coupons attached to said bonds which would mature before a tax could be lawfully thereafter levied and become due to pay the same. At the time the auditor actually registered the bonds in question on the 2d of January, 1891, he did not detach from said bonds any coupons whatever. In June, 1891, the proper authorities of the city of Beatrice levied a tax, not only for the payment of the coupons which would mature on the 1st of November, 1891, after said levy, but also a sufficient tax to pay the coupons which matured in May and November, 1890, and May, 1891. The tax so levied was collected by the treasurer of the city of Beatrice, and out of this tax and before the bringing of this suit he paid and discharged the coupons which matured May 1, 1890. This action was brought by James C. Brinkworth, a citizen and taxpayer of said city, to enjoin the latter from paying any of the coupons on said bond which matured prior to the 1st day of May, 1892. The court rendered a decree dismissing the petition of Brinkworth, and he has appealed. Section 37, chapter 9, Compiled Statutes, 1893, provides: "That whenever a bond of any county, city, town, township, precinct, village, school district, or other municipality, shall be presented to the auditor of public accounts for registration, the auditor shall examine the interest coupons thereto attached, and shall detach as many of them as shall mature before the first taxes levied to meet the same, shall become due and collectible, and stamp said coupons

'Detached by the auditor of public accounts,' and send to the treasurer of the county from which said coupons were issued." To reverse this decree it is insisted that taxes levied upon the property of the citizens of the city of Beatrice become due and collectible on the 1st day of January after their levy, and that the officers of the city of Beatrice and the county authorities of said Gage county could levy no tax for the payment of these interest coupons after the time at which the auditor actually registered them, January 2, 1891, which tax would be collectible until January, 1892, and therefore it was the duty of the auditor to detach all the coupons which matured in May and November, 1890, and May and November 1891. But counsel is mistaken as to the time when taxes levied upon the property of the city of Beatrice become due and collectible. Such taxes become due and collectible on the 1st day of October after their levy. (See secs. 83, 91, ch. 77, Compiled Statutes, 1893.)

Assuming for the moment the correctness of the contention of appellant's counsel, that the auditor at the time he actually registered these bonds, January 2, 1891, should have detached therefrom all coupons which had then matured and which would mature before a tax could be levied and become due for the payment of the same, the auditor should have detached only the coupons which matured on the 1st of May and November, 1890, and the 1st of May, 1891, as the proper city and county authorities could have levied a tax in June, 1891, for the payment of the coupons which fell due November 1, 1891, and this tax would have fallen due on the 1st of October of said year and been available for the payment of the coupons maturing in the following November. But these bonds were presented to the auditor for registration on the 21st of December, 1889. It was his duty to register and certify them at that time, and the record shows he would have done so but for the fact that he was prevented from so doing by the injunction

proceedings hereinbefore mentioned. The auditor and secretary of state then, when they did register and certify these bonds in January, 1891, should have registered and certified them as of the 21st of December, 1889, when they were received for registration, and it would have been entirely proper to have made the certificates of registration and certification show that the registration had been delayed by injunction proceedings, and for that reason the bonds were registered and certified as of December 21, 1889. Counsel for the appellant insists that the auditor and secretary of state could not do this, and that as the bonds were not actually registered until January 2, 1891, and as no taxes could be levied after that time for the payment of the coupons on these bonds, and which tax would mature prior to October, 1891, that it was the duty of the auditor to detach not only the coupons which would mature in May, 1891, but to detach the coupons which had matured in May and November, 1890, as no tax had been levied at the time the bonds were actually registered for the payment of such coupons. No authority is cited to sustain this contention; and with our knowledge of the well known legal ability of counsel for the appellant we rely with perfect confidence on the presumption that no such authority can be found. On the other hand, counsel for the appellees insist that the auditor should not have detached from these bonds any coupons whatever, as said section 37 of the statute quoted above has no reference to bonds issued by a city to aid a work of internal improvement. We do not agree with this contention. The statute applies to all bonds, and it is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. (*Young v. Clarendon Township*, 132 U. S., 340.) The object of the enactment of the statute, said section 37, was to prevent the municipalities of the state from executing and putting upon the market their obligations for the

payment of money which would by their terms mature before a tax could be legally levied and become due for the payment of the same. Indeed, we think this is the spirit of all the statutes of the state authorizing municipal corporations to issue bonds. The law authorized the city of Beatrice to issue its municipal bonds to aid a work of internal improvement, but it had no authority to issue and deliver an interest coupon which would mature before a tax could be lawfully levied and become due for its payment. The coupons on these bonds which matured in May, 1890, were issued without authority of law. They were absolutely void even in the hands of an innocent purchaser. (*Marsh v. Fulton County*, 77 U. S., 676.) These bonds then were, as a matter of law, registered December 21, 1889, and it was the duty of the auditor, under said section 37 of the statute just quoted, to detach from said bonds the coupons which matured May 1, 1890, and return them to the county treasurer of Gage county. After the injunction proceedings were dissolved it was the duty of the city of Beatrice, in Gage county, in June, 1891, to levy taxes for the payment of the coupons which would mature on the 1st of November, 1891, and for the coupons which had matured in November, 1890, and May, 1891, and for the payment of which no provision had been made by reason of the pendency of the injunction proceedings; or, in the language of section 79, chapter 77, Compiled Statutes 1893, it was the duty of the city authorities of Beatrice in June, 1891, to include in their levy of taxes a sufficient sum to pay the amounts then due upon all legal and valid bonds outstanding against the city. The coupons which matured November 1, 1890, and May 1, 1891, were legal and valid obligations outstanding against the city; but the coupons which matured on May 1, 1890, were not legal, valid, or binding obligations of the city, and the city authorities in June, 1891, should not have included in their levy any sum of money for the payment of such coupons.

We have said that the treasurer paid the coupons which matured on the 1st of May, 1890, before the bringing of this suit. The record shows: "And now, on this 28th of March, 1892, came the plaintiff and files his petition," etc. This petition was sworn to on the 27th of May, 1892, and at the end of the petition is the following: "Filed May 28, 1892. R. W. Laflin, Clerk of the District Court." The amended answer on which the action was tried, and the only one in the record, was sworn to on the 12th of April, 1893, but the record does not recite when this answer was filed. There is nothing in the record to show that any summons was ever served upon the treasurer, nor that any temporary injunction or restraining order was ever served on him. The case was heard on the 27th of May, 1893, and the decree recites that by stipulation the hearing was to be a final one, and the court authorized, after hearing the evidence, to enter a final decree instead of a temporary order of injunction. With the record in this shape we must presume that the treasurer paid the coupons which fell due on May 1, 1890, before the bringing of this action. We conclude, therefore, (1) that the bonds in controversy were registered and certified, in contemplation of law, on the 21st of December, 1889; (2) that the auditor should not have detached from said bonds any coupons except those which matured on the 1st of May, 1890; (3) that the authorities of the city of Beatrice in the levy of taxes made by them in June, 1891, properly included in such levy a sum sufficient to pay the coupons which matured on the 1st day of November, 1890, and the 1st day of May, 1891. The decree of the district court is, therefore, in all things

AFFIRMED.

VAN VALKENBURGH & SON v. MASON GREGG.

FILED JUNE 22, 1895. No. 6004.

1. **Sales of Goods**: BREACH OF CONTRACT: DAMAGES: TENDER OF DELIVERY. A vendor of goods cannot recover damages on account of the refusal of the vendee to accept, unless he tenders delivery of the goods in accordance with the contract.

2. ———: ———: ———: DELIVERY. Where a written contract specifies a place of delivery, delivery must be tendered at that place; and ambiguities in such written contract are to be solved in the same manner as ambiguities in other writings.

3. ———: PLACES OF DELIVERY. The shipment by a vendor at A of goods consigned to himself at B, the vendor making a draft for the price, and attaching the bill of lading thereto, is a tender of delivery at the point to which the goods are shipped, and not at the place of shipment.

4. ———: CONTRACTS: PLACES OF DELIVERY: EVIDENCE. A contract for the sale of goods was substantially as follows: "Bought of M. G. five (5) cars new shelled corn, track Ohiowa or Tobias, at forty-five (45) cents per bushel, his weights, billing of same to be given by December 10, 1890. [Signed,] V. & Son." *Held*, That this was a contract for delivery at Ohiowa or Tobias, the vendor to ship from either of those points to the vendee at a point designated by him, and that compliance with such contract was not proved by showing a shipment from one of those points to a point designated by vendee, the goods being consigned to the vendor.

5. ———: ———: ———: WAIVER. The fact that the vendee had received a portion of the goods consigned to the vendor at the point designated was a waiver only of the terms of delivery as to the goods so received, and did not waive delivery of the remaining goods according to the contract.

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

The facts are stated by the commissioner.

Stewart & Munger, for plaintiffs in error:

A delivery by a seller to a common carrier of property

billed to the proper destination, but consigned to the seller's order is not a delivery or tender of delivery to the purchaser. (*Torcheimer v. Stewart*, 65 Ia., 593; Newmark, Sales, secs. 147, 407.)

The failure to ship the grain promptly and the delay in furnishing the bill of lading justified the refusal to accept the property. (*Barber v. Taylor*, 5 M. & W. [Eng.], 526; *Robinson v. Brooks*, 40 Fed. Rep., 525; *Rommel v. Wingate*, 103 Mass., 327; *Hoffman v. King*, 58 Wis., 314.)

Where delivery is made by installments, the buyer's acceptance of the first installment will not debar him from rejecting on proper grounds the portions subsequently delivered. (Newmark, Sales, secs. 231, 232, 265; *Hubbard v. George*, 49 Ill., 275; *Cohen v. Platt*, 69 N. Y., 348; *Norrington v. Wright*, 115 U. S., 188.)

Marquett, Deweese & Hall, contra.

IRVINE, C.

On December 4, 1890, the parties to this action entered into a contract as follows:

"Bought of Mason Gregg five (5) cars new shelled corn, track Ohiowa or Tobias, at forty-five (45) cents per bushel, his weights, billing on same to be given by December 10, 1890. VAN VALKENBURGH & SON."

It is agreed that the corn was shipped in large cars, three of which carried what the parties had understood as five cars. On the 6th of December Van Valkenburgh & Son wrote Gregg as follows:

"Please ship us at Beaver City one large car new corn. Draw on us through First National Bank, Minden, and have it come direct here with invoice. Parties are anxious for this car. VAN VALKENBURGH & SON."

The car was shipped and was received by Van Valkenburgh & Son. On the 10th of December the following letter was written by Van Valkenburgh & Son:

"Please ship at once a large car corn to us at Beaver City, and on Monday next load another large car to us at Beaver City. These three large cars that we have ordered will make the 2,500 bushels ordered and bought of you. Can you sell us more at same price? Would be pleased to hear from you how you understand these orders, and if you will ship them promptly.

"VAN VALKENBURGH & SON."

Gregg on receipt of this letter shipped the second car, and on the following Monday, being December 15, shipped the third car. The second car was received by Van Valkenburgh & Son. On the 15th, but after Gregg had shipped the third car, Van Valkenburgh & Son telegraphed him:

"Don't ship third car to Beaver City. Parties there refuse. VAN VALKENBURGH & SON."

The car had already gone, and Van Valkenburgh & Son refused to receive it. Gregg, on learning of their refusal, shipped it to Salt Lake City, sold it there, and brought suit against Van Valkenburgh & Son for the difference between the contract price and the amount realized. He recovered judgment, from which Van Valkenburgh & Son prosecute error.

The car occasioning the controversy was loaded at Ohiowa and consigned by Gregg to himself at Beaver City. The bill of lading was then sent by Gregg's agent to Gregg at Lincoln, where Gregg made a draft on Van Valkenburgh & Son, and, attaching the bill of lading thereto, sent it to Minden, where Van Valkenburgh & Son conducted their business. The right of recovery in this case depends upon whether Gregg tendered delivery of the car at the place where he had contracted to deliver it. Van Valkenburgh & Son claim that the contract was for delivery to them at Ohiowa or Tobias. Gregg claims that the price was merely fixed at those points, but that he was justified in consign-

ing the corn to himself at the point designated by the vendees. In such a case there is no doubt that had Gregg consigned the car at Ohiowa to the vendees at Beaver City, this would have been a delivery at Ohiowa. On the other hand, consigned as it was, the delivery or tender of delivery was at Beaver City, and could not take place until the vendees, by payment of the draft at Minden, obtained possession of the bill of lading. (*Merchants Nat. Bank v. Bangs*, 102 Mass., 295; *Forcheimer v. Stewart*, 65 Ia., 593.) Gregg did not tender a delivery in accordance with the contract, if the contract required a delivery at Ohiowa. This we think it did. Where no place of delivery is provided, it may be inferred from the circumstances of the case, from the usages of trade or the previous course of dealing between the parties, or even from the nature of the article sold. (*Hatch v. Standard Oil Co.*, 100 U. S., 134.) But where the contract designates a place of delivery, the contract prevails; and patent ambiguities in a written contract must be solved according to the ordinary rules in such cases. If it were not for the last clause in the written contract there could be no possible doubt that the delivery was to be at Ohiowa or Tobias. It reads: "Bought * * * [on] track Ohiowa or Tobias." It is evident, however, from the last clause that the contract contemplated the shipping of the cars to some other point, and it is claimed that such other point was the point of delivery, and that the first clause only indicated that the vendee was to pay the freight from Ohiowa or Tobias to such point. But to give it such a construction does violence to the language of the contract. We think its obvious meaning is that the corn was to be bought, *i. e.*, delivered, on the tracks at Ohiowa or Tobias billed to Van Valkenburgh & Son at such point as they should designate. Their direction was "on Monday next load another large car to us at Beaver City." Gregg did not ship to them at Beaver City, but shipped to himself at Beaver City. A vendor cannot

recover damages for the refusal of the vendee to accept unless delivery is tendered at the place required.

It is contended that the circumstances and the conduct of the parties indicate a different construction, because the other two cars were shipped in the same manner and accepted by the vendees; but although the vendees did accept the other cars, they wrote twice to the vendor complaining of the manner in which they had been shipped, on the ground that by such method the car arrived several days before the vendees could obtain possession of it through the bill of lading, and that the carrier subjected them to demurrage in consequence. The acceptance of these cars so billed waived only a departure from the contract as to these cars, and did not alter the terms of the contract for the corn not yet shipped.

It is also claimed that it was necessary for Gregg to ship in that manner in order to secure payment. The answer to this contention is that had he desired to protect himself in such manner he should have so stipulated in the contract. It is probable that, under the terms of the contract, the vendee should have been present at Ohiowa to pay for the cars, and that if Gregg had tendered the corn at Ohiowa and refused to ship until payment was made there, this would have been a sufficient compliance; but having contracted to deliver at Ohiowa, he had no right under the terms of his contract to attempt to deliver elsewhere, whatever his motive may have been.

It is argued that the vendees refused to accept solely because the price of corn had fallen at Beaver City. This is all immaterial to the case. If the vendor did not tender compliance with the contract, the motive of the vendee in refusing to accept otherwise than as provided in the contract does not affect the case.

The evidence does not sustain the verdict, and the judgment must be reversed. As the cause must be remanded for a new trial, it may be well to direct attention of coun-

sel to the fact that the construction of this contract is for the court, although there may arise questions of fact for the determination of the jury which would influence the construction. On the former trial the court gave no instruction as to the construction of the contract. In further proceedings this point should be observed.

REVERSED AND REMANDED.

STATE BANK OF O'NEILL, APPELLANT, V. W. D. MATHEWS, IMPLEADED WITH THOMSON-HOUSTON ELECTRIC COMPANY, APPELLEE.

FILED JUNE 22, 1895. No. 6369.

1. **Deeds as Mortgages.** A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed should become absolute.
2. ———: ASSIGNMENT OF SECURED NOTES. A made to B his promissory notes, and to secure the payment thereof conveyed real estate to B by deed absolute in form. B sold the notes to C, and to secure them executed to C an instrument in the form of a mortgage on the land conveyed by A's deed. *Held*, That this mortgage would be treated as an assignment of the mortgage from A to B.
3. **Mortgages:** ASSIGNMENT OF PART OF NOTES SECURED: FORECLOSURE: DISTRIBUTION OF PROCEEDS OF SHERIFF'S SALE. Where a mortgage secures the payment of several notes, the assignment of one of the notes is an assignment *pro tanto* of the mortgage, and in the absence of any stipulation to the contrary, all the notes secured by the mortgage are entitled to share *pro rata* in the distribution of the fund realized from foreclosure of the mortgage.
4. ———: ———: ———: ———. The holder of several notes secured by the same mortgage transferred a portion of them to A by general indorsement, and thereafter indorsed the remaining notes without recourse to B. *Held*, That under these facts the case fell within the general rule above stated.

5. ——: ——: ——: ——. The fact that the notes first to mature were transferred prior to the transfer of the remaining notes did not imply any agreement that those first transferred should have preference.

APPEAL from the district court of Holt county. Heard below before BARTOW, J.

H. M. Uttley, for appellant.

Thomas Carlon, contra.

IRVINE, C.

One Donald McLean made and delivered to W. D. Mathews four promissory notes, each dated December 31, 1890, one for $2,000, payable ninety days after date, one for $1,500, payable five months after date, one for $1,500, payable six months after date, and one for $5,000, payable eight months after date. To secure these notes he conveyed by deed absolute in form, certain real estate to Mathews. The pleadings on both sides admit that this conveyance was made as security, and it was, therefore, a mortgage in spite of its form. A few days thereafter Mathews sold the three notes first to mature to the State Bank of O'Neill, of which Mathews was president, and at the same time executed to that bank an instrument in the form of a mortgage on the land conveyed to him by McLean. This mortgage was conditioned to secure all four notes. The three notes sold were indorsed by McLean generally. Still later McLean, in part payment of a debt to the Thomson-Houston Company, indorsed the remaining note without recourse to that company. After the maturity of the notes the bank instituted foreclosure proceedings, making the Thomson-Houston Company a party defendant. A decree of foreclosure was rendered, and the land sold, not realizing enough to pay all the notes. The decree had not fixed the order of payment, but directed the purchase money to

be brought into court. After this was done the bank applied for an order distributing the money, and giving it priority. The court refused this order, but instead thereof directed the money, after payment of costs, to be divided *pro rata* between the bank and the electric company. From this order the bank appeals.

As we have said, the conveyance from McLean to Mathews must be treated as a mortgage, and this notwithstanding the fact that McLean testifies that the agreement was that if the first note was not paid the deed should become absolute. This was the understanding and is the legal effect of all mortgages, and the whole doctrine of foreclosure and redemption arose from courts of equity relieving against this understanding and its legal effect. This deed being a mortgage, the mortgage made by Mathews to the bank must be considered merely as an assignment of the mortgage from McLean to Mathews. It therefore cuts very little figure. The mortgage is but an incident to the debt, and by an assignment of the debt the mortgage passes to the assignee. (*Webb v. Hoselton*, 4 Neb., 308.) It has also been held that where a mortgage secures several notes the assignment of one of the notes is an assignment *pro tanto* of the mortgage, and that, in the absence of any stipulation to the contrary, notes so secured share *pro rata* in the distribution of the fund. (*Studebaker v. McCargur*, 20 Neb., 500; *Harman v. Barhydt*, 20 Neb., 625; *Todd v. Cremer*, 36 Neb., 430; *Whipple v. Fowler*, 41 Neb., 675.) Without considering the correctness of this rule, it is sufficient to say that it has been for many years established in this state. It has become a rule of property, and it will not now be disturbed. Is there anything in this case to take it out of the rule?

There is some argument on either side addressed to the position of the parties as being purchasers without notice. All these considerations may be dismissed. It is true that Mathews, dealing with the bank in his individual in-

terest, did not charge the bank with notice of facts within his knowledge, and not communicated to other officers. (*Koehler v. Dodge*, 31 Neb., 328.) But the bank had notice otherwise. It appears from McLean's testimony, which is all the evidence in the case, that he had expected to sell all four notes to the bank, but the bank declined to take more than three; therefore, the bank had knowledge of the existence of the four notes, and the mortgage made by Mathews to the bank described all the notes, and in that way charged the bank with notice. (*Studebaker v. McCargur, supra.*) Nor can the electric company claim anything as a purchaser without notice, because it appears from the evidence that McLean informed the company, when he sold them the last note, that the other notes were secured on the same property. It is, therefore, not necessary to consider whether the situation would be different if either party took without notice of the rights of the other. The most forcible argument made on behalf of the appellant is that having indorsed the three notes generally to the bank, if McLean had retained the fourth note he could not, as against the bank, urge a right to participate *pro rata* in the proceeds of the mortgage, and that under the evidence the electric company has no equity superior to that of McLean. This argument appeals to the writer as one having in principle much force, but in *Studebaker v. McCargur* there was a general indorsement, and the court does not seem to have regarded that fact material. Moreover, the principle which would forbid McLean, had he retained the fourth note, from claiming the right to a *pro rata* distribution is based on the policy of courts of equity to avoid circuity and multiplicity of actions (*South Omaha Nat. Bank v. Wright*, 45 Neb., 23), rather than on any contractual obligation. So that the position of the electric company as transferee of the fourth note is not the same as McLean's position would be had he retained it. The electric company was not surety or indorser on the other notes.

It is argued that the rule requiring that such notes shall prorate may be varied by special agreement, but there is in this case no evidence of any such agreement. The fact that some of the notes were transferred before the others does not imply any agreement that the notes first transferred shall have priority. This feature existed in the cases we have cited. We see nothing in the case to take it out of the general rule.

JUDGMENT AFFIRMED.

CULBERTSON IRRIGATING & WATER POWER COMPANY v. W. D. WILDMAN.

FILED JUNE 22, 1895. No. 5859.

1. **Action to Recover Wages:** PLEADING AND PROOF. An action to recover wages under a contract for personal services can only be sustained by proof that the services were performed. Where one seeks to recover damages for breach of contract to employ he must so plead.

2. **Contract of Employment:** NOVATION. Where one enters into a contract to employ another at a fixed rate for a time certain, and afterwards disposes of the business in which the services are to be rendered to a third person, and such third person retains the servant in his employment and pays him at the contract rate for several months, this is sufficient evidence of novation to charge such third person with the obligations of the contract.

3. ———: ———: MISJOINDER. In such case the original employer and his vendee are not jointly liable for services performed after the novation, but if they are sued jointly and a cause of action against the vendee is pleaded and proved, he cannot be heard to object because judgment was also rendered against the vendor, nor can the misjoinder in such a case be raised by general demurrer or objection to evidence on the ground that a cause of action is not stated.

4. ———: SUIT FOR WAGES: PLEADING. In a suit for wages under

a special contract, an averment that plaintiff has performed all the conditions thereof so far as defendant permitted is a sufficient averment of performance unless attacked by motion.

5. ———: ———: MEASURE OF DAMAGES. Where the wages contracted for were $60 per month in cash and $40 per month in water rights, the servant's measure of damages in an action for wages is $100 per month, the value of the water rights having been fixed by the contract.

ERROR from the district court of Hitchcock county. Tried below before WELTY, J.

House & Blackledge, for plaintiff in error.

J. W. Cole, contra.

IRVINE, C.

Wildman sued C. J. Jones, A. W. Bond, and the Culbertson Irrigating & Water Power Company, alleging that on the 12th day of August, 1890, Jones and Bond employed Wildman to work for them for the wages of $100 per month, $60 thereof to be paid in cash each month and $40 to be paid in perpetual water rights, the employment to last until the completion of a certain work known as the Culbertson canal; that afterwards the Culbertson Irrigating & Water Power Company, which we shall hereafter for brevity call the company, succeeded to the rights and liabilities of Jones and Bond, and assumed and ratified the contract with plaintiff. The plaintiff further alleged that the defendants had failed to pay him his wages for the months of March and April, 1891, wherefore he asked judgment for $200. The answer of the company was a general denial. Jones and Bond made default. A trial was had on the issues between the plaintiff and the company, and a verdict returned for the plaintiff for $200. Judgment was entered against all the defendants for this sum. By these proceedings the company seeks a reversal of this judgment.

Some of the assignments of error are not discussed in the briefs, and will, therefore, be treated as waived. Several of the arguments advanced might properly be raised under the assignment that the verdict is not sustained by the evidence, although they are supported by additional special assignments. These we shall consider first without referring to the special assignments on which they are based.

One point made is that while the action was for wages earned there is no evidence to show that the plaintiff performed any services during the months of March and April, the period for which wages are alleged to be in default. There is evidence, however, that during the month of March plaintiff was about the office of the company ready to perform any services demanded of him, and that he in fact did during that month perform a number of services for the company and everything that he was required or requested to do. As to the month of April the case is different. The plaintiff testifies that during that month he presented his contract to the book-keeper and general manager, and told him he would expect to be paid in accordance therewith. He was informed that the company had nothing more for him to do. It also appears that during that month he was absent from the company's place of business and engaged in another town in other employment. The petition, as already stated, was for wages earned. We are aware that some old cases held that under such a count recovery could be had where a servant was wrongfully discharged before the expiration of his term of employment. This was upon the theory that the services were constructively performed, where actual performance was prevented by the wrongful act of the master. This doctrine has, however, been repudiated in England where it arose, and we think the law now is, especially under the Codes, where real and not fictitious causes of action must be pleaded, that an action for wages will only be sustained by proof that the services were performed, and where the action is for dam-

ages for breach of contract to employ the case must be so pleaded. (*Howard v. Daly*, 61 N. Y., 362; *James v. Allen County*, 44 O. St., 226.) The burden of proof was on the plaintiff to show that he performed the services in April, and as he does not fix the time of his discharge, his proof fails as to that month under the averments of his petition.

It is next argued that there was no evidence charging the company with liability. To this we cannot agree. The construction of the canal was undertaken by Jones & Bond. The contract was made with Wildman in August, 1890. In the latter part of that month the company was incorporated, and there was evidence tending to show, although not without contradiction, that the company took up the work September 1, retained Wildman in its employ and paid him each month at the rate and in the manner provided for in his contract until March 1, 1891. These facts were sufficient to establish a novation, and charge the company with the performance of the contract.

In this connection it is argued that the company could not be jointly liable with Jones and Bond; that if there was no novation it released the company. We cannot find that this objection was raised in any manner in the district court. If the petition stated a cause of action against the company and the proof established it, no question of misjoinder having been raised, the company cannot now be heard to complain of the misjoinder. Jones and Bond made default. They do not complain of the judgment against them, and the company cannot do so.

It is argued that the petition does not state a cause of action against the company, for the reason that it does not specifically allege that the plaintiff performed the services contracted for. The allegation of the petition in this respect is that plaintiff "has kept and performed all the conditions of his part of said contract, so far as he was permitted to do by the defendants." This averment might have been open to attack by motion, but we think it was a

sufficient averment of performance as against demurrer or objection on the trial to the introduction of evidence. The latter was the only method adopted to raise the question. On redirect examination the plaintiff was asked upon what consideration the contract was based. His answer was that in consideration for the employment plaintiff was to transfer certain water rights and privileges he owned. The admission of this testimony over the company's objection is assigned as error. We think the evidence was properly admitted. On cross-examination the company had shown by the plaintiff that his work had been in the office, and that during the month of March the services performed by him were not very continuous in their character, or great in amount. The fact that to obtain employment plaintiff had transferred to the company these water rights was material and proper in redirect examination for the purpose of explaining that the somewhat slight services were, perhaps, all that the contract contemplated.

On the measure of damages the court instructed the jury that if it should find for the plaintiff, he could not recover to exceed $100 per month. It is claimed that this instruction was erroneous for the reason that the contract was that only $60 a month should be paid in cash, and that the remainder should be in perpetual water rights, and there was no evidence as to the value of such rights. But the parties had by their contract fixed such value. It did not provide what water rights should be transferred to plaintiff, but that he was to have water rights to the value of $40 per month. On failure to perform, the plaintiff was, therefore, clearly entitled to $100 per month.

We find no error in the record prejudicial to the company, except that the plaintiff was allowed to recover for the month of April, while the proof did not justify such recovery. For this error the judgment must be reversed, unless the plaintiff shall, within forty days from the filing of this opinion, enter a remittitur for $100, with interest

at seven per cent from the 16th of September, 1892, the date of the judgment. If he do so, the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

ALFRED E. HARGREAVES, APPELLEE, V. HENRY MENKEN ET AL., APPELLANTS.

FILED JUNE 22, 1895. No. 6314.

1. **Mortgages**: DURESS: DISMISSAL OF CRIMINAL PROCEEDINGS. A mortgage given to secure a debt will not be set aside as obtained by duress on the ground that it was given to obtain a dismissal of criminal proceedings, instituted by the creditor against the mortgagor, where the mortgage was given without threats or promises having been made to the mortgagor, and after a statement by the creditor's agent that no promise could be made, but, on the contrary, the prosecution would have to take its course.

2. **Executions**: TITLE OF PURCHASER. A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien on the land; and a deed or mortgage unrecorded at that time is superior to the title of such purchaser, at least if it be recorded before the sale.

3. **Mortgages**: JUDGMENT AT LAW FOR DEBT: FORECLOSURE. Where judgment has been obtained at law on the debt secured by a mortgage, no action to foreclose can be brought until an execution has been issued on the judgment and returned unsatisfied. The return of an attachment pending the action is not sufficient.

4. ———: FORECLOSURE: GARNISHMENT. The pendency of proceedings against garnishees, upon a judgment for the debt, stays foreclosure.

5. ———: ———: PROCEEDINGS AT LAW. To prevent foreclosure it is not necessary that proceedings at law should have been instituted upon the notes secured by the mortgage. It is sufficient if the proceedings are to recover the same debt.

APPEAL from the district court of Johnson county. Heard below before BABCOCK, J.

J. Hall Hitchcock, T. Appelget, and *E. H. Wooley,* for appellants.

Cornish & Lamb, contra.

IRVINE, C.

Hargreaves began this action against Menken and wife, Herman and wife, and J. H. Shepherd to foreclose a mortgage made by the Menkens to Hargreaves to secure the payment of a note for $316. Shepherd admitted the allegations of the petition, and by cross-petition asked a foreclosure of the same mortgage, alleging that it also secured a note of $220 in favor of Shepherd. The Menkens answered both the petition and cross-petition, alleging that the mortgaged premises had been their homestead, and that the notes and mortgage were procured from them by duress, in that at the time Menken was wrongfully deprived of his liberty at the instance of Hargreaves and Shepherd, and that the mortgage was induced by reason of such imprisonment. Herman answered, setting up title in himself under an execution and sale of the property by virtue of certain judgments against Menken. Herman also averred that the mortgage of Hargreaves and Shepherd was withheld from record in fraud of his rights, and still further, that certain proceedings at law were pending to recover the debt secured by the mortgage. There was a decree for the plaintiff and the defendant Shepherd foreclosing the mortgage, and the Menkens and the Hermans appeal.

On the question of duress the evidence is conflicting. It appears that a firm of which Menken was a member was indebted to Hargreaves Bros., a firm of which Hargreaves was a member; that Menken's firm had made some trans-

fer of its property, and that an attorney for Hargreaves was endeavoring to collect the debt. While these matters were in progress, Hargreaves made a complaint against Menken, charging him with obtaining goods under false pretenses. Menken was arrested and released on his own recognizance. Thereafter, and while the prosecution was pending, he and his wife executed the notes and mortgage, and soon thereafter the prosecution was dismissed, the docket showing because no one appeared for the state. Menken testifies that Hargreaves' attorney told him he would send him to the penitentiary unless he "fixed the matter up," and that if he would secure the debt he would be released. The attorney in question testified that he made no promises or threats; that Menken came to him without previous solicitation and desired to secure the debt, stating as a reason therefor that he wished Hargreaves, when secured, to proceed against other persons who Menken thought had caused him trouble, and dealt unfairly with him. The attorney also testifies that Menken asked him what would become of the prosecution, and that the attorney answered that he could make no promises, that it was a criminal case and would have to take its course. There is evidence corroborating the testimony of the attorney. If this testimony is true, then it is very clear that the mortgage was not obtained by duress. The finding of the trial court was, therefore, in this particular justified by the evidence. Nor can Herman claim anything by reason of the withholding of the mortgage from record. The mortgage was made May 9, 1890, and was recorded January 8, 1891. None of the judgments under which the land was sold became a lien thereon until September, 1890. The executions were not issued until January 20, 1891; the sale took place March 7, 1891. A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien on the land, and a deed or mortgage then unrecorded is to be preferred as against the

title of a purchaser at the execution sale, at least if it be recorded before the sale. (*Mansfield v. Gregory*, 8 Neb., 432, 11 Neb., 297; *Harral v. Gray*, 10 Neb., 186; *Reynolds v. Cobb*, 15 Neb., 378; *Westheimer v. Reed*, 15 Neb., 662.)

The remaining point made is that there were proceedings at law pending which constituted a defense to this action. The petition and Shepherd's cross-petition both allege that no proceedings had been instituted to recover the amount of the indebtedness. Herman's answer alleges that certain proceedings had been instituted and judgment recovered upon the debt. We will not set out this averment at length, but simply say that it was substantially according to the proof made, which disclosed that prior to the execution of the mortgage both Hargreaves Bros. and Shepherd had instituted actions at law to recover the same debts. Judgments were rendered in favor of plaintiffs in these actions in April, 1890. Certain persons were garnished, and their answers not being satisfactory, Hargreaves Bros. brought suit against the garnishees, and the latter action was pending when the suit was brought to foreclose the mortgage. Section 848 of the Code provides that "after such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." Section 850 requires that "upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid." Section 851 provides that "if it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that

the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." The manifest object of these provisions is to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage. Other provisions exist whereby in the foreclosure case personal remedies may be availed of, and the statute should be so construed as to prevent the mischief which the legislature had in view. In neither of the personal actions does the record disclose that an execution had been issued upon the judgment and returned unsatisfied. It does appear that writs of attachment were issued, but because an attachment was returned unsatisfied at the commencement of the suit, it does not follow that an execution after judgment would be ineffectual, and to show the issuing of an attachment, and its return unsatisfied, does not satisfy the requirement of section 851, that an execution must be so returned before a foreclosure case can proceed. Moreover, we think that the proceedings against the garnishees pending at the time this suit was brought were a bar to this action. The language of the Code is very general. No foreclosures can be had where any proceedings at law have been instituted until their final termination. The suit against the garnishees was an action to recover the debt secured by the mortgage, and while it was pending this suit could not be brought. Appellees seek to avoid this result on the ground that the notes to secure which the mortgage was made were executed after the judgments were recovered, and that, therefore, these judgments were not upon the debt secured by the mortgage. This argument is not sound. The notes were only evidence of the debt. It is admitted that they were given for the same debt upon which judgment was recovered, and changing the form of the debt or its evidence did not render it any less the same debt.

It is argued that Herman cannot avail himself of the

proceedings at law against Menken to defeat foreclosure. We can see no distinction against Herman. On the other hand, if there were any distinction it would be in his favor. As between Herman and Menken, Menken was the debtor, and that would be all the more reason for requiring plaintiff to exhaust his remedy against Menken.

Because of the proceedings at law, the judgment of the district court must be reversed, and the cause dismissed, without prejudice, however, to the institution of another action in case the facts hereafter warrant.

REVERSED AND DISMISSED.

SHEDRICK C. BURLINGIM v. WILLIAM BADERS.

FILED JUNE 22, 1895. No. 5751.

1. **Instructions.** An instruction is erroneous which requires a jury to base its verdict on a matter which forms only a portion of the evidence bearing on the principal issue, and disregards the determination of that issue itself.
2. ———. Such error is not cured by other instructions stating the issue correctly.

ERROR from the district court of Seward county. Tried below before MILLER, J.

Ed P. Smith and *E. C. Biggs*, for plaintiff in error.

Norval Bros. & Lowley, contra.

IRVINE, C.

Mary Unsicker was the owner of a quarter section of land, and also of an eighty-acre tract in Seward county. There were upon both of these tracts incumbrances as follows:

(1.) A mortgage from Mary Unsicker and husband to the Equitable Trust Company for $2,500. (2.) Another mortgage between the same parties for $250. (3.) A mortgage to Burlingim for $1,320, which last mortgage had been assigned to Claudius Jones. In December, 1887, Baders and Mary Unsicker made a contract whereby Baders was to purchase the eighty-acre tract for $1,650. Fifty dollars was to be paid in cash, $1,000 to be paid in the following March. The remainder of the purchase money the parties contemplated should be raised by a mortgage to be placed on the eighty-acre tract for $600. The eighty acres was to be relieved from the burden of the Unsicker mortgages, and for this purpose it was contemplated that the $1,600 received from Baders should be applied toward the payment of these mortgages, and that the Unsickers should obtain a new loan on the quarter section remaining in them, wherewith to discharge the remainder of the old incumbrances. Baders paid the $50 and the $1,000, and executed a note and mortgage to one Upton for the $600; but the transaction was not otherwise completed. A suit was brought to foreclose the old mortgages; they were foreclosed, and the land, including the eighty-acre tract, sold to Harry T. Jones, son of Claudius Jones. The foregoing facts are unquestioned. On every other point in the case there is a conflict. Baders brought this action against Burlingim and Harry T. Jones, charging the foregoing facts, and charging, in addition thereto, that he had paid the $1,000 to Burlingim under an agreement on Burlingim's part that he would make the loan of $600, and that with the money so obtained he would procure the release of the old mortgages; that Burlingim failed to perform his agreement, but instead thereof conspired with Harry T. Jones to appropriate the $1,000, procure a foreclosure of the mortgages, and enable Jones to get the land. On the trial the court gave a peremptory instruction to find in favor of the defendant Jones, and the judgment rendered upon

this verdict is not questioned. Therefore, the charge of conspiracy is eliminated from the case, and the gist of the action is the violation by Burlingim of his agreement to procure the release of the mortgages. Burlingim in his answer denies that he ever undertook to procure the mortgages to be released, but alleges that the $1,000 was paid to him by the Unsickers instead of the Baders, and for the sole purpose of applying the same towards the satisfaction of the mortgages, and that he had done so. The pleadings are very voluminous, and contain many facts which are evidentiary rather than final; but the foregoing summarizes the principal issues. The court gave the following instruction: "If from the testimony you should find that it was the plaintiff who gave to the defendant the $1,000, and should you further find that the defendant afterwards paid such money with the knowledge of the mortgages existing against the premises purchased by the plaintiff from the Unsickers, it would then be his duty, with such knowledge, to retain such money and withhold payment of the same until such mortgages were released and canceled on the land purchased by the defendant from the Unsickers, and if with such knowledge if he paid such money, it would then be your duty to find for the plaintiff. However, should you find that the $1,000 given to the defendant Burlingim was given to him by the Unsickers or either of them, it would then be your duty to find for the defendant." There was a verdict for the plaintiff, and Burlingim prosecutes error.

We think the instruction quoted was erroneous. It is true that the pleadings put in issue the fact as to whether the $1,000 was paid to Burlingim by Unsicker or by Bader; but this was only a matter of evidence, and the verdict did not necessarily turn on that question. By the instruction as given, the jury was told that if it was the fact that the money was paid by Bader, and if Burlingim knew of the existence of the incumbrance, then the verdict must be for plaintiff. This was the effect of the instruction, because it

was admitted that Burlingim knew that the mortgages were not released. It did not follow that because Bader paid the money to Burlingim the latter became liable. It would seem from the testimony that both Unsicker and he were present when it was turned over to Burlingim. If Bader paid it to Unsicker and Unsicker turned it over to Burlingim, this would tend to show that Burlingim's contract was not what the plaintiff claimed, but it would not finally establish that fact; nor, on the other hand, would the fact that Bader paid the money directly to Burlingim conclusively show that Burlingim agreed to see that the mortgages were released, although, in view of the other evidence, it would have a tendency in that direction. It was, therefore, erroneous to charge the jury that the verdict must turn on this fact. The real question was whether Burlingim undertook to secure the release of the mortgages, or simply undertook to apply the $1,000 toward their payment, which there is evidence tending to show that he did. The instruction quoted entirely overlooks the real issue. There are other instructions placing this issue before the jury, but they do not cure the error in the sixth, because the latter does not merely direct attention to the facts stated as matters to be considered in determining the real issue, but requires the jury to base its verdict solely upon those facts.

REVERSED AND REMANDED.

CITY OF HASTINGS V. JEFFERSON H. FOXWORTHY.

FILED JUNE 22, 1895. No. 6152.

1. **Municipal Corporations:** DAMAGES: PRESENTATION OF CLAIM: TIME: VALIDITY OF REQUIREMENT. The provision of section 34, article 2, chapter 14, Compiled Statutes, that in order to maintain an action against a city of the second class

having more than 5,000 inhabitants, for injury or damage to person or property, the party complaining must file a statement in the office of the city clerk, within six months from the date of the injury, giving the circumstances of such injury and other information, is a reasonable exercise of legislative power, and the filing of such a statement is a condition precedent to maintaining an action for such injury, and compliance therewith must be alleged and proved. *City of Lincoln v. Grant*, 38 Neb., 369, followed.

2. **Res Adjudicata:** REVIEW. An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect.

3. ———: ———. *Hiatt v. Brooks*, 17 Neb., 33, modified.

4. **Action Against Cities:** LIMITATIONS: DISABILITY OF PLAINTIFF. Where a statute requires a certain thing to be done within a time specified, as a condition precedent to maintaining an action, the disability of the plaintiff during a portion of the period allowed will not extend the time of performance, provided a reasonable time remain within the period after the disability is removed.

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

See opinion for reference to authorities.

Tibbets, Morey & Ferris and *A. H. Bowen*, for plaintiff in error.

J. R. Webster, J. L. McPheely, and *B. F. Smith, contra.*

IRVINE, C.

This was an action by Foxworthy against the city of Hastings to recover for personal injuries by him sustained through falling upon a sidewalk where it was alleged the

city had permitted ice and snow to accumulate and remain. The case has acquired a long history. In its early course the district court overruled a demurrer to one count of the answer, and a judgment of dismissal having been entered, the plaintiff brought the case to this court, where the judgment of the district court was reversed. (*Foxworthy v. City of Hastings*, 23 Neb., 772.) The case was remanded to the district court, a trial was had, resulting in a verdict for the defendant, and the case was again brought to this court and the judgment reversed for error in the instructions. (*Foxworthy v. City of Hastings*, 25 Neb., 133.) A second trial having resulted in another verdict for the defendant, Foxworthy again brought the case here, where it was for the third time reversed; this time for the insufficiency of the evidence. (*Foxworthy v. City of Hastings*, 31 Neb., 825.) After the cause had been the last time remanded, a change of venue was taken to Kearney county, where the case has been again tried, this trial resulting in a verdict and judgment for the plaintiff for $5,000. The city now brings the case here for review. Of the errors assigned we shall notice only two, which raise the same question. These are that the court erred in overruling the objection of the defendant to the introduction of any evidence on the ground that the petition does not state a cause of action; the other that the verdict is not sustained by sufficient evidence.

The city of Hastings has been, ever since the events complained of, a city of the second class having more than 5,000 inhabitants, and section 34, article 2, chapter 14, Compiled Statutes, providing for the government of such cities, is as follows: "All claims against the city must be presented in writing, with a full account of the items, verified by the oath of the claimant, or his agent, that the same is correct, reasonable, and just, and no claim (or demand) shall be audited or allowed unless presented and verified as provided for in this section; *Provided*, No costs shall be recovered against such city in any action brought against it

for any unliquidated claim, including claims for personal injuries sustained by reason of the negligence of such city, which has not been presented to the city council to be audited; nor upon claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest thereon; *Provided further*, That all actions against such city for injury or damage to person or property hereafter sustained by reason of the negligence of such city must be brought within six months from the date of sustaining the same; and to maintain such action it shall be necessary that the party file in the office of the city clerk, within six months from the date of the injury or damage complained of, a statement giving full name and the time, place, nature, and circumstances of the injury or damage complained of, and the name or names of the witness or witnesses thereto." The case when first presented to this court called for a consideration of this section. The defendant had pleaded that the action was not brought within six months from the time when the plaintiff had sustained his injury. It was to this plea that the plaintiff demurred. This court held (23 Neb., 772) that that portion of the section we have quoted, requiring that actions shall be brought within six months, was invalid and that the general statute of limitations applied. The city's contention now is that notwithstanding that decision the last clause of the section is valid, and that no action can be maintained unless the plaintiff, within six months from the date of the injury, filed in the office of the city clerk a statement of the time, place, nature, and circumstances of the injury, and the names of the witnesses. The amended petition avers that the injury was sustained January 21, 1886, and that the statement was filed July 28, or more than six months thereafter. There are averred other facts by which it is sought to excuse the delay. This feature will be considered separately. The petition and proof both show that no statement was filed within the period required

by the statute, and it is in this respect that the city claims that the petition and proof are defective.

The first opinion in the case related solely to that portion of the section providing a special period of limitations; but in the opinion the following language was used: "Questions, no doubt, will arise as to the validity of the provision requiring notice of the names of the witnesses, etc., to be given to the city council at the time the claim for damages is filed. But that matter does not properly arise in this case. While it is proper to present the names of such witnesses to the city authorities, in order that the validity of the claim may be investigated, yet it is believed that the failure to do so will not defeat a recovery, although it may affect the question of costs." While by this language there is ventured an intimation that the action would lie notwithstanding the failure to file a statement, the court expressly states that the question was not involved in the record as then presented. Since the last hearing of the case in this court it has been decided that a provision almost identical in the charter of cities of the first class having more than 25,000 inhabitants is valid, and that the filing of the statement required is a condition precedent to maintaining the action and must be alleged and proved. (*City of Lincoln v. Grant*, 38 Neb., 369; *Dayton v. City of Lincoln*, 39 Neb., 74.) In *City of Lincoln v. Grant* there was cited on behalf of the contention that the statutory provision was not mandatory the language we have quoted from the first opinion in this case; and the court in the opinion in the Grant case observed that this language was a mere *dictum* and so intended. The opinion in the Grant case was concurred in by the author of the opinion in 23 Neb., so it is manifest that the court did not in the latter opinion undertake to decide the question. So far as any express decision or actual consideration of the question is concerned, it has never arisen in this case, and following the decision in *City of Lincoln v. Grant*, the ques-

tion must be solved in favor of the contention of the city, unless by implication it has formerly been otherwise resolved in this case, and unless, further, the court is bound by such implied decision, so far as this case is concerned, notwithstanding its deliberate judgment to the contrary in the Grant case. The defendant in error contends that there has been such an implied decision, and that this court is so bound. To this contention counsel address an argument of great technical force, supported by very respectable authority.

Referring to the decision in 23 Neb., it will be remembered that the case was there presented to reverse the overruling of a demurrer to the answer. It is a familiar rule of pleading, repeatedly enforced by this court, that a demurrer brings up for review not only the pleading demurred to, but all prior pleadings, and judgment on the demurrer must go against that party who is guilty of the first defect. (*Bennet v. Hargus*, 1 Neb., 419; *Hower v. Aultman*, 27 Neb., 251.) Regarding this rule it is, therefore, clear that the city on the first hearing could have invoked the aid of that clause of the statute we are now considering against the demurrer to its answer, and that a decision on the lines of the Grant case would have resulted in the affirmance of the judgment on the ground that the petition was defective for not pleading a compliance with the last clause of the section. It may then be fairly said that this court, by sustaining the demurrer to the answer, impliedly held that the petition did state a cause of action, and that it was, therefore, not necessary to plead, and consequently not necessary to prove, a compliance with the provision we are considering. So, again, on each of the other occasions when the case was before this court, similar considerations would have led to the affirmance of the judgments in favor of the city on the ground that notwithstanding any of the errors which in fact led to a reversal, the judgment was the only one which could have been ren-

dered under the pleadings and proof. We think, therefore, that the defendant in error has quite clearly established the proposition that the question under consideration, had it been presented, would have controlled any of the former decisions; and that the court may be said to have already three times impliedly decided the question now before us in favor of Foxworthy, although on no occasion was that question in fact considered or actually decided.

The argument having advanced thus far, the defendant in error invokes the application of a rule which has been frequently announced by appellate courts, that a ruling once made in a case by an appellate court, while it may be overruled in other cases, is binding both upon the inferior court and upon the appellate court itself in all subsequent proceedings in the original case, and that in such subsequent proceedings neither the lower court nor the court making the ruling can depart from such ruling. A ruling so made is said to become "the law of the case." As a preliminary to the discussion of the application of the rule to this case, it may be well to review the former decisions of this court and ascertain to what extent it has committed itself to the doctrine contended for.

In *Hiatt v. Brooks*, 17 Neb., 33, the court stated the rule in the syllabus as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequence of which the court cannot depart nor the parties relieve themselves." The opinion contains no discussion of the rule, but only a statement that the court would adhere to the views expressed in the former opinion, followed by the statement that it would be inadmissible to review the grounds of such opinion, now that the trial court has obeyed the order before made with the result logically following. No authori-

ties are cited in the opinion, but the statement of the rule in the syllabus is followed by a citation of "*Phelan v. San Francisco*, 20 Cal., 45, quoted in Wells' Res Adjudicata." From this method of citation it would seem probable that the court had not consulted the decision cited, but only the text-book; and from the summary method in which the opinion disposed of the question, it is evident that it was not one considered very important to the disposition of the case.

In *O'Donohue v. Hendrix*, 17 Neb., 287, the case had already been before the court, and this language was used in the opinion: "The first and third objections were considered on the former hearing, and decided against the plaintiff. No motion for a rehearing was filed nor was any objection made to the decision of the court. Those questions, therefore, will not be again considered. (*Hiatt v. Brooks*, 17 Neb., 33.)"

In *Leighton v. Stuart*, 19 Neb., 546, a quotation is made from the former opinion in the same case, followed by this language: "In *Hiatt v. Brooks*, 17 Neb., 33, it was held, and I think correctly, that," etc., (quoting the syllabus in *Hiatt v. Brooks*). The court then adds that there is no doubt, independent of this principle, that the conclusions of law already arrived at were correct. The rule in *Hiatt v. Brooks* was invoked in support of the decision of questions of fact in *Lane v. Starkey*, 20 Neb., 586, and the court there held that the rule must be applied only to the decision of legal principles, but that it did not require the following of former decisions on questions of fact.

In *Marion v. State*, 20 Neb., 233, there is no reference to the doctrine in the syllabus, but certain conclusions reached on a former appeal of the case were adhered to, the following being the only reference to the subject in the opinion: "We adhere to our former holdings upon this part of the case, both upon the ground that we believe them to be correct and for the further reason that having

been so decided in this case on its previous hearing, *Marion v. State, supra,* it has become the law of the case." (Citing *Hiatt v. Brooks* and *Leighton v. Stuart.*)

In *Chicago, B. & Q. R. Co. v. Hull,* 24 Neb., 740, the language of the syllabus in *Hiatt v. Brooks* is requoted in the syllabus. In the opinion the following is the only language addressed to the subject: "This point was distinctly presented in this case when it was first before this court, and distinctly decided. Under the well known rule of *stare decisis,* that decision remains the law of this case." It may be here remarked that in *Hiatt v. Brooks* the court refers the rule to the principle of *res adjudicata,* while in *Chicago, B. & Q. R. Co. v. Hull* it is referred to the doctrine of *stare decisis.*

In *Meyer v. Shamp,* 26 Neb., 729, the rule is stated in the syllabus as follows: "A judgment or ruling of this court in a case or point distinctly and finally made, will be held to be the law of the case in which made, throughout its course of litigation, without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling." The court refers to *Hiatt v. Brooks* and several of the cases we have already cited, and says that the rule there stated "is believed to be the law."

The foregoing comprises, we believe, all that has ever been said by this court on the subject. Of these decisions, we have the following observations to make: In the first place, in each case, either by the language employed or by the adoption by citation of the language in *Hiatt v. Brooks,* the rule was limited to rulings formerly made on points distinctly presented for decision. Inasmuch as the plaintiff in error here, as we have seen, can invoke only an implied decision and not one on any point distinctly made on the former hearings, we do not think that any of the cases cited, by its terms, controls this case. A further observation is that notwithstanding the repeated statements of the

rule, there has never been in any case a discussion of its correctness, or a reason advanced for its application. In the third place, it twice at least appears from the opinions that notwithstanding the rule the court had reconsidered the questions presented by the former appeal, and believed the former ruling to be correct, and in no case has any doubt been expressed as to the correctness of the former decision. In other words, the court has never yet been confronted with the problem which we are now facing, that of overruling a former decision in the same case, or else abiding by it because of the doctrine stated, although such former ruling was manifestly wrong and opposed to the later decisions of the court. Had the court on former occasions entertained any doubt of the correctness of the ruling on the first appeal, it can hardly be that such doubt would have been thrust aside without a consideration of the reason for the rule requiring it to be thrust aside, and the statement of some reason in support of such rule. In a sense, therefore, all the statements which we have quoted may be said to be *obiter*, and we feel not only at liberty, but required, now when the application of the rule for the first time would demand adherence to a decision manifestly wrong, to carefully examine the subject, even though such examination may lead to a modification of a rule of practice which has obtained for many years. In this discussion, before examining the question upon principle, we shall endeavor to examine it in the light of the authorities and ascertain how the doctrine arose and to what extent it has received the support of other courts. In *Hiatt v. Brooks* it was expressly adopted from *Phelan v. San Francisco*, 20 Cal., 45, and in all subsequent cases it has been based solely upon the authority of *Hiatt v. Brooks*. It may be said, then, that we have adopted the doctrine from California, and we shall look first at the decisions of that state.

The case in which we first find the rule announced in

California is that of *Dewey v. Gray*, 2 Cal., 374. It would seem from the report that the case had once before been before the supreme court, but we have been unable to find the first decision reported. The action was one for rent, to which it was pleaded that the landlord had re-entered before the expiration of the lease and relet the premises to another. The court says that it before held that the re-entry and reletting discharged the tenant from his covenant, with the exception that the landlord was still entitled to recover any rent which had accrued at the time of the re-entry. Then follows this remarkable language: "The latter portion of that decision is in abrogation of one of the plainest principles of law, and if this case was a new one I would not hesitate to overrule it; but legal rules deprive us of the power to do so. The decision having been made in this case it has become the law of the case, and is not now the subject of revision." The sole authority cited in support of this radical statement is *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413, a case which we shall show hereafter is not in point, and depends upon entirely different principles, which the California court, as well as others, seems to have overlooked. Hardly less remarkable than the language here used is the fact that it was manifestly *obiter*. The jury had found a verdict for the plaintiff for the full amount of the rent claimed. Under the instructions this involved a finding that there had been no re-entry, so it was entirely immaterial to the decision of the case whether in case of a re-entry recovery could be had for rent accrued to that time. But behold to what length a too rigid adherence to the doctrine of *stare decisis* may lead us.

In *Clary v. Hoagland*, 6 Cal., 685, the action was one of forcible entry, and had begun in the county court where judgment had gone in favor of the plaintiff. The supreme court reversed the judgment and remanded the cause for a new trial. The case was again presented to the supreme

court on *certiorari* to review proceedings wherein the county court had by *mandamus* commanded its clerk to issue a writ on the original judgment. A motion to dismiss the writ was denied, and a rehearing was allowed on the question as to whether the former judgment was conclusive on the parties, the supreme court having in the meantime determined that in such case the district court had no appellate jurisdiction, and the case having been first brought to the supreme court through the district court by an attempted appeal. Here, it will be observed, the court was called upon to say whether or not in subsequent proceedings in a case the parties and the court were bound by a decision announced in an appeal over which the supreme court had no jurisdiction. The court again cited *Washington Bridge Co. v. Stewart*, and carried the doctrine of *Dewey v. Gray* to its logical conclusion, holding that although it had no jurisdiction in such cases, still, having in this particular case entertained jurisdiction, the parties were bound by the result. Not only this, the question of jurisdiction was not raised on the former hearing, but the court said that it must always be implied that a court at the very first decides the question of its jurisdiction, and having entertained the case on its merits, the question of jurisdiction must be considered as having been decided, although not in fact raised or considered.

In *Davidson v. Dallas*, 15 Cal., 75, the doctrine was again stated very nearly in the language in which it appears in some of the Nebraska cases. *Dewey v. Gray* is quoted at length, and, in addition thereto, there are cited *Washington Bridge Co. v. Stewart* and several other cases in the supreme court of the United States; also, *Hosack v. Rogers*, 25 Wend. [N. Y.], 313; *Stiver v. Stiver*, 3 O., 18; *Booth v. Commonwealth*, 7 Met. [Mass.], 286, and *Russell v. La Roque*, 13 Ala., 151. Only one of these cases, we shall undertake to show, was in point. The case we are considering is, however, noteworthy as being one of a very

few cases in which the court has attempted to give a reason for such a rule of law; and the reason given is that after a mandate the appellate court loses jurisdiction over the case, and that questions decided leading to the judgment and mandate constitute a final adjudication. This reasoning is undoubtedly sound as applied to a certain class of mandates, as is illustrated in a class of cases which the California court has considered as supporting its doctrine; but we cannot see how it is applicable to a mandate reversing a case and remanding it for a new trial. In the latter case the whole case is tried anew, and nothing is settled by the first appeal beyond the fact that the first trial was erroneous, and that all the issues must be tried again.

The case of *Phelan v. San Francisco*, 20 Cal., 39, being the only case which our court has cited in support of the doctrine, states it in the language of the syllabus in *Hiatt v. Brooks*, citing *Davidson v. Dallas*; but there is no discussion of the doctrine. In the same volume, however, appears the case of *Leese v. Clark*, 20 Cal., 388, where Judge Field delivered the opinion of the court and again stated the doctrine. He says that the court entertained no doubt of the correctness of the former decision, then cites *Dewey v. Gray* and the other California cases, and three of the cases cited in *Davidson v. Dallas*. The reason is stated to be that the court by its mandate abandoned jurisdiction of the first appeal, and lost the power to modify its judgment therein expressed.

A number of California cases later than the 20th might be cited supporting the contention of Foxworthy. It will not be necessary to review them. It is sufficient to say that the California court has, by repeated decisions, adhered to that doctrine, and that all these cases fairly support Foxworthy's contention. Inasmuch as our cases, if adhered to, based as they are on the authority of California, would require a decision here in favor of Foxworthy, we have reviewed the cases down to the 20th, at which point

our court adopted their doctrine, for the purpose of showing that they originated in California in an *obiter dictum*, and that California traces the doctrine to certain cases in the supreme court of the United States and elsewhere, which do not support the doctrine; and for the further reason of showing that the California court has given a reason for its decisions applicable to those cases which it cites and furnishing a sufficient ground for those decisions, but which does not in any way apply to the cases decided in California or to such a case as the one now before us.

The California doctrine is not without support in the decisions of some other states.

In *Russell v. La Roque*, 13 Ala., 149, the opinion opens as follows: "This cause has been tried before this court, and the rules applied to it then is the law of it now." In better English, but just as bluntly, the same court said in *Thomason v. Dill*, 34 Ala., 175, that propositions laid down on a former appeal "are the law of this case and must not be lost sight of." In neither case was any doubt expressed as to the correctness of the former decision, and there is no discussion of the rule announced.

In *Rector v. Danley*, 14 Ark., 304, the opinion opens with a statement that it is a settled doctrine that a decision made when the cause was in the court before is the law of the case, and nothing then determined can be reviewed. Here, again, no authority is cited and no reason is given.

Precisely of the same nature is the case of *Mynning v. Detroit, L. & N. R. Co.*, 35 N. E. Rep. [Mich.], 811. The doctrine has also been adopted in Indiana, the rule being stated there also unaided by argument or authority. (*Kress v. State*, 65 Ind., 106; *Pittsburg, C. & St. L. R. Co. v. Hixon*, 110 Ind., 225; *Continental Life Ins. Co. v. Houser*, 111 Ind., 266.)

The doctrine also receives apparent support in the cases of *Hill v. Hoover*, 9 Wis., 12, and *Pierce v. Kneeland*, 9 Wis., 19; although both of those cases might have been solved

under a strict and correct application of the doctrine of *res adjudicata*. Of the same character is the case of *Hopkins v. Hopkins*, 40 Wis., 462. In none of these cases was the first reversal general, but the cause was remanded with certain features finally adjudicated, so that they could not again properly arise in the further proceedings in the case.

In *Stacey v. Vermont Central R. Co.*, 32 Vt., 551, the court, while intimating some doubt as to the correctness of the doctrine, states that it has been so long established that it will not be departed from, but also states the reason for it to be, in the first place, that the former decision has the same weight as authority as a decision in another case, and, in the second place, that it is an adjudication between the parties. The latter reason is the only one which could be advanced for holding the decision conclusive upon the court, and the Vermont court says that it is not conclusive as a matter of law, because the court may revise and reverse it. Thus, this case is, after all, ambiguous, leaving the former decision in scarcely any stronger position than a decision of the same question between other parties.

In *Semple v. Anderson*, 4 Gil., 546, the rule seems to be for the first time in Illinois announced, and the court cites in support of its conclusion the cases in the supreme court of the United States cited by the California court, and 7 Met. [Mass.], 286. As we have already stated, we shall show that these cases are based upon a different principle, which is illustrated by the case of *Hollowbush v. McConnel*, 12 Ill., 203. In that case the opinion was by Judge Trumbull. On the former appeal the cause had been remanded for certain specified proceedings, not remanded for new trial generally. In the inferior court an effort was made to relitigate the questions which had been finally determined by the first appeal, and which were not within the scope of the mandate. The court properly held that these issues were *res adjudicata*, citing *Washington Bridge Co. v. Stewart*, 3

How. [U. S.], 413, which is in point on this proposition. Unfortunately, however, in *Cook v. Norton*, 61 Ill., 285, the court, on the sole authority of *Hollowbush v. McConnel*, applied the doctrine to a case remanded generally for a new trial, losing sight of the distinction between a final order adjudicating an issue and an order remanding a case for a new trial throughout, leaving all issues still undetermined. Later Illinois cases have followed the doctrine of *Cook v. Norton*, the question not seeming to have ever again been examined on its merits.

We have now referred to the decisions of all states which in our opinion lend either actual or apparent support to the doctrine of the California court. We have seen that in every case the rule first originated in a bald *dictum* without the support of reason or argument, or else it was based on the authority of certain cases in the supreme court of the United States, or of New York, Massachusetts, and Ohio. The New York case cited is *Hosack v. Rogers*, 25 Wend., 313. This was a case before the court for the correction of errors. A doctrine somewhat akin to that here contended for is stated in the syllabus prepared by the reporter. There is only one opinion supporting that view, three adverse thereto. The vote of the court was eleven to eight for affirmance, and it nowhere appears that that vote was because a majority of the court agreed with the one member who advanced the "law of the case" doctrine, except by a note of the reporter to the effect that it was "generally understood" that but for the principle of *stare decisis* the judgment would have been reversed. The case of *Booth v. Commonwealth*, 7 Met. [Mass.], 285, often cited in support of the doctrine, was where a judgment had been affirmed and the plaintiff in error undertook to sue out a second writ of error from the same judgment. The court, of course, held that this could not be done, but we cannot see how by any stretch of the imagination the rule here contended for can be discovered as involved in that ques-

tion. The case of *Stiver v. Stiver*, 3 O., 19, is also cited; but that case merely held that a bill in chancery would not lie to correct a judicial error. *Pollock v. Cohen*, 32 O. St., 514, was precisely like *Booth v. Commonwealth.* The cases most frequently cited as supporting the doctrine are, however, those in the supreme court of the United States, and we shall now proceed to their examination.

The first case in point of time is *Himely v. Rose*, 5 Cranch [U. S.], 313. This was an admiralty case. There had been an appeal in which the sentence was reversed with a direction as to what the sentence should be, and an order remanding the case for the entry of a sentence in accordance with the opinion. For the purpose of entering such a sentence the circuit court referred the case to auditors, and there was an appeal from the auditors' report. In arguing this appeal, Mr. Martin was about to open a question covered by the first appeal, when Chief Justice Marshall remarked: "Nothing is before this court but what is subsequent to the mandate." It will be observed that the chief justice in effect stated that everything prior to the mandate had been adjudicated, and this was undoubtedly correct. The mandate did not send the case back for a new trial, or for a new hearing, but with specific instructions as to further proceedings. The propriety of such further proceedings was, therefore, finally adjudicated and not involved in the second appeal.

In *Skillern v. May*, 6 Cranch [U. S.], 267, a cause had come to the supreme court from the circuit court for the district of Kentucky. The decree of that court had been reversed with directions to make partition. When the cause came up before the circuit court upon the mandate, it was discovered that the jurisdiction of the circuit court was not pleaded and the case again came to the supreme court on a certificate of division as to whether the circuit court should then dismiss the cause for want of jurisdiction. The supreme court wrote no opinion, but merely entered an

order that it was the duty of the circuit court to obey the mandate. This case certainly involved no question of the power of the supreme court to change its conclusion. It merely repeated to the circuit court what the mandate had already directed.

The next case is the famous case of *Martin v. Hunter*, 1 Wheat., 304. The case had been brought to the supreme court of the United States on a writ of error to the court of appeals of Virginia. The supreme court had reversed the case and remanded it to the court of appeals, which refused to execute the mandate on the ground that the supreme court of the United States had no jurisdiction. A writ of error was then taken to review the refusal of the court of appeals to obey the mandate, and it was argued that if the supreme court had no jurisdiction of the first writ, all subsequent proceedings were void. To this the supreme court answered that the former record was not before it, and that the second writ of error did not draw in question the propriety of the first judgment. In *Hunter v. Martin*, 4 Munf. [Va.], 1, the first mandate is set out at length, from which it appears that the supreme court remanded the case with directions to the court of appeals to enter a judgment for Martin. It will be observed that the first judgment of the supreme court was a final one upon the merits, constituting an adjudication of title. The cause was not remanded for a new trial, and no question had been left open.

In the case of *The "Santa Maria,"* 10 Wheat. [U. S.], 431, the supreme court on the first appeal had entered a decree and issued a mandate to carry that decree into effect. Pending the appeal a claim had been interposed for insurance and other charges on the boat. On the second appeal this claim was resisted, on the ground that the petitioner was a *mala fide* claimant. The court remarked that no question could be raised which had been before the court on the first appeal, but that all new questions were opened

for determination and the whole record before the court for that purpose. This was another case of final adjudication by the first appeal. The matters there involved had not been reopened for a new hearing. *Sibbald v. United States*, 12 Pet. [U. S.], 488, was a similar case.

The case most frequently cited by the courts which have adopted the doctrine contended for by Foxworthy is *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413. In that case an assessment had been made on the stockholders of the bridge company. Stewart and others who were stockholders did not pay, and the company undertook to forfeit their stock. Congress passed an act to purchase the bridge, whereupon these stockholders filed a bill in the circuit court for participation in the purchase money. The court entered a decree holding that the plaintiffs were still stockholders, but that before division of the purchase money certain other stockholders should be reimbursed from that fund for advances which they had made. The decree also ordered a reference to an auditor to state an account in accordance with the decree. An appeal was immediately taken from this decree and the decree affirmed by the supreme court. The auditor then proceeded to state the account, after which a final decree was entered. An appeal was taken from this decree by the bridge company, which had also been the appellant before. The company undertook to question the propriety of the first decree on the ground that it was interlocutory merely, and therefore not appealable, and that the bridge company was not estopped by the decision on the first appeal. The supreme court held that the bridge company having appealed from the interlocutory decree and no exception having been taken to the jurisdiction, and the case having been decided on its merits, the parties were now estopped from alleging the want of jurisdiction, and that the first decree affirming the interlocutory decree of the circuit court constituted an adjudication of all matters therein involved. This case was

like all the others. The refusal of the court on the second appeal to reconsider the questions was based not on any want of power to do so after a new trial in the same case of the same issues, but was based on the fact that the first appeal had led to a judgment in the supreme court, finally adjudicating the issues, and leaving none of those already disposed of to be retried after the mandate.

The foregoing are the cases usually cited by the advocates of the California rule. Many others of like character in the supreme court of the United States might be cited, but that court has never laid down the California rule and has never decided a case which lends any support to it. We need not review the decisions of the courts of the other states. We have examined very many of them. We find many cases like those in the supreme court of the United States, and, indeed, this court has applied the principle therein involved. (*Younkin v. Younkin*, 44 Neb., 729.) On the other hand, many courts have, without question, on a second appeal after a mandate reversing a case for a new trial, reconsidered questions presented on the second trial which had also been presented on the first. The distinction which we have endeavored to point out, a distinction ruling the decisions of the supreme court of the United States, and one which the California court failed to observe, was distinctly recognized in *Adams County v. Burlington & M. R. R. Co.*, 55 Ia., 94. It was there urged that a decision did not become *res adjudicata* so long as the case remained pending. The court said: "Whatever force there might be in this position in an action at law where the right to introduce new evidence after verdict involves the retrial of the whole case, we think it cannot be maintained in a case like this." On a rehearing the same result was reached upon the ground that when the cause was first reversed it was remanded for a single purpose; for all other purposes there was held to have been an adjudication. In *Davis v. Curtis*, 70 Ia., 398, general language was used

to the effect that a ruling once made became the law of the case. *Adams County v. Burlington & M. R. R. Co.* was the only authority cited, and *Davis v. Curtis* was a case like that, the first appeal having determined the rights sought to be relitigated. On this branch of the case we shall refer to only three other authorities; these are *Bane v. Wick*, 6 O. St., 13, *Bell v. Lamprey*, 58 N. H., 124, and *Frankland v. Cassaday*, 62 Tex., 418. The doctrine of these cases is that conclusions reached on questions of law on the first appeal will ordinarily not be examined on a second appeal, but that in exceptional cases, when the court is very clearly satisfied that its former opinion was erroneous, this rule will not be applied.

In the discussion of the authorities we have gone far beyond the proper limits of most opinions. We have done so because we deem the question one of very great importance, and have felt the necessity of a close examination both upon principle and upon authority. The general course of the review has been to trace the doctrine back. Adopting now the contrary course, it will be observed that its history is this: The supreme court of the United States and other courts having once entered judgments or decrees finally adjudicating certain issues, decided very properly that on a second appeal nothing so adjudicated could be relitigated. Other courts declined to permit a party after an unsuccessful appeal to prosecute a second appeal from the same judgment. A few courts, notably California, failing to draw the distinction between a judgment upon the merits and a *venire de novo*, adopted these cases as authority for the proposition that where a new trial had been awarded the court could not on a second appeal re-examine any questions of law decided on the first. Having gone so far they were driven to the further conclusion that the principle applies to every question involved in the first appeal whether in fact examined or not. Then in a very few instances after this doctrine had been established, but never

in a case of first impression, some reasons have been given in its support. That usually given is that the first opinion is an adjudication. It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion on a point of law where no judgment is entered in accordance with that opinion but the cause is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be relitigated. To apply the rules of *res adjudicata* to such a case would require a further holding that where a court has overruled a demurrer it may not afterwards on the trial dismiss the case because no cause of action is stated, or, having granted a temporary injunction, that it may not dissolve that injunction if it becomes satisfied that it was improvidently granted. Another reason given is that there must be an end to litigation. This is a salutary maxim, but to say that a court may not correct its own mistakes for this reason is to push it to an absurd conclusion. A third reason, somewhere given, is that on a second appeal the court only reviews the record for error on the second trial; that it is the duty of the trial judge to follow the opinion of the appellate court, although he may think it is erroneous, and technically he never errs when he does so. It is true that it is the duty of the trial judge to follow the directions of the appellate court, but when the case comes again before the appellate court, the question is not did the trial judge proceed according to its former opinion, but were his rulings correct in law. To enforce erroneous rulings, simply because the appellate court had directed the error, would be to pervert the law and sacrifice justice to the technicalities of practice. That the rule is not well founded in principle may be seen by the confusion of the courts in their efforts to base it upon a known principle. Some courts trace it to the principle of *res adjudicata*, some to that of *stare decisis*, and some, evidently realizing that it falls within neither principle, fall back upon the indefi-

nite term "the law of the case," as if it were possible under our system of jurisprudence that there should be one law for one case and a different law for other cases entirely similar thereto. It has never been doubted that an appellate court is not bound blindly to follow precedent. A rule of law once announced affords a guide for similar cases, and will ordinarily control their decision; but having announced a rule, when another case arises presenting the same question, if the court is satisfied that its former opinion was wrong, it may, and frequently does, overrule it. The limitations resting upon courts in this respect are usually stated to be, first, that a former decision will not be overruled when it has become a rule of property; and secondly, that it will be followed although erroneous, where more mischief will result from overruling than from following it. This is as far as the doctrine of *stare decisis* should go. When, however, a decision in one case is overruled in another, there is no remedy for the defeated party in the first case. His rights have been determined, and a decision overruling a former opinion in a different case amounts always to an admission by the court that it has subjected the unsuccessful party in the first case to an injustice which can never be remedied. Notwithstanding this, subject to the limitations we have stated, courts do overrule such opinions. Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the court, and the case in such a situation that by the correction of the error no injustice will be done, beyond, perhaps, the creation of additional costs? If the doctrine contended for is to prevail here, then it follows that the only instance in which the court is not permitted to correct its mistakes, or refuses to do so, is also the only instance where the mistake can be corrected without injustice. Take the case before us. The court in the Grant case decided in effect that its former decisions in this case should have been in favor of the city instead of Fox-

worthy. In subsequent cases, by reason of the decision in the Grant case, the city would prevail under the same state of facts; but if the former decisions in this case are conclusive upon the court the rule will be different for the city of Hastings and for Mr. Foxworthy in this one case than it is for all others and in other cases; and if so, what is to be done with that part of the fourteenth amendment to the federal constitution which forbids any state to deny to any person the equal protection of the laws? A court has no legislative power. Its duty is to declare what the law is, not to make law. To hold that it is bound to follow in a given case an erroneous decision formerly rendered in the same case would be to hold that, although the court believes the law to be otherwise, it will make a special law for the particular parties and the particular case before it, contrary to the general law—to substitute what it is pleased to call "the law of the case" for the law of the land, for the law which every member of the court is sworn to administer. To do so it must not only legislate, but legislate specially in a manner which our constitution forbids to the legislative body itself.

We conclude that the principles governing the case are these: The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the court to re-examine its former decisions and apply the law correctly. We think that ordinarily the court is justified in refusing to re-examine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous that this should be done. It is, however, now clearly established that the former opinions in this case were erroneous and the court should correct the error. In the amended petition the averment appears that the plaintiff was confined to his bed and house for more than ten weeks, and was wholly incapacitated,

mentally and physically, to do any business or transact any affairs until the first day of May thereafter. On the trial a witness testified that for six or eight weeks Mr. Foxworthy suffered intense pain, and that for a month or six weeks he was insane through pain. It will be remembered that the injury was sustained January 21 and the statement was filed with the city council July 28. Do the facts so pleaded and proved excuse the delay? We think not. The filing of the statement was a condition precedent to the maintenance of the action. It was not in the nature of a limitation, and the existence of a disability preventing plaintiff from filing a claim would not extend the time for filing it for the statutory period after the disability was removed. We think the uniform line of authority on this subject is that the condition must still be performed within the time specified, provided a reasonable time after the removal of the disabilities remain for that purpose. It has been so held even in the case of a limitation by contract. (*Steel v. Phenix Ins. Co.*, 47 Fed. Rep., 863; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann., 599.) Giving the utmost possible effect to the pleadings and evidence in regard to Mr. Foxworthy's disability, there remained after its removal several months within which the statement might have been filed.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. A. M. POST, HON. T. O. C. HARRISON, } JUDGES.
HON. ROBERT RYAN, HON. JOHN M. RAGAN, HON. FRANK IRVINE, } COMMISSIONERS.

CHRIST MULLER v. G. W. PLUE ET AL.

FILED SEPTEMBER 17, 1895. No. 6011.

1. **Justice of the Peace:** SERVICE OF SUMMONS: JUDGMENT. In an action before a justice of the peace, where the defendant does not appear, the record must show that legal service of the summons was made, or the judgment will be void.
2. ———: SUMMONS: DOCKET ENTRY. A justice of the peace must enter upon his docket the day and hour fixed in the summons for the time of trial, and the omission to do so is fatal, where there is no appearance of the defendant.
3. ———: ———: APPEARANCE OF PLAINTIFF. Where the defendant fails to appear, the record must disclose that the plaintiff

appeared within one hour of the time named in the summons for appearance, or jurisdiction is lost.

4. **Replevin**: LIEN OF EXECUTION ON VOID JUDGMENT. In an action of replevin, where the defendant claims to hold the property by virtue of the levy of an execution regular on its face, the writ and levy thereunder will confer upon the officer no right to hold the property as against the owner, if the execution was issued upon a void judgment.

5. ———: ———. The second point of the syllabus in *Wilson v. Macklin*, 7 Neb., 50, overruled.

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

The opinion contains a statement of the case.

Grimes & Wilcox, for plaintiff in error:

The record was insufficient to show a judgment. (*Gapen v. Bretternitz*, 31 Neb., 304; *Miller v. Burlington & M. R. R. Co.*, 7 Neb., 227.)

In cases before inferior courts the record must show that the court had jurisdiction. (*State v. Berry*, 12 Ia., 60; *Goodrich v. Brown*, 30 Ia., 291; *McCurdy v. Baughman*, 1 N. E. Rep. [O.], 93; *Hargis v. Morse*, 7 Kan., 415.)

Where defendant does not appear the record must show a legal service, or the judgment will be void. (*Repine v. McPherson*, 2 Kan., 340.)

Where there is no appearance of defendant the docket of a justice of the peace must affirmatively show that plaintiff appeared within one hour of the time named in the summons, or jurisdiction is lost. (*Mudge v. Yaples*, 25 N. W. Rep. [Mich.], 297; *Post v. Harper*, 28 N. W. Rep. [Mich.], 161.)

An officer claiming title to property under a process in his hands must show a valid unpaid judgment. (Wells, Replevin, sec. 30; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Adams v. Hubbard*, 30 Mich., 104.)

An execution regular on its face may protect an officer

against personal responsibility in serving it, but when he claims property under it he must show it was issued on a valid judgment. (*Gidday v. Witherspoon*, 35 Mich., 368.)

T. Fulton Gantt and *James M. Ray, contra:*

When jurisdiction appears, all matters relating to the form of procedure in justice courts should be construed with great liberality. (*Crook v. Hester*, 21 Neb., 369; *Degering v. Flick*, 14 Neb., 449; *Rawalt v. Brewer*, 16 Neb., 444.)

The judgment of a justice of the peace is as absolute between the parties as the judgment of the highest court and cannot be attacked collaterally. (*Hilton v. Bachman*, 24 Neb., 492; *Roberts v. Flanagan*, 21 Neb., 503; *Oakley v. Pegler*, 30 Neb., 628; *State v. Buffalo County*, 6 Neb., 454.)

Every presumption is in favor of the correctness of a judgment until the contrary affirmatively appears. (*Credit Foncier v. Rogers*, 10 Neb., 184; *Thesing v. School District*, 16 Neb., 134; *Hilton v. Bachman*, 24 Neb., 492.)

NORVAL, C. J.

This was a suit in replevin brought by the plaintiff in error in the county court of Lincoln county for the recovery of the possession of six head of cattle. From a judgment in favor of the defendants the plaintiff prosecuted an appeal to the district court, where, upon a trial to the court, judgment again went against him.

A reversal is sought on the ground that the findings and judgment are contrary to law and the evidence in the case. There is no controversy as to the facts. It was stipulated upon the trial that at the commencement of the action plaintiff was the owner of the cattle in dispute; that they were taken from his possession by the defendant M. L. Artlip by virtue of an execution issued by J. E. Cussins, a justice of the peace of Somerset precinct in said county, in a suit wherein the defendant in error herein, G. W. Plue,

was plaintiff and Christ Muller was defendant; that a demand for a return of property was made by plaintiff prior to the commencement of this suit. It is contended that the execution, under which the defendants attempted to justify, was not issued upon a valid judgment. The following is the record made by Justice Cussins, as appears by the docket introduced in evidence on the trial:

"Transcript of proceedings had before me, a justice of the peace of —— precinct, ——, in Lincoln county, in the state of Nebraska, in an action wherein —— was plaintiff, and —— bill of particulars —— was defendant.

"The plaintiff says there is due him from the defendant the sum of $37 for trespass and damage done by his stock on his farm. Summons issued April 27, 1891. Summons returned May 2, 1891. Case was called. Plaintiff appeared. Defendant did not appear. Witnesses, Alex. Green, G. W. Moore, Charles McDonal, H. C. Lord, D. McGahey, Ed. Changnon, and Mel Young.

"By request of G. W. Plue, plaintiff, judgment rendered on default May 2, 1891, for the plaintiff for the sum of $19 and all costs.

"May 18, 1891, execution issued and delivered to M. L. Artlip, special constable."

It will be observed that the docket of the justice fails to disclose the day and hour specified in the summons for the appearance of the defendant, nor does it appear that service of the writ was ever had upon him, nor, if made, that it was served at least three days before the time set for trial as required by statute. It is shown that Muller never appeared before the justice. Therefore it was necessary for the docket to show affirmatively that jurisdiction was acquired over his person by the service of process upon him within the time and in the mode prescribed by statute. In other words, it was indispensable that the docket, by a reasonable intendment, disclose the justice had jurisdiction of the person of the defendant. While it is true the docket entry

shows that the plaintiff appeared, the trial was had, and judgment was rendered on the 2d day of May, 1891, yet it is not shown that that was the day fixed for the return of the summons; nor does the docket state at what hour the plaintiff appeared and the case was called for trial. By section 916 of the Code the parties to a suit in justice court are given one hour in which to appear, after the time named in the summons for appearance; and unless the plaintiff appears within the hour, jurisdiction is lost where the defendant makes default. So far as the justice's docket discloses, the case may have been called and judgment rendered before the hour mentioned in the summons, or several hours thereafter. The omission of the justice to state in his docket the hour for the appearance of the defendant and the time when the case was called for trial are jurisdictional defects, and render the judgment void. (*Mudge v. Yaples*, 25 N. W. Rep. [Mich.], 297; *Post v. Harper*, 28 N. W. Rep. [Mich.], 161.) The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts, the facts necessary to give jurisdiction must fairly appear from the record. (*State v. Berry*, 12 Ia., 60; *Goodrich v. Brown*, 30 Ia., 291; *McCurdy v. Baughman*, 1 N. E. Rep. [O.], 93; *Repine v. McPherson*, 2 Kan., 340; *Hargis v. Morse*, 7 Kan., 415.) It is a familiar rule that a personal judgment without jurisdiction of the person of the defendant is void. (Cases *supra*.)

There being no valid judgment, the next question presented is whether the execution and levy thereunder conferred upon Artlip or the execution creditor any right or authority to hold the property seized under the writ. It is a general rule, deducible from the authorities, that a sheriff or constable is not required to look beyond the process placed in his hands; and if it be regular on its face, and issued by a court having jurisdiction of the subject-matter,

he will be protected in the execution of the process when proceeded against as a tort-feasor, even though the judgment may be void; but the rule is merely one of protection, and confers no right beyond that. Notwithstanding an execution fair and regular on its face is sufficient to protect the officer serving it from personal responsibility as a trespasser, yet the writ alone cannot confer any right of property; but where the officer claims property under it he must establish that the process was issued upon a valid, unpaid judgment. If the execution is issued upon a void judgment, a levy under the writ will confer upon the officer no right to hold the property as against the owner. (*Campbell v. Williams*, 39 Ia., 646; *Balm v. Nunn*, 19 N. W. Rep. [Ia.], 810; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Le Roy v. East Saginaw City R. Co.*, 18 Mich., 233; *Gidday v. Witherspoon*, 35 Mich., 368.)

In reaching this conclusion we have not overlooked the provisions of sections 182 and 1034 of the Code of Civil Procedure relating to affidavits for the replevin of property, and the decision of this court in the case of *Wilson v. Macklin*, 7 Neb., 50. Under the foregoing sections an order of replevin cannot be issued unless an affidavit of the plaintiff, his agent or attorney, is filed, setting up, among other things, that the property "was not taken in execution on any order or judgment against said plaintiff," etc. The purpose of the statute in requiring such an averment was to prevent one from replevying property which has been seized upon execution issued upon a valid judgment against him. Therefore the plaintiff is required to make oath that it has not been so taken before the writ can be obtained. In *Wilson v. Macklin*, *supra*, the replevin affidavit stated that the "goods and chattels were not taken in execution on any order or judgment against said plaintiff," but were taken by execution issued against plaintiff on a void judgment, and it was held that the affidavit was defective, and further that in that action the plaintiff could

not assail the validity of the judgment upon which the execution issued. This construction of the provisions of the Code is too literal. To construe the statute as prohibiting in all cases the replevin of property which has been levied upon by an officer under an execution would prevent a judgment debtor whose goods have been seized under such a writ from maintaining replevin therefor, although the judgment should be paid off after the levy is made, or the judgment should be reversed while his property remained in the officer's hands. The legislature never so intended, nor was it the design of the law-makers that the possession of property taken by virtue of an execution issued upon a void judgment could not be recovered by replevin. Without a valid judgment there can be no valid execution. *Adams v. Hubbard*, 30 Mich., 104, was replevin against an officer for property held by virtue of a levy upon an execution issued by a justice of the peace against the plaintiff in replevin. Evidence was introduced tending to prove that the judgment upon which the execution sued out was void. The circuit court directed a verdict for the defendant. Upon a review of the case the supreme court say: "This was erroneous. If the justice had acquired no jurisdiction there was no judgment, and the pretended execution was no execution within the meaning of the statute which prohibits a defendant in execution for bringing replevin for property taken upon it; and though, if regular upon its face, it would protect the officer when proceeded against as a wrong-doer, it cannot be made the basis of a claim of right to the property seized without proof of a valid judgment." To the same effect are *Campbell v. Williams, supra; Balm v. Nunn, supra;* Cobbey, Replevin, sec. 312; *White v. Jones*, 38 Ill., 159. It follows from what has been said the trial court should have determined that the plaintiff was entitled to the possession of the property in dispute. The conclusion reached makes it unnecessary to consider the question argued by counsel

whether Mr. Artlip was legally deputed by the justice to serve the execution. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ROBERT HANNA V. EMERSON, TALCOTT & COMPANY.

FILED SEPTEMBER 17, 1895. No. 6241.

1. **Partnership**: ACTION AGAINST INDIVIDUAL MEMBERS: SUMMONS. This suit is not against a partnership, but against the individual members thereof, since the summons runs against the defendants individually, their firm relation being stated in the petition and summons as *descriptio personæ*.
2. ———: ———: ———: SERVICE. Service of summons in an action against the individual members of a partnership or firm is not governed by sections 24 and 25 of the Code, but by section 69, which authorizes service to be made either by delivering a copy of the writ to the defendant personally, or by leaving one at his usual place of residence.
3. **Action on Account**: VENUE: SUMMONS. An action on an account against two or more persons may be brought in the county in which any one of the defendants at the time resides or may be summoned. If such an action is not instituted in a county where a party defendant resides it must be begun in the county where the defendant then is, and summons must be served upon him while in such county.
4. **Transitory Actions**: SUMMONS. Where a transitory action is properly brought in one county under the provisions of section 65 of the Code, summons may be issued to any other county of the state to bring in other parties defendant.
5. **Summons**: SERVICE. Service of process in a personal action in a county brought upon a nominal defendant merely, who has no actual or substantial interest in the subject of the litigation adverse to the plaintiff, will confer no authority upon the court to bring in another party by the issuing of a summons to, and by the service of the same upon such person in another county.
6. **Alias Summons**. To entitle a party to the issuance of an alias

summons it is not essential that he should refile the petition in the case, or file a new one.

7. **Limitation of Actions**: PLEADING. When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be taken advantage of by answer.

8. **Summons**: SERVICE. The third point in the syllabus in *Morrissey v. Schindler*, 18 Neb., 672, *held* to have been overruled by implication by *Herron v. Cole*, 25 Neb., 692, and subsequent decisions.

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

E. T. Farnsworth, for plaintiff in error, cited: *Mayberry v. Willoughby*, 5 Neb., 368; *Hackley v. Patrick*, 3 Johns. [N. Y.], 537; *Hurley v. Estes*, 6 Neb., 386; *Allen v. Miller*, 11 O. St., 374; *Cobbey v. Wright*, 29 Neb., 274; *Dunn v. Haines*, 17 Neb., 560; *Hower v. Aultman*, 27 Neb., 251; *State v. School District*, 30 Neb., 520; *State v. King*, 34 Neb., 196; *Wanzer v. Bright*, 52 Ill., 35; *In re Robinson*, 29 Neb., 137; *Franklin v. Morris*, 26 Atl. Rep. [Pa.], 364.

J. J. O'Connor, contra.

NORVAL, C. J.

This suit was brought in the court below by the defendants in error against the plaintiff in error, Robert Hanna, and one J. M. Sugar, members comprising the firm of Hanna & Sugar, to recover the balance due upon an account for goods sold and delivered. Summons was issued on January 14, 1891, directed to the sheriff of Douglas county, which was duly served on the same day upon Sugar, but the writ was returned "not found" as to the defendant Hanna. On December 23, 1891, an alias summons was issued to Dawson county upon the defendant Hanna, which was served by delivering to him personally a certified copy thereof with all the indorsements thereon. Sugar made

default, while Hanna made only a special appearance in the cause, and filed a motion to quash the summons for various reasons, which will not be here stated. This motion the court overruled, and judgment was entered in favor of the plaintiffs and against both Hanna and Sugar in the sum of $1,283.80 and costs. Hanna brings the cause to this court by a proceeding in error to review the decision of the court below on the motion to quash. In noticing the objections to the summons we shall not attempt to follow the order given in the motion.

It is urged that there is no authority to issue a summons to a county other than the one where the action is brought in causes like the one at bar. This suit is not against the firm of Hanna & Sugar, but against the defendants individually, who at the time of the contracting of the indebtedness were members of such firm, their partnership relation being stated in the petition and process merely as *descriptio personæ*. Service of summons is not controlled by sections 24 and 25 of the Code. (*King v. Bell*, 13 Neb., 409; *Herron v. Cole*, 25 Neb., 692; *Rowland v. Shephard*, 27 Neb., 494; *Roggenkamp v. Hargreaves*, 39 Neb., 540.) Upon the point under discussion the above cases are in direct conflict with the holding in *Morrissey v. Schindler*, 18 Neb., 672, which last case must be regarded as overruled by implication by the later cases above mentioned. This action not being *in rem*, but *in personam*, therefore, under section 60 of the Code, may be brought in any county in which one of the defendants resides or may be summoned. (*Pearson v. Kansas Mfg. Co.*, 14 Neb., 211; *Cobbey v. Wright*, 29 Neb., 274; *Bair v. People's Bank*, 27 Neb., 577.) Where a transitory action is brought in a county where one or more of the defendants is properly served, then, under the provisions of section 65 of the Code, summons may be issued to any other county of the state to bring in other defendants. (Cases *supra*.) Sugar, who was served in Douglas county, it is said, is a mere nominal defendant,

made a party solely for the purpose of obtaining jurisdiction over Hanna by summons sent to Dawson county. If it were true that Sugar is only a nominal defendant, without any actual or substantial interest in the subject of the litigation adverse to the plaintiff, we grant service of summons upon him would confer no authority upon the court to bring in Hanna by serving him with summons in Dawson county. In other words, if Sugar was released by the plaintiff below from any and all liability on account of the indebtedness which is the basis of the present cause of action, as is insisted by the plaintiff in error, then Sugar was a nominal party merely, and was not a necessary or proper defendant. (*Dunn v. Haines*, 17 Neb., 560.) While there is some evidence in the record tending to sustain this contention of plaintiff in error, yet a reversal cannot be predicated thereon, since the question whether Sugar had been released, and the effect thereof on the case as to Hanna, was not raised in the trial court by the motion to quash, unless presented by the fifth ground of the motion, which is as follows: "That there was collusion and fraud between defendant Sugar and the plaintiff herein for the purpose of bringing this action into this court, as will appear more fully hereafter." The foregoing was insufficient to challenge the court's attention to the point that service was had in Douglas county upon a nominal defendant alone. The paragraph pleads no fact, but is the statement of a conclusion of law merely; hence we will not review the evidence introduced on the hearing of the respective parties tending to support and refute the claim made in the brief that the action was brought and the service of summons was obtained upon Sugar in Douglas county through fraud and collusion between Sugar and plaintiffs.

Another ground urged for quashing the summons is that neither of the defendants reside in Douglas county. So far as jurisdiction was concerned, it was wholly immaterial where the defendants or either of them resided, or

whether they were residents of the county where the suit was instituted or not, provided either one of the defendants was within Douglas county at the time the suit was instituted. Sugar being at the time in said county, the action was properly brought therein. (*Coffman v. Brandhoeffer*, 33 Neb., 279.)

The point is also raised that the petition was filed in the court below a long time before the issuance and service of summons and while the defendant Hanna was absent from Douglas county. The record so discloses, but this fact is no ground for quashing the summons. Sugar being within Douglas county when the petition was filed and the summons which was served upon him was issued, the district court acquired jurisdiction of the action. The first summons having been returned not found as to Hanna, in accordance with the provisions of section 67 of the Code an alias writ was issued. The fact that it was issued nearly a year after the filing of the petition is of no consequence. Obviously this is so. The legislature never contemplated that a new petition shall be filed, or the original one refiled, at the time of the suing out of an alias summons. (*Davis v. Ballard*, 38 Neb., 830.)

Another ground stated in the motion to quash is that the summons was served upon the defendant Hanna by leaving a copy of the same at his usual place of residence, and not by delivering the same personally to him. There is no merit in this objection, for two reasons: First, it is not true that the writ was served by leaving a copy at the residence of the defendant. On the contrary, the return made by the officer upon the writ shows—and it is undisputed by any other portion of the record—that the summons was served by delivering to Hanna personally a copy of the same, including all of the indorsements thereon. In the second place, it is wholly immaterial whether the service was by delivering a copy of the writ to the defendant or by leaving the same at his usual place of abode. Service in either mode would be good. (Code, sec. 69.)

The objection that the summons notified the plaintiff in error that he had been sued in Dawson county is untenable. The venue of the writ is laid in Douglas county. It purports on its face to have been issued out of the district court of said county, recites the fact that the defendant has been sued in said district court by Emerson, Talcott & Co., and notifies him when he is required to answer. The summons is in due form, and in every respect meets the requirements of the statute.

Another proposition discussed in the briefs, and which is one of the grounds in the motion to quash, is that the petition does not state a cause of action against Hanna. In other words, that the statute of limitations has run against the claim as to said defendant. The action being upon an account, under the statute it became barred at the expiration of four years from the accruing of the cause of action. The question of the bar of the statute is not raised in this case by answer, but it is insisted that the petition on its face discloses that the cause of action arose at such a period of time that under the statute no action can be maintained. It is well settled in this state that when it is not apparent from the petition that the debt is barred, the statute of limitations must be taken advantage of by answer. It was not so raised in this case. Does the petition show that the action is barred? We do not think so. It is therein averred: "Said defendants are justly indebted to said plaintiffs in the sum of $891.53 for a balance for goods sold and delivered to said defendants during the year 1887, and interest thereon from September 1, 1887, at eight per cent. An itemized statement is hereto attached and made a part of this petition." The itemized account or statement above referred to is not copied into the transcript. The allegation quoted is the only reference made in the petition to the matter, and it does not state the specific dates or times when the goods were delivered or when they were to have been paid for. If any portion of them were received

after December 23 of that year the indebtedness matured after that date, and such may have been the case. So far as the petition discloses, then, the statute of limitations had not run, at least against the entire claim. The petition failing to show when the right of action accrued, it does not disclose that the statute of limitations had barred the action. The judgment is

AFFIRMED.

LEONARD K. SCROGGIN V. HARRIET R. JOHNSTON ET AL.

FILED SEPTEMBER 17, 1895. NO. 5705.

1. **Pleading:** AMENDMENTS. The allowing of a petition to be amended so as to change the form of the action is permissible where the identity of the cause of action is preserved.
2. ———: ———: EJECTMENT: CONTRACTS. Plaintiff brought an action in ejectment, and the defendant pleaded a contract entered into by plaintiff for the sale of the premises and demanded affirmative equitable relief. The plaintiff was permitted to file an amended pleading, changing the form of the action from ejectment to that of foreclosure of the contract. *Held*, Not reversible error.
3. ———: ———. In a proper case the court may permit a pleading to be amended to conform to the proof.
4. **Rulings on Evidence:** REVIEW: ASSIGNMENTS OF ERROR. This court will not review the rulings of the trial court on the admission of testimony unless the particular rulings are pointed out in the petition in error.
5. **Trial to Court:** ADMISSION OF INCOMPETENT TESTIMONY: REVIEW. In a cause tried without a jury the admission of incompetent or irrelevant testimony is not reversible error.
6. **Conflicting Evidence:** REVIEW. The finding of the trial court, based on sufficient evidence, will not be disturbed on appeal, unless manifestly wrong.
7. **Estoppel:** PLEADING: MAXIMS. The facts constituting an estoppel *in pais* must be pleaded.

ERROR from the district court of Nuckolls county. Tried below before MORRIS, J.

T. T. Beach and *S. A. Searle*, for plaintiff in error.

S. W. Christy, contra.

NORVAL, C. J.

An action of ejectment for the southeast quarter of the northwest quarter and the north half of the southwest quarter of section 33, town 3, range 6 west, in Nuckolls county, was instituted in the court below by Harriet B. Johnston against Charles H. Malsbury. Upon a trial to the court, without answer, judgment was rendered for the plaintiff, and upon the same day, at the request of the defendant, the judgment was set aside, and the statutory second trial was granted. Defendant was also given leave to answer, and, by consent of parties, L. K. Scroggin was made a party defendant. The petition states that the plaintiff has the legal estate in the premises described and is entitled to possession of them; that the defendant unlawfully withholds possession and has received the rents and profits of said lands and applied the same to his own use, amounting to the sum of $600. The answer of Scroggin contains a general denial, after which it sets up that the plaintiff, formerly Harriet R. Spurck, on the 1st day of February, 1884, entered into a contract in writing whereby she agreed to convey said premises to Malsbury upon his paying the sum of $2,000, as follows: $500 cash, and the remaining $1,500 in five equal payments of $300 each, commencing on February 1, 1889, with ten per cent interest from date of contract, the said $300 payments being evidenced alone by said contract and for which no promissory notes were given; that Malsbury executed and delivered to plaintiff his two promissory notes of $250 each in settlement of the $500 cash payment; that said contract,

or article of agreement, was duly acknowledged and recorded; that plaintiff on July 12, 1884, sold and assigned to J. W. Kline all her right, title, and interest in and to said contract and moneys described therein, and indorsed and delivered to said Kline the said two promissory notes; that subsequently said Kline, his wife joining with him, sold, assigned, and transferred said contract and moneys therein promised to the defendant L. K. Scroggin, and said Kline indorsed and transferred said two notes to said Scroggin, to whom defendant Malsbury has since paid said notes with the accrued interest thereon, as well as the interest on the five $300 payments; and that Malsbury has made no other or further payments thereon, for the reason plaintiff has notified him not to do so. The answer closes with a prayer that the court find the amount due Scroggin on said contract, together with the amount to become due thereon, and decree the same shall be paid to him, and upon such payments being made the court direct said plaintiff to convey the premises to Malsbury, or if the court shall find the plaintiff has no interest in the premises, that he be required to convey the same to Scroggin, and that plaintiff be enjoined from further prosecuting the suit, and for general relief. Malsbury's answer was substantially the same as the one filed by Scroggin, with the exception that it contained the further averments to the effect that he has complied with all the terms of the contract up to the time of receiving notice from plaintiff not to pay any moneys upon the contract to either Kline or Scroggin, and that Malsbury is now, and always has been, ready to perform each and all the stipulations of said contract by him to be performed, and is now ready and willing to make payment in full of all moneys due and to become due under the contract. This defendant prayed the court to determine who has the right to the money and to whom it shall be paid; that upon making payment to such party as the court shall direct plaintiff be required to

convey the premises to said answering defendant according to the terms of said contract; that plaintiff be restrained from further prosecuting this suit, and that this defendant receive such other and further relief as justice and equity demanded. For reply to the answers plaintiff denies each averment therein contained not expressly admitted; admits the execution of the contract between herself and Malsbury, set forth in the answer; denies that she assigned or sold the contract to Kline or any one else; denies that Scroggin is entitled to receive the money on said contract of purchase or that he is entitled to a deed to said premises or any part thereof; avers that the assignment from Kline and wife to Scroggin was made during the pendency of the suit, and that Malsbury has failed to make the payments and perform the covenants and conditions of said contract on his part, whereby said contract is forfeited. Subsequently, by leave of court, Malsbury, by an amendment to his answer, admits he is in possession of the lands, but says he entered in possession under the contract of purchase dated February 1, 1884; avers that in good faith he has paid to Scroggin on said contract, believing him to be the owner thereof, the following sums: $450 about February 1, 1885, and $425 about February 1, 1886; that on or about April 4, 1888, he executed and delivered to Scroggin a note for $411.44, secured by a chattel mortgage, of which amount $228.75 was to be applied in payment of interest on said contract of purchase; that defendant has made lasting and valuable improvements upon the land of the value of $600. He prays the court to determine who is entitled to the purchase money, and for judgment against Scroggin for the several sums he paid him, with interest, in case the court decrees the plaintiff is the owner of the contract and entitled to receive the moneys therein called for. Upon the issues thus formed by the several pleadings the cause was tried to the court, and at the close of the trial plaintiff was permitted, over objection of counsel for

plaintiff in error, to file an amended or supplemental petition to conform to the proofs, in which it is alleged, in substance, that Malsbury was in possession of the premises under the contract of purchase already mentioned, which instrument it is alleged was afterwards taken from plaintiff's possession without her knowledge or consent and without her receiving any value therefor from any person whomsoever; that through some source to her unknown, except by the testimony adduced on the trial, Scroggin obtained possession of said contract, and has collected the sums due thereon from Malsbury up to February 2, 1887, without the knowledge or consent of plaintiff. The prayer is that an account be taken of the amount due plaintiff on said contract from Malsbury, and that a decree be rendered for a sale of the premises to satisfy said sum, unless the same is paid by a day fixed by the court, and for general equitable relief. The court below found that plaintiff never delivered the assignment of said contract to Kline, nor authorized any one else to do so for her, but that the same was by her then husband wrongfully and fraudulently abstracted from plaintiff's possession, and by him delivered to Kline to pay a part of her husband's indebtedness to Scroggin and for the payment of which said Kline was surety; that Malsbury has not paid to plaintiff any portion of the purchase money for the lands covered by said contract of sale, but has paid to Scroggin the sum of $1,104.19; that there is due from Malsbury to plaintiff on said contract $3,583.26 for principal and interest, and that there is due Malsbury from Scroggin for moneys paid him on account of said contract the said sum of $1,104.19. A decree of foreclosure and sale of the premises was entered in favor of the plaintiff, the several assignments of the contract were annulled, and judgment was entered upon the finding in favor of Malsbury and against Scroggin for $1,104.19, and execution was awarded therefor. From the findings and judgment Scroggin prosecutes a petition in error.

The first argument is directed to the ruling of the trial court in permitting the plaintiff below, after the evidence had been all taken, to file an amended or supplemental petition, whereby the form of the action was changed from a suit at law to a purely equitable action. It is true the suit, as originally brought, was in ejectment to recover the possession of land, and that such an amendment of the proceedings was allowed as to change the form of the action to that of foreclosure of a land contract upon the same premises, yet a reversal ought not to be ordered in consequence thereof. This court has decided that the permitting of an amendment of a petition which changes the form of the action is of no consequence, so long as the identity of the cause of action remains. (*Roberts v. Swearingen*, 8 Neb., 363; *McKeighan v. Hopkins*, 19 Neb., 33; *Schuyler Nat. Bank v. Bollong*, 28 Neb., 684; *Homan v. Hellman*, 35 Neb., 414.) In the case last cited, which was an action to quiet title to real estate, the petition was amended to state a cause of action in ejectment to recover the same premises, and such amendment was held not to be erroneous. The case reported in 19 Neb. was a suit in ejectment, and the court permitted an amendment to make the action one to redeem. In *Robinson v. Willoughby*, 67 N. Car., 84, the plaintiff was permitted to amend his complaint, changing the form of the action from ejectment to that of foreclosure of a mortgage. In the case at bar it will be observed that a judgment was rendered in favor of the plaintiff for the recovery of the premises without any defense being interposed. Subsequently, on request of the defendant Malsbury, the statutory second trial was granted, when he answered, and Scroggin was permitted to intervene. The answers of both the defendants set up matters for equitable cognizance, and equitable relief was demanded. The cause was tried by all the parties upon the theory that the action was one for the equity side of the court. Scroggin, therefore, cannot now be heard to complain that the

form of the action was changed. It was inaccurate for the plaintiff to designate his amended pleading as a "supplemental petition," since it pleaded no new facts accruing after the filing of his original petition, but contained merely a statement of the transactions constituting his cause of action arising before the bringing of the suit. Technically it was an amended petition, but the fact that it was not so styled and designated by proper indorsement is immaterial. In a proper case the court may permit a pleading to be amended to conform to the facts proved. (*Keim v. Avery*, 7 Neb., 54; *Homan v. Steele*, 18 Neb., 652; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Parlin*, 30 Neb., 376; *Whipple v. Fowler*, 41 Neb., 675.) We fail to discover any abuse of discretion in permitting the amended pleading to be filed.

Complaint is made because of the alleged errors in the rulings of the trial court on the admission of testimony offered by the plaintiff. We cannot reverse the judgment on that ground, even though the rulings were erroneous—First, because the points were not sufficiently presented by the petition in error. No particular ruling is therein specified or called to our attention, the assignment being that the trial court permitted and received improper, immaterial, unimportant, and irrelevant testimony on behalf of the plaintiff. Like assignments in a petition in error have been invariably held bad. (*Wiseman v. Ziegler*, 41 Neb., 887; *Wonderlick v. Walker*, 41 Neb., 806.) In the next place the cause was tried to the court without the intervention of a jury, and the rule in such case is that error cannot be predicated in the reviewing court upon the erroneous admission of testimony. (*Ward v. Parlin*, 30 Neb., 376; *Whipple v. Fowler*, 41 Neb., 675, and cases there cited.)

Error is alleged in that the court below propounded questions to the plaintiff, on re-cross-examination, while a witness in her own behalf. Our attention has been challenged

to but one interrogatory put by the court to the witness to which an objection was made by plaintiff in error "to the court taking the part of counsel in the case," and that is found on page 26 of the bill of exceptions. The cross-examination of Mrs. Johnston was conducted by Mr. Beach, during which he asked her, "You paid no attention to what became of the Malsbury assignments and notes?" to which she made answer, "Yes; I put them away." Q. "Did you until 1887 pay any attention to it?" A. "No, sir." Then the court asked the witness this question, which is the one objected to: "You mean you paid no attention to the assignment that you had made, or the notes from the time you made them. Do you mean that?" The reply was: "I took the papers home and put them in the secretary with my other papers. That is the assignment and the notes. I took them home and put them with my other papers in the secretary." It is plain that the object and purpose of the court in propounding the interrogatory was to ascertain if the witness understood the question Mr. Beach had framed in regard to whether she paid any attention to what became of the Malsbury assignment and notes. There was absolutely no evidence of there being a Malsbury assignment, while there was testimony concerning an assignment made by the plaintiff of the contract with Malsbury. It was the duty and province of the court to see that the witness comprehended the questions asked, in order that they might be answered understandingly.

It is insisted that the findings, decree, and judgment are not supported by the evidence and are contrary to law. That Mrs. Johnston executed an assignment of the land contract to Kline there is no room for doubt, the main question of fact which the trial court was called upon to determine being whether or not there was a delivery of the Malsbury contract, the assignment thereof and the notes of the plaintiff to Kline. There is no claim that Mrs. Johnston personally delivered them, but the evidence in-

troduced by the defendant is to the effect that they were delivered by her husband with her knowledge and consent, while the plaintiff testified unequivocally that after she executed the assignment she took it home and placed the same, together with the notes and contract, in a drawer of the secretary in which she usually kept her papers; that she did nothing further with them, and did not see them again until at the trial; that she received nothing for making the assignment; that she was induced to execute the assignment upon the statement made by her husband that Mr. Kline would pay $2,000 for the contract and notes, and that the papers were to be delivered to Mr. Kline upon his paying the money, which was never done. The evidence on behalf of Scroggin tends to contradict that introduced by the plaintiff upon the question of the delivery of the assignment, notes, and contract. The testimony was, in the main, that of interested witnesses, who testified diametrically opposite to each other. Scroggin's principal witness was Mr. Johnston, the husband of the plaintiff, although they have not lived together since 1885. Under the statute of Nebraska and the construction placed thereon by repeated decisions of this court, Mr. Johnston was disqualified from testifying against his wife. (*Buckingham v. Roar*, 45 Neb., 244.) Upon a careful perusal of the bill of exceptions we are satisfied there is sufficient competent evidence in the record to support the findings of the trial court that plaintiff never delivered the contract, assignment, and notes to Kline, and that their possession was obtained without her knowledge or consent, although the preponderance of the evidence is on the other side of the scale. We can but apply the rule that where the evidence is conflicting, the findings of the trial court based thereon will not be disturbed upon appeal. There being no delivery of the assignment, no title or interest in and to the contract or the moneys therein mentioned passed to Kline, nor to his assignee Scroggin. (*Steffian v. Milmo Nat. Bank*, 6 S.

W. Rep. [Tex.], 823; *Moody v. Dryden*, 34 N. W. Rep. [Ia.], 210; *Patrick v. McCormick*, 10 Neb., 1; *Cotton v. Gregory*, 10 Neb., 125.)

Plaintiff in error argues that he is a *bona fide* holder of the notes for value before maturity, and is therefore entitled to protection. A sufficient reply to this is, no such issue was raised by his answer. He does not plead that he became the owner of the notes before due in the usual course of business without notice of Mrs. Johnston's rights, nor does he aver that he paid anything of value therefor. The five payments of $300 each described in the contract, as elsewhere stated, were not evidenced by notes of any kind. The contract was in no sense commercial paper, and therefore Scroggin is not entitled to the same protection as a *bona fide* holder of negotiable paper purchased before maturity.

It is finally insisted that Mrs. Johnston is estopped from claiming the amount due on the land contract by placing it, duly assigned, together with the notes, in the possession of her husband, or where he had access to them. Counsel for the plaintiff is quite right when he says this question is raised for the first time in this court in the brief filed herein, and therefore such defense is not availing. It will be observed, from the synopsis of Mr. Scroggin's answer, that he has pleaded no estoppel, which he should have done if he desired to invoke the principle of law, which has become axiomatic, that "where one of two innocent persons must suffer loss by the fraud or misconduct of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." There being no reversible error in the record, the judgment is

AFFIRMED.

RAGAN, C., not sitting.

STATE OF NEBRASKA, EX REL. ARTHUR S. CHURCHILL, ATTORNEY GENERAL, V. GEORGE P. BEMIS, CHARLES H. BROWN, D. CLEM DEAVER, WILLIAM J. BROATCH, PAUL VANDERVOORT, AND ALBERT C. FOSTER.

FILED SEPTEMBER 17, 1895. No. 7947.

1. **Constitutional Law:** STATUTES: AMENDMENT: REPEAL. Section 11, article 3, of the Constitution provides: "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." *Held*, That the term "repeal" is therein employed in the sense in which it was understood when the constitution was adopted in 1875.

2. ———: ———: ———: ———. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of a statute in terms, or in substance, is a mere reaffirmance of the original act, and not a repeal in the strict or constitutional sense of the term.

3. ———: ———: ———: ———. The great object to be attained by that provision of the constitution is certainty in legislation, hence all that is required is that the amendatory act shall be definite and certain as to the law amended, and germane to the original act. (*State v. Babcock*, 23 Neb., 128.)

4. **Metropolitan Cities:** GOVERNMENT: FIRE AND POLICE COMMISSIONERS: CONSTITUTIONAL LAW: STATUTES. In 1887 an act was passed entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government." In 1889 section 145 of said act was amended by the addition thereto of a provision not affecting its general scope and purpose, and the original section was repealed, the title of the amendatory act being "An act to amend section 145 of an act etc., and to repeal said section as heretofore existing." In 1891 said section was further amended by the addition of a provision not affecting its general object, and the section as amended was repealed, both acts preserving the number and language of the original section, except as affected by such amendment. In 1895 an act was passed entitled "An act to amend section 145 of 'An act incorporating cities of the metropolitan class, and defining, regulating, and prescribing their

duties, powers and government,' approved March 30, 1887, and as subsequently amended." *Held*, That the act last mentioned is not inimical to the constitution on the ground that the original section was repealed by the act of 1889.

5. **Constitutional Law**: STATUTES: TITLES OF BILLS. The provision of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," was intended to prevent surreptitious legislation and not to prohibit comprehensive titles. The test is not whether the title chosen by the legislature is the most appropriate, but whether it fairly indicates the scope and purpose of the act.

6. **Statutes**: REPEAL BY IMPLICATION. An act which embraces the entire subject-matter of a prior act and also additional provisions will be construed as a repeal of the latter by implication.

7. **Metropolitan Cities**: PROVISION OF CHARTER FOR FIRE AND POLICE COMMISSIONERS: PARTY AFFILIATIONS: CONSTITUTIONAL LAW: COMITY. The provisions of the charter of the city of Omaha for a board of fire and police commissioners composed of three members "at least one from each of the two political parties casting the largest number of votes at the last preceding general election," does not conflict with the constitution of this state or the constitution of the United States in prescribing party affiliation as a qualification for office. If such provision be not mandatory in the sense that it is binding upon the appointing power,—a question not decided,—it is at least advisory and will be accorded consideration consistent with the comity existing between different departments of government.

8. ———: ———: TIME STATUTE TOOK EFFECT. The act of 1895 amendatory of the act of 1887 (Session Laws, 1895, ch. 10) was passed over the veto of the governor April 4, but did not, under the provisions of section 24, article 3, of the constitution, take effect until three calendar months after the adjournment of the legislature for that session. *Held*, That the provision therein for the appointment of fire and police commissioners for cities of the metropolitan class within thirty days from its passage refers to the time when said act took effect as a law.

9. ———: APPOINTMENT OF FIRE AND POLICE COMMISSIONERS: ABSENCE OF MEMBER OF APPOINTING BOARD: VALIDITY OF PROCEEDINGS. In the absence of a special provision to the contrary, the presence of all the members thereof is not indispensable to the transaction of business by a public body or board. Where members having reasonable notice neglect to at-

tend the meetings of a board charged with duties to the public, the action of those present, if a majority of all or a quorum authorized by statute or by law, is the action of the board and equally binding as if all had attended and expressly assented thereto.

ORIGINAL action in the nature of *quo warranto*, on the relation of the attorney general, to determine the rights of rival claimants to the offices of fire and police commissioners of the city of Omaha. *Judgment in favor of William J. Broatch, Paul Vandervoort, and Albert C. Foster.*

The facts are stated in the opinion.

A. S. Churchill, Attorney General, for the state.

E. W. Simeral and *Greene & Breckenridge*, for respondents George P. Bemis, Charles H. Brown, and D. Clem Deaver:

The act of 1895, chapter 10, Session Laws, is void because the section of the act it purports to amend and repeal did not exist, and it therefore has nothing to rest on. (*Ex parte McCardle*, 7 Wall. [U. S.], 514; *Coffin v. Rich*, 45 Me., 507; *Dogge v. State*, 17 Neb., 143; *State v. Berka*, 20 Neb., 377; *State v. Babcock*, 23 Neb., 133; *State v. Benton*, 33 Neb., 834; *Trumble v. Trumble*, 37 Neb., 340; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *Burnett v. Turner*, 87 Tenn., 124; *Hall v. Craig*, 125 Ind., 523; *Wall v. Garrison*, 11 Col., 515; *Maxwell v. State*, 89 Ala., 150; *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill., 656; *Sovereign v. State*, 7 Neb., 409; *Smails v. White*, 4 Neb., 353; *Stricklett v. State*, 31 Neb., 674; *Smith v. State*, 34 Neb., 689.)

The act is void as being in violation of the constitutional provision that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. (*White v. City of Lincoln*, 5 Neb., 516; *Ives v. Norris*, 13 Neb., 252; *Wall v. Garrison*, 11 Col., 515.)

The act is broader than its title and is therefore void. (*Trumble v. Trumble*, 37 Neb., 340; *People v. Denahy*, 20 Mich., 349; *Weigel v. City of Hastings*, 29 Neb., 379; *Wolf v. Taylor*, 98 Ala., 254; *State v. Nomland*, 3 N. Dak., 427; *Elliott v. State*, 91 Ga., 694; *Clark v. Board of Commissioners of Wallace County*, 39 Pac. Rep. [Kan.], 225; *Commonwealth v. Samuels*, 14 Pa. C. C. Rep., 423; *Perkins v. City of Philadelphia*, 156 Pa. St., 539; *People v. Fleming*, 7 Col., 230; *City of Grand Rapids v. Burlingame*, 93 Mich., 469; *Gatling v. Lane*, 17 Neb., 84; *In re White*, 33 Neb., 819.)

The act is unconstitutional for the reason that it is in conflict with other sections of the city charter. (*Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *Ex parte Hewlett*, 40 Pac. Rep. [Nev.], 96.)

Two members of the old board were appointed for four years from May 7, 1895. They are not legislated out by any express provision of the act. They have never been tried and removed. At the time of their appointment their term of office was fixed by law. They should be permitted to serve out their term. (*State v. Board of Public Lands and Buildings*, 7 Neb., 42; *State v. McColl*, 9 Neb., 203; *State v. Seay*, 64 Mo., 89.)

The provision of the act making party affiliation a test of eligibility to office is in conflict with section 1 of the fourteenth amendment of the constitution of the United States providing, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." The provision violates section 3 of the state bill of rights. It also violates section 15 of article 3 of the state constitution providing that the legislature shall not pass local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or

franchise whatever." (*Attorney General v. City of Detroit*, 58 Mich., 213; *City of Evansville v. State*, 118 Ind., 426; *Rogers v. City of Buffalo*, 123 N. Y., 173.)

The law is incapable of execution, and therefore void. (Sutherland, Statutory Construction, secs. 237, 238.)

The new board was not legally appointed. Where a power is conferred upon three or more persons in a matter of public concern, requiring the exercise of discretion and judgment, and contains no directions respecting the number of those who may exercise the power, such exercise will not be valid unless all act, or unless all meet for consultation. After a legal meeting has taken place a majority may govern. (*People v. Coghill*, 47 Cal., 361; *Scott v. Detroit Young Men's Society*, 1 Doug. [Mich.], 121; *State v. Wilksville*, 20 O. St., 293; *Hudley v. Mayor of City of Albany*, 33 N. Y., 606; *People v. Whiteside*, 23 Wend. [N. Y.], 9; 26 Wend. [N. Y.], 634.)

In absence of an emergency clause the act in providing that the commissioners shall be appointed within thirty days after its passage violates the following provision of the constitution: "No act shall take effect until three calendar months after the adjournment of the session at which it was passed, unless in case of emergency." (*Harding v. People*, 10 Col., 387.)

Courts should not hesitate to declare legislative acts invalid when they are found to be in substantial conflict with the fundamental law of the state. (*State v. Bartley*, 41 Neb., 277.)

Hall, McCulloch & Clarkson, for respondents William J. Broatch, Paul Vandervoort, and Albert C. Foster:

The appointment by a majority of the board is valid. (*Williams v. Inhabitants of School District*, 21 Pick. [Mass.], 82; *Horton v. Garrison*, 23 Barb. [N. Y.], 179; *Sprague v. Bailey*, 19 Pick. [Mass.], 442; *First Nat. Bank of Bennington v. Town of Mt. Taber*, 52 Vt., 87; *Louk v. Woods*,

15 Ill., 256; *Walker v. Rogan*, 1 Wis., 597*; *Merchant v. North*, 10 O. St., 251; 19 Am. & Eng. Ency. Law, pp. 465, 466; *Hopkins v. Scott*, 38 Neb., 661.)

In support of an argument in favor of the constitutionality of the act the following cases were cited: (*State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 13; *Perry v. Gross*, 25 Neb., 826; *In re White*, 33 Neb., 812; *Miller v. Hurford*, 13 Neb., 13; *Gatling v. Lane*, 17 Neb., 81; *State v. Ream*, 16 Neb., 681; *State v. Mayor of Kearney*, 28 Neb., 110; *State v. McColl*, 9 Neb., 203; *Taylor v. Courtnay*, 15 Neb., 190; *Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Brome v. Cuming County*, 31 Neb., 362; *State v. Maccuaig*, 8 Neb., 215; *State v. Howe*, 28 Neb., 618.)

The provision for the appointment of officers of different political affiliations does not invalidate the act. (*State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 13; *People v. Hurlbut*, 24 Mich., 93.)

The expression in the law referring to the time the appointment should be made was intended to mean thirty days after the act took effect. (*Hardin v. People*, 10 Col., 387.)

POST, J.

This is an original proceeding in the nature of a *quo warranto*, on the relation of the attorney general, under the provisions of section 714 of the Civil Code, to determine the rights of the respondents, who claim to be members of the board of fire and police commissioners for the city of Omaha. By section 145 of the act of 1887, entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government," hereafter referred to as the charter of the city of Omaha, provision is made for a board of fire and police commissioners consisting of five members, to-wit, the mayor, and four electors of said city to be appointed by the governor. In 1889 and 1891 said section was amended by the addition

thereto of provisions to which reference will be hereafter made, but which do not call for notice in this connection. In 1895 an act was passed entitled "An act to amend section 145 of an act entitled 'An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government,' approved March 30, 1887, and as subsequently amended, and to repeal said section," and which it is conceded took effect not later than August 1 following, unless void for reasons hereafter considered. By the last mentioned act provision is made for a board of fire and police commissioners consisting of three members to be appointed by the governor, attorney general, and commissioner of public lands and buildings. It is disclosed by the pleadings upon which the cause is submitted, that on the day last named said board was composed of the following members, to-wit: Howard B. Smith, Virgil O. Strickler, D. Clem Deaver, and Charles H. Brown, all of whom had been in due form appointed by the governor, and Geo. P. Bemis, mayor of said city, and will, for convenience, be referred to as the old board. On the 2d day of August the respondents, William J. Broatch, Paul Vandervoort, and Albert C. Foster, were named as fire and police commissioners under the provisions of the act of 1895, the record of their appointment being as follows:

"AUGUST 2, 1895, 10 o'clock A. M.

"Appointing board for the appointment of fire and police commissioners for cities of metropolitan class met pursuant to written notice heretofore given of said meeting. Present, H. C. Russell, Com. P. L. & B., and A. S. Churchill, Attorney General.

"Whereupon the following proceedings were had: Hon. H. C. Russell was chosen chairman *pro tem.* and A. S. Churchill secretary. The meeting being called to appoint fire and police commissioners of the city of Omaha.

"Whereupon W. J. Broatch was appointed one of the said fire and police commissioners of said city for the term

ending December 31, 1895, Paul Vandervoort for the term ending December 31, 1896, and A. C. Foster for the term ending December 31, 1897, and commissions instructed to be issued accordingly.

"There being no other business, after waiting until 11 o'clock A. M. of said date the board adjourned.

"Record read and approved. H. C. RUSSELL,
"*Chairman pro tem.*
"A. S. CHURCHILL,
"*Secretary.*"

Said respondents subsequently qualified in the manner prescribed by law, and will be referred to as the new board. Messrs. Strickler and Smith, upon the appointment and qualification of the new board, recognized the title of the latter and refuse to join in resisting their claims to the offices in controversy.

It should be remarked, as preliminary to an examination of the cause on its merits, that this court is not the keeper of the legislative conscience, and that the motives of members of the respective houses, or the wisdom and propriety of the act involved, present no question of judicial cognizance. That act is, we may assume, as are most if not all measures of like character, wholly indefensible; still the caustic arraignment of counsel should have been addressed to another department of the government, since it is not within our province to criticise or defend it as a matter of legislative policy. It should be remembered, too, that all presumptions are in favor of legislative acts, and that no act will be declared invalid unless plainly and irreconcilably in conflict with the constitution. With these general observations we will proceed to a consideration of the questions discussed, and which will, so far as practicable, be examined in the order presented by counsel for the old board.

It is in the first place claimed that section 145 of the act of 1887 was repealed by the act of 1889 amendatory thereof, and that the attempted amendment of 1895 is ac-

cordingly without force or effect. That argument renders necessary an examination of the several acts mentioned, so far as they relate to the subject in hand. Section 145, as originally adopted, not only provides for a board of fire and police commissioners, not more than two of whom shall belong to one political party, but also, in explicit terms, defines their powers and duties. The act of 1889, entitled "An act to amend sections * * * 145, * * * and to repeal said sections as heretofore existing," is a literal re-enactment of the section amended, except that it provides for the government and control of the police of the city in accordance with rules adopted by the board of fire and police, instead of by ordinance; and the further provision therein for the giving of bonds by the members of the board. The act of 1891 provides for the appointment of the members of the board from the three political parties casting the largest number of votes at the last preceding election, but is otherwise a re-enactment of section 145 as previously amended. The following paragraph from the brief of counsel is the strongest possible presentation of the question from the standpoint of the old board:

"Section 145 was amended by section 46, chapter 13, Laws, 1889, and the section as originally enacted was repealed, so that it ceased then to exist. Section 46, act of 1889, was carried into the Compiled Statutes as section 145, chapter 12*a*, entitled 'Cities of the Metropolitan Class,' and was in turn amended by section 32, chapter 7, Laws, 1891, in the title of which it was designated as section 145 of chapter 12*a*, Compiled Statutes, and the section amended was expressly repealed. So that section 145, chapter 12*a*, Compiled Statutes then ceased to exist, and the law that continued thereafter in force was neither section 145 of the act of 1887, nor section 46 of the act of 1889, but section 32 of the act of 1891, and, as section 145 of the act of 1887 had not been in existence since 1889, the act of 1895 touches nothing and is absolutely void."

The fallacy of that argument lies in the assumption that the effect of the amendatory acts is in any proper sense a repeal of the original section. True, as provided by section 11, article 3, of the constitution, "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed," but the term "repeal" is therein evidently employed in the sense in which it was understood at the time the constitution was adopted. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of the same statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term (*Ely v. Holton*, 15 N. Y., 595; *Moore v. Mansert*, 49 N. Y., 332; *Fullerton v. Spring*, 3 Wis., 667; *Middleton v. New Jersey & W. L. R. Co.*, 26 N. J. Eq., 269; *Wright v. Oakley*, 5 Met. [Mass.], 406; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. [U. S.], 450), and the rule thus stated has been distinctly recognized by this court. (See *State v. McColl*, 9 Neb., 203, and *State v. Wish*, 15 Neb., 448.) In the case last cited MAXWELL, J., uses the following language: "We hold, therefore, that where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, that the new act or amendment is a mere continuation of the former act and is not in a proper sense a repeal." The following recent cases are in harmony with the foregoing and sustain the validity of the act assailed: *Commonwealth v. Kenneson*, 143 Mass., 418; *Hebrew Association v. Beushimal*, 130 Mass., 327; *Hancock v. District of Perry Township*, 78 Ia., 556; *State v. Kibling*, 63 Vt., 636. The act of 1891 did not abolish section 145 as originally enacted, or as amended in 1889, but, on the contrary, re-enacted it in terms with the exceptions above noted. Nor is the fact that the act of 1891 refers to the section as it appears in the Compiled Statutes at all ma-

terial, since it was the original act which was amended, the reference to the compilation being for convenience only.

Of the cases to which we are referred by counsel for the old board, *Coffin v. Rich*, 45 Me., 507, has been cited as an apparent exception to the rule above stated (see 23 Am. & Eng. Ency. of Law, 515); but the later statute, as appears from a careful examination of that case, imposed upon stockholders of corporations a liability different from that of the former act, and was construed as a technical repeal rather than a mere re-enactment of the old law. In *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill., 656, the facts are not fully reported, but it appears from the opinion of the court that the legislature had attempted to amend a section which "had been previously amended by a distinct and complete section." It cannot be determined whether the act referred to was amendatory merely, or whether it substituted new and distinct provisions for the original section. In *State v. Benton*, 33 Neb., 823, the act sought to be amended had been repealed by implication, leaving nothing to which the amendatory act could apply. In *Hall v. Craig*, 125 Ind., 523, the question of the validity of the later statute was not determined, the court preferring to treat the acts as *in pari materia*, although earlier decisions of that court seem to sustain the proposition here asserted, and may be regarded as exceptions to the rule. Other cases cited deal with repeals proper rather than amendatory acts, and need not be examined at length. The great object to be attained by the constitutional requirement is certainty in legislation, and to avoid the doubt and perplexity which would inevitably result from the amendment of statutes by reference to sentences or words. As said by this court in *State v. Babcock*, 23 Neb., 128: "All that the law requires is that the amendatory statute shall be definite and certain as to the statute amended, and germane to the title of the original act." When tested by that rule it would seem that the reference

to the prior act as section 145 of the act of 1887, "and as subsequently amended," is not appropriate merely, but is probably the most accurate that could have been devised, since it satisfied the demand of the constitution and is consonant with reason.

It is next argued that the provisions of the law of 1895 for the removal, by the officers designated as the appointing board, of fire and police commissioners for official misconduct is broader than its title, and accordingly invalidates the entire act; but that law is, as we have seen, amendatory of the law of 1887, and not an independent measure, hence we must look for its title to the act last mentioned. We shall not examine the cases cited from other states, since every phase of the question presented has been fully considered by this court. The constitutional requirement, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," (Constitution, sec. 11, art. 3,) was intended to prevent surreptitious legislation, and not to prohibit comprehensive titles. The test is not whether the title chosen is the most appropriate, but whether it fairly indicates the scope and purpose of the act. (*Boggs v. Washington County*, 10 Neb., 297; *State v. Ream*, 16 Neb., 681; *State v. Babcock*, 23 Neb., 128; *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb., 884.) Authority to remove unfaithful officers is a proper if not a necessary incident of municipal government, and the provision therefore is obviously within the title of the act "defining, regulating, and prescribing the duties and powers and government of cities of the metropolitan class."

Another criticism of the act under consideration is that it conflicts with certain other sections of the city's charter not therein referred to, among which are mentioned section 149*a*, chapter 12*a*, Compiled Statutes, authorizing the appointment of a police matron by the mayor, and section

167, providing that the mayor shall receive as a member of the board of fire and police commissioners the compensation allowed other members of said board. Section 149*a* is not found in the act of 1887, but in the act of 1893, entitled "An act to provide for the appointment of a police matron in cities, and to repeal any law inconsistent herewith." That the act of 1895 conflicts with those provisions is obvious, and since it embraces the entire subject-matter of the sections mentioned, operated as a repeal thereof by implication. (*Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 823.)

It is argued that the act under consideration violates the constitution of the state and the constitution of the United States by making party affiliation a qualification for office. The particular provision of the act assailed is the following: "The said appointing board shall, within thirty days from and after the passage of this act, appoint as the commissioners above named three citizens, at least one from the two political parties casting the largest number of votes for governor at the last preceding general election. One of these shall be designated in said appointment to serve until December 31, 1895, the second until December 31, 1896, and the third until December 31, 1897." The constitutional restrictions above referred to are section 3 of our bill of rights, viz., "No person shall be deprived of life, liberty, or property without due process of law," and section 15, article 3, as follows: "The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever;" also section 1 of the fourteenth amendment to the constitution of the United States, viz., "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law." The question here presented was considered in

State v. Seavey, 22 Neb., 454, and *State v. Smith*, 35 Neb., 13, and determined adversely to the foregoing contention. We have, however, on account of the importance of the subject, concluded to briefly re-examine it in the light of authority.

Of the cases cited by counsel for the old board, *Attorney General v. City of Detroit*, 58 Mich., 213, cannot be regarded as authority, in view of the express restriction of the constitution of that state, which, after prescribing the form of oath to be taken by public officers, concludes as follows: "And no other oath, declaration, or test shall be required as a qualification for any office or public trust," while the only provision of our constitution upon the subject is that found in section 4 of the bill of rights, viz., "No religious test shall be required as a qualification for office." *City of Evansville v. State*, 118 Ind., 426, appears to be in point, but that case, if not indeed overruled, is opposed to the doctrine stated in the subsequent case of *Hovey v. State*, 119 Ind., 386, in which Elliott, C. J., uses this language: "It is within the authority of the legislature, by virtue of its general power, to require that the officers of this class shall be selected from different political parties, or that they shall be persons of peculiar skill and experience." Opposed to the contention of counsel are two classes of cases, of which the first, and more numerous, assert, without qualification, the power of the legislature, in the absence of express constitutional restriction, to prescribe particular qualifications for holding office, such as political affiliation. Other cases regard like provisions as directory, or, more accurately speaking, advisory merely, and binding upon the appointing power only within the limits of the comity existing between different departments of government. Of the first class may be mentioned the following cases: *Hovey v. State, supra; State v. Finger*, 28 N. E. Rep. [O.], 135; *Rogers v. City of Buffalo*, 123 N. Y., 173; *People v. Hoffman*, 116 Ill., 587; *Patterson v. Barlow*, 60 Pa. St.,

54. Among those which regard the provisions under consideration as advisory merely, may be cited the following: *In re Supervisors*, 43 Fed. Rep., 859; *State v. Seavey, supra*, and opinion of Cooley, J., in *People v. Hurlbut*, 24 Mich., 44. It is unnecessary to pursue the subject by examining the merits of the views thus stated, as both are adverse to the contention of counsel and are, it is believed, alike harmonious with the letter and spirit of our constitution. We observe in recent legislation, state and national, numerous acts of this character, and which have, except in the instances cited, been respected by both executive and judicial departments of the government. A familiar illustration is the provision of the Revised Statutes of the United States for juries drawn by commissioners of different parties. Another is the law in force for many years for the appointment by the circuit court of supervisors of elections in certain cases. These statutes, although frequently before the courts for construction, have never, within our knowledge, been assailed as unconstitutional. (See *United States v. Paxton*, 40 Fed. Rep., 136; *In re Supervisors*, 43 Fed. Rep., 859; *In re Supervisors*, 20 Blatch. [U. S.], 13.) But a case directly in point, which has apparently been overlooked by counsel for both parties, is the appointment by us of the present supreme court commission under the act of 1893. That act, it will be noticed, provides that no two of the three commissioners therein authorized, shall be members of the same political party. Every phase of the question was examined by the court as then organized and although a doubt was expressed as to the right of the legislature to control the discretion of the appointing power, we agreed that the provision mentioned was at least directory, a courteous request of the law-making power, to which full respect was accorded in the selection of our esteemed associates of the commission. The act last referred to having been subsequently assailed for the reasons now urged among others, was, after full consideration, held not to conflict

with the constitution of the state. (*In re Supreme Court Commissioners*, 37 Neb., 655.) It is thus apparent that the contention of counsel is without merit, being opposed both by reason and the pronounced weight of authority.

It is said that the act is inconsistent and incapable of execution by reason of the provision therein for the appointment of the board of fire and police within thirty days from and after its passage, to-wit, April 3, 1895, whereas said act did not take effect until three calendar months after the adjournment of the legislature for that session. (Constitution, sec. 24, art. 3.) To one familiar with legislative methods in this state, the apparent inconsistency suggests its own explanation, viz., that the bill, as originally introduced, contained an emergency clause providing that it should take effect upon its passage, and which was subsequently eliminated without amending the other provisions thereof so as to conform to its altered condition. It is evident that by the expression, "within thirty days from and after the passage of this act," is meant thirty days from the time when said act took effect as a law. Where a statute is ambiguous the courts, following established rules of construction, adopt that interpretation which will best promote its general object. (Endlich, Interpretation of Statutes, 196; *State v. Allen*, 43 Neb., 651.) The cases are numerous in which the foregoing general principle has been held applicable to facts substantially like those here involved. (See *Harding v. People*, 10 Col., 387; *Charles v. Lamberson*, 1 Ia., 435; *Price v. Hopkin*, 13 Mich., 327.) In *Harding v. People, supra*, it is said: "In the absence of any emergency clause in view of the constitutional provision, the expression 'after the passage of the act,' as used in the law, can have but one meaning, namely, after the act goes into effect." With the view thus expressed we are entirely satisfied.

Finally, it appears from the record that the governor, for reasons to him appearing sufficient, but which need not

be discussed in this connection, declined to take any action whatever under the act above mentioned, and, although notified of the meeting called by the other members of the appointing board, refused to attend or in any manner participate in the selection of fire and police commissioners. It is argued that the concurrent action of the three state officers named in the act is essential to a valid appointment thereunder, hence the selection of the new board at such meeting in the absence of the governor is without authority and void; but to that proposition we cannot give our assent. On the contrary, it is clear that the presence and participation of the governor was not indispensable, he having been notified of the meeting and requested to attend. The action of the majority is, under the circumstances, the action of the board, and equally binding as if all had attended and expressly assented thereto. (*McInroy v. Benedict*, 11 Johns. [N. Y.], 402; *Horton v. Garrison*, 23 Barb. [N. Y.], 176; *Gildersleeve v. Board of Education*, 17 Abb. Pr. [N. Y.], 201; *Walker v. Rogan*, 1 Wis., 597; *Merchant v. North*, 10 O. St., 251; Throop, Public Officers, 112; Mechem, Public Officers, 572.) The reason upon which that doctrine rests is that public interests shall not be prejudiced by the neglect or caprice of a single member of a public body in failing or refusing to attend upon sufficient notice of its meetings; but where the law expressly requires the concurrent action of all the members of a board or body, all must participate therein, although that rule has no application to the act under consideration, which does not expressly, or by implication, require the action of all the members of the appointing board. We must not, from what is here said, be understood as indulging in any criticism upon the act of the governor, whose motives in refusing to co-operate with the other members of the appointing board are not impugned in this proceeding. It follows, however, from what has been said, that the respondents Broatch, Vandervoort, and Foster are the legally appointed

members of the board of fire and police commissioners and as such are entitled to the possession and emoluments of the offices in controversy.

JUDGMENT ACCORDINGLY.

WASHINGTON D. PERCIVAL V. STATE OF NEBRASKA.

FILED SEPTEMBER 17, 1895. No. 6872.

1. **Contempt:** COURTS: PUBLICATION REGARDING A PENDING CAUSE. A publication regarding a cause during its pendency in court, which tends to corrupt or embarrass the administration of justice and to produce a prejudice in the minds of the public with respect to the merits of the cause, is a contempt and punishable.

2. ———: ———: ———: CONCLUSIVENESS OF ANSWER. Where, in a proceeding for an indirect or constructive contempt, consisting of the publication in a newspaper, the article upon which the complaint is based is indefinite in its meaning and application, and is not libelous *per se*, and does not, unless aided by an innuendo, apply to the court, nor reflect upon its integrity or purpose, and, in so far as any reflection upon the court is concerned, is capable of an innocent interpretation; and the defendant, in an answer sworn to by him, positively asserts that he used the language employed in the article in a meaning other than libelous, and with no intent to reflect upon either the integrity or honesty of purpose of the judge, or to embarrass or impede the administration of justice, such answer will be taken as conclusive.

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

The opinion contains a statement of the case.

Edward W. Simeral and *E. R. Duffie*, for plaintiff in error:

Comment upon past proceedings is not contempt. (*Storey*

v. People, 79 Ill., 45; *Cheadle v. State*, 11 N. E. Rep. [Ind.], 426; 16 Am. & Eng. Ency. Law, 495.)

The language was not *per se* libelous. (13 Am. & Eng. Ency. Law, 391.)

Constructive contempt being a summary proceeding, the language used must apply directly to the court or judge; and if, in order to make it apply to the judge, resort must be had to innuendo and the same is denied in the answer, contempt does not lie. The answer must be taken as true. (*Fishback v. State*, 30 N. E. Rep. [Ind.], 1088; *Cheadle v. State*, 11 N. E. Rep. [Ind.], 426.)

A. S. Churchill, Attorney General, and *W. S. Summers, Deputy Attorney General*, for the state.

HARRISON, J.

In this case the plaintiff in error was proceeded against for contempt, resulting in his conviction and sentence. It appears that there were two trials or hearings, a judgment of conviction and sentence upon the first being set aside upon motion of plaintiff in error, and a new hearing awarded. It is stated that the affidavit or complaint,—the basis of the first trial or hearing of the proceedings,—differed from the one upon which there was a final hearing; but however this may be, the complaint which was presented here as containing the charge of which plaintiff in error was convicted is as follows:

"Comes now J. L. Kaley, county attorney in and for the county of Douglas and state of Nebraska, and in the name of the state of Nebraska gives the court to understand and be informed, who, being sworn, on his oath says that Washington D. Percival, on or about the 9th day of March, 1894, in the county aforesaid, then and there wrongfully, unlawfully, and maliciously, for the purpose and with the intent of bringing the district court in and for the county of Douglas and state of Nebraska, and then and there being presided over by Judge C. R. Scott, one

of the judges of said district court, into disrepute and ridicule and to cause the people to have a contempt for said court, and for the purpose of causing it to be believed that said court was corrupt and influenced by corrupt motives, and for the purpose of destroying the integrity, honor, and efficiency of said court in the administration of public justice, and for the purpose of vilifying and traducing said court, and to thwart the due administration of justice in said court, and with the intent willfully to obstruct the proceedings and hinder the due administration of justice in a suit then and there and therein pending before said court, to-wit, the cause of the State of Nebraska v. T. T. Jardine, and then and there being undisposed of in said court, then and there wrote and published, and caused to be published, in the Omaha *Evening Bee*, being a daily newspaper published in the city of Omaha on said 9th day of March, 1894, and of general and extensive circulation and being generally read in said city of Omaha and in the county of Douglas and fourth judicial district of the state of Nebraska, and throughout the state of Nebraska in which said court presided over by said Judge C. R. Scott, then and there being the criminal section of the said district court, and was and is one of the courts of said judicial district, of and concerning said court the following false, scandalous, contemptuous, and defamatory matter, that is to say: 'Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull. Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth,' intending then and there and thereby wrongfully, unlawfully, and contemptuously to cause it to be be-

lieved that said court presided over by said Judge C. R. Scott was corrupt and influenced by corrupt motives."

After some preliminary pleas were filed on behalf of plaintiff in error and heard and disposed of by the court, and an affidavit in the nature of an answer, which was verified positively, was filed for the party charged, in which he denied that he wrote, or caused to be written or published, the following portion of the article quoted in the information, viz.: "Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull," but admitted that he wrote the remainder of the article set forth in the information, which was as follows: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth," and it does not appear, and is not shown, that plaintiff in error was the author or caused to be published any more of the article alleged in the complaint than the portion the authorship of which he admitted in his answer. We then have here a charge of not direct, but constructive contempt alleged to have been committed by the writing and publication of such admitted portion of the article. It is contended by counsel that the portion of the article written or published, or caused to be published, by the plaintiff in error, did not constitute a contempt of court. In section 669 of the Code of Civil Procedure, under the head of "Contempt," it is provided: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of * * * Fourth—Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."

In 2 Bishop, Criminal Law, 259, it is stated: "By the commonly accepted doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice,—or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel,—may be visited as a contempt." It has also been said that the power to punish for contempt "is inherent in courts of justice, necessary for self-protection and an essential auxiliary to the pure administration of the law." (*People v. Wilson*, 64 Ill., 195, 16 Am. Rep., 542.) These are general rules, and we will now turn to some which, though general, are more specifically applicable to the facts and circumstances as developed in the case at bar. The general rule is that to constitute any publication a contempt, it must have reference to a matter then pending in court and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceeding. (Rapalje, Contempt, sec. 56; 2 Bishop, Criminal Law, sec. 262; *Fishback v. State*, 30 N. E. Rep., [Ind.], 1088; *State v. Sweetland*, 54 N. W. Rep. [S. Dak.], 415.) The plaintiff in error, in his answer, denied that he used the words in the portion of the article written by him which is set forth in the complaint with intention to cast upon either the court or its officers any imputation or charge of corruption or lack of integrity, and with intent to embarrass or impede the administration of justice. "If the article is *per se* libelous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, then it would be trifling with justice to say that the publisher could admit the publication and deny that he intended the plain and unmistakable meaning which the language used conveys; but when the language used in an article is not *per se* libelous, and only becomes so and made to apply to the court by the

use of innuendoes, and if fairly susceptible of an innocent meaning so far as any reflection upon the court is concerned, and defendant answers under oath that he used it in a sense not libelous and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge or to embarrass the administration of justice, his answer must be taken as conclusive." (*Cheadle v. State*, 11 N. E. Rep., 426; *Fishback v. State*, *supra*.) We think the above rule a correct one. The language of the portion of the article proved or admitted by the plaintiff in error to be his production (we will quote it again), "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth," cannot be said, upon its face and without an innuendo, to apply or refer to the court proper or its officers, or to jurors or witnesses, or to one more than another, or to be libelous *per se*, or that it clearly charges, as is stated in the complaint, that the court was corrupt and influenced by corrupt motives, or to so charge with reference to any particular person or persons, or to any one more than another. It cannot be said, upon its face, to refer to any case pending at the time it was written and published or to any designated case. In its terms it deals with some past transaction or proceedings. The phrase "possessed of a pull" is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error and the proof made were insufficient to support a charge

and conviction of contempt and sentence therefor. (*State v. Sweetland, supra.*) We desire to state that we are only herein passing upon the portion of the article admitted or proved in the present case to have been penned by the plaintiff in error, and that no other parts of the article with which this seems to have been connected have been considered, nor has the probable effect or meaning of the portion herein involved been contemplated when read in connection and as a part of the whole article. It follows from the views herein expressed that the judgment of the district court must be

REVERSED AND PLAINTIFF IN ERROR DISCHARGED.

IN RE BARBARA HAVLIK.

FILED SEPTEMBER 17, 1895. NO. 6706.

1. **Habeas Corpus:** REVIEW. "Mere errors and irregularities in a judgment or proceeding of a court in a criminal case under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus*. That writ cannot operate as a writ of error." *In re Betts*, 36 Neb., 282; *State v. Crinklaw*, 40 Neb., 759, followed.
2. **Contempt:** JURISDICTION: HABEAS CORPUS. Where the law did not authorize contempt proceedings under and by virtue of which a party was imprisoned, there was a lack of jurisdiction and the judgment void and *habeas corpus* a proper remedy to obtain a release from imprisonment.
3. **Proceedings in Aid of Execution.** In proceedings in aid of execution, as provided for in sections 532 to 549, inclusive, of the Code, any property of the judgment debtor not exempt by law and in the hands of third persons may be ordered to be applied to the satisfaction of the judgment, and such order may be enforced by the ordinary legal methods of procedure.
4. ——: ORDERS: DISOBEDIENCE: CONTEMPT. An order in pro-

ceedings in aid of execution as provided for in the Code of Civil Procedure, to a third person to turn over property in his or her possession to be applied in discharge of the judgment, it disobeyed, cannot be enforced by imprisonment of the party so ordered, as for a contempt under section 546 of the Code.

ORIGINAL application for writ of *habeas corpus*. *Prisoner discharged.*

Reese & Gilkeson, W. B. Comstock, and *H. A. Reese,* for petitioner.

Simpson & Sornborger and *Good & Good, contra.*

HARRISON, J.

It appears from the record in this case that the National Bank of Wahoo obtained a judgment in the county court of Saunders county against Frank Havlik for the sum of $567.34 and costs of suit, upon which execution was issued of date November 16, 1893, and delivered to an officer and was returned "no property found." On the day of the return of the execution the president of the bank filed with the court an affidavit in which it was stated, with other usual averments, that the defendant, or judgment debtor, was the owner of property not exempt under the law from being subjected to the payment of his debts, and which he concealed, and, upon application, an order was issued citing the debtor to appear and answer under oath such inquiries as might be made of him touching his property. The debtor appeared, and as a result of his examination it was concluded that Barbara Havlik, the petitioner herein, had in her possession and control three promissory notes of the aggregate sum of $2,200, the property of the judgment debtor, and not exempt by law from being applied to the payment of his debts, and that they were placed in her hands for the purpose of hindering and delaying the bank in the collection of the amount due it, and in fraud of its rights in the premises, and thereupon a citation was served upon

Barbara Havlik commanding her to appear and answer concerning any property in her possession or under her control belonging to the judgment debtor. This citation she did not obey, and a bench warrant was issued and she was brought into court and questioned, and pursuant to the conclusions and findings of the court from the evidence elicited during her examination and that of Frank Havlik she was ordered to deliver into court, within ten days, the promissory notes, to be applied toward the payment of the bank's judgment. Of this order there was personal service, but she failed and refused to comply therewith, and a complaint was filed charging her with contempt of court in so failing and refusing to comply with the court's order, and, as a result of a hearing upon such complaint, she was adjudged guilty of a contempt and ordered to be confined in the jail of the county until she obeyed the order of the court in reference to the promissory notes, and, upon being imprisoned in the county jail, she applied to this court for a writ of *habeas corpus*, which was issued, and the sheriff of Saunders county has made return thereto and an issue of law has been joined.

It is stated in the applicant's petition, among other things, that the applicant has at all times insisted that the promissory notes in question were her property, and hence she declined to turn them over to the court to be applied in payment of the debts of Frank Havlik. There are two main questions raised and discussed in the case as presented here: One is, Is *habeas corpus* the proper remedy or should the applicant have appealed or prosecuted a writ of error from the decision of the sentencing court? And the other, Was the adjudication of the trial court void or was it only irregular or erroneous? The two are so connected that an answer to the latter will determine the disposition to be made of the former, for, if the judgment of the court, by virtue of which the applicant was committed to prison, was merely irregular or erroneous, then appeal or error was the proper remedy and it cannot be reviewed in a *habeas corpus*

proceeding. (*Ex parte Fisher*, 6 Neb., 309; *In re Betts*, 36 Neb., 283; *State v. Crinklaw*, 40 Neb., 759.) But if the judgment under which she was imprisoned was for any reason void, then *habeas corpus* was proper and she can be released in the present proceeding. "Where the proceedings are wholly void, because of want of jurisdiction of the court over the subject matter, or are illegal, as distinguishable from being merely erroneous, the writ of *habeas corpus* is an appropriate remedy. (*In re Betts*, 36 Neb., 282, and cases cited.)

The proceedings which resulted in the imprisonment of the applicant herein were instituted under the provisions of chapter 2, title 14, of the Code of Civil Procedure, designated "Proceedings in Aid of Execution," and more particularly sections 532, 538, 541, 546, and 547 thereof. (Code, title 14, ch. 2.) These sections provide for an examination of the debtor's debtor before the judge or a referee, and if from the information thus obtained the judge shall conclude that there is any money or property in the hands of the person or corporation examined due the judgment debtor, the judge "may order it to be applied toward the satisfaction of the judgment." The main intent and purpose of the provisions of the sections under the head of "Proceedings in Aid of Execution" is evidently the discovery of money or property of the judgment debtor liable to be applied toward the satisfaction of the indebtedness, and the order to the third person who was not a party to the original action, or to these summary proceedings, except as cited to appear and answer, if complied with, while it might operate a discharge of all claims by anyone against such person in regard to the moneys or property involved, yet where such third person claims ownership of the money or property his or her right cannot be fully concluded in the summary manner set forth in the chapter to which we have referred. The judge has a right to direct how the money or proceeds of

any property disclosed shall be applied, and the means of enforcing his directions must be through the ordinary processes of the law. In this case Barbara Havlik was not a party to the original action or the judgment resulting therefrom against Frank Havlik, and she claimed the credits or property which it was ordered should be applied to the satisfaction of the judgment against Frank Havlik as her own and refused, as she had a right to, to turn it over to be so applied, and she had a right to maintain her claim of ownership in any of the ordinary proceedings by law contemplated in and applicable to such circumstances and conditions, and there was no authorization of the enforcement of a compliance with the order on her part by her imprisonment in contempt proceedings. These sections of our Code, with some few exceptions which are unimportant so far as any bearing upon the question herein is concerned, are also embodied in the Code of the state of Ohio and have been construed by the supreme court of that state and support the views herein expressed. (See *Union Bank of Rochester v. Union Bank of Sandusky*, 6 O. St., 254; *Edgarton v. Hanna*, 11 O. St., 323; and see, also, *Estey v. Fuller Implement Co.*, 47 N. W. Rep. [Ia.], 1025; 2 Freeman, Executions, sec. 405; *West Side Bank v. Pugsley*, 12 Abb. Pr., n. s. [N. Y.], 28.) The law not authorizing or warranting the imprisonment of the applicant herein for non-compliance with the order made, or her punishment as for contempt, the court or judge had no jurisdiction to adjudge her to be imprisoned, and the judgment in the contempt proceedings was void and *habeas corpus* the proper remedy. (See citations hereinbefore made in support of the rule. See, also, Spelling, Extraordinary Relief, secs. 1202–1243, pp. 988–1025; *People v. Kelly*, 24 N. Y., 74; Freeman, Judgments, sec. 624.) It follows that the demurrer to the application for the writ must be overruled and the

PETITIONER DISCHARGED.

STATE OF NEBRASKA, EX REL. FRANK SHAFFER, V. HENRY E. BOWMAN ET AL.

FILED SEPTEMBER 17, 1895. NO. 4160.

Mandamus. A writ of *mandamus* will issue only when the right to require the performance of the desired act is clear.

ORIGINAL application for *mandamus*. *Writ denied.*

William Leese and *F. B. Beall*, for relator.

C. C. Flansburg and *J. G. Thompson*, *contra.*

RYAN, C.

This application for a *mandamus* was filed April 8, 1890. The relator in his petition alleged that the city of Alma in the year 1890 was a city of the second class, containing more than one thousand inhabitants; that said city was made up of three wards; that on the first Tuesday of April, 1890, the relator was a candidate for the office of councilman of the first ward and received the same number of votes as did the candidate opposing him; and that the respondents, who were judges of the election in the said ward, had duly delivered to the city clerk of Alma the ballots cast and poll books used in said first ward election without having previously determined by ballot which candidate should serve as councilman from the first ward. The prayer was for a writ of *mandamus* requiring the respondents to assemble forthwith and determine the aforesaid tie vote by ballot and certify the result to the city clerk and council of said city. By their answer filed October 2, 1891, the respondents alleged that they had never been requested to determine the said tie vote until the poll books and ballots had passed out of the hands of themselves as election judges. We have been cited to no statute which in terms

makes provision for the above contingency. Section 45, chapter 26, Compiled Statutes, provides that where the tie is between two persons who are candidates for a township office the clerk shall notify both to appear at his office at a given time to determine the same by lot before the board and that the certificate of election shall be given accordingly. If the above proceedings prescribed by the chapter entitled "Elections" are by analogy to be deemed applicable to elections in cities of the class to which Alma belongs, as probably they should be, the petition should have stated that the city clerk had taken the step above indicated before a decision could be required by lot, and, even then, the general powers of the judges of election would not so nearly correspond to those of the board as would the powers of the city council. The writ is denied.

WRIT DENIED.

PAUL H. LEADER ET AL., APPELLEES, V. M. M. TIERNEY ET AL., APPELLANTS.

FILED SEPTEMBER 17, 1895. No. 6165.

Trusts: ACTIONS TO ENFORCE. A party who had furnished means to pay for an interest in real property purchased for certain parties contributing thereto and of which, for convenience, the title had been taken in the name of one investor for the benefit of all contributors, is entitled to maintain an equitable action for the enforcement of the trust which, by reason of the foregoing facts, had arisen in his favor against said associate holding title.

APPEAL from the district court of Dakota county. Heard below before NORRIS, J.

J. J. McAllister and *Argo, McDuffie & Argo*, for appellants.

R. E. Evans and *Jay & Beck, contra.*

RYAN, C.

This action was brought in the district court of Dakota county by the appellees to compel M. M. Tierney to convey to appellees certain lots, which, it was alleged, had been purchased and paid for by said appellees and said Tierney jointly. It was alleged that, for convenience in making conveyances of said lots, the title was taken in the name of M. M. Tierney, who had not only refused to execute conveyances to appellees as his trust relation required, but had conveyed some of the lots to John H. Burke, and some to Laura A. Tierney, in disregard of the rights of the appellees. The two individuals last named were joined as defendants, and as against their claims it was averred that they were not *bona fide* purchasers, and held such interests as they had subordinate to the rights of the appellees. The appellants, in effect, denied each of the allegations of the petition, and themselves in their own individual rights prayed that title might be decreed in their favor. By reply the averments of the answer were denied and, upon a trial, these issues were found in favor of the appellees. It is urged that the agreement alleged in the petition is within the statute of frauds, and that, therefore, the appellees, though they may have furnished the means for making payment of one-third of the purchase price, are remediless, because the subject-matter was real property, and of the trust there exists no written evidence. Section 3, chapter 32, Compiled Statutes, provides: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by a deed of conveyance in writing, subscribed by the party creating, granting, assigning, sur-

rendering, or declaring the same." In the sections immediately following the above it is provided that the above section shall not be construed to prevent the arising of any trust by operation of law. In *Carter v. Gibson*, 29 Neb., 324, it was held that a trust, though not created by such an instrument as would be requisite to convey an interest in real property, was not within the inhibition of the above sections and could be enforced. The construction given the above sections equally applies to the case at bar. There is no theory upon which the testimony of one party can be harmonized with that of the other. Evidently the district court rejected the testimony of appellants, and the proofs, under such circumstances, were as clear and satisfactory as were required in *Robinson v. Jones*, 31 Neb., 20. The judgment of the district court is

AFFIRMED.

HENRY WORTENDYKE V. GEORGE E. SALLADIN.

FILED SEPTEMBER 17, 1895. No. 5910.

Fraudulent Conveyances: INSOLVENT CORPORATIONS: PREFERENCE IN FAVOR OF STOCKHOLDER. Where the holder of stock of an insolvent corporation, just before its final suspension of business, obtained assignments to himself of such an amount of the corporation's bills receivable as to fully secure claims owing to such stockholder and a partnership firm of which he was a member, leaving almost no assets for the payment of the other creditors of the corporation, the intent with which such preference was made and received was a question of fact for the jury, and its verdict upon proof of the above facts, that such preference was fraudulent as against creditors of the corporation, will not be disturbed as unwarranted in fact or in law.

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

G. M. Lambertson, for plaintiff in error:

A failing bank has the right both to borrow money and to give security for the payment thereof, and may also secure creditors for antecedent debts if done in good faith. (*Hershiser v. Higman*, 31 Neb., 534; *Davis v. Scott*, 22 Neb., 154; *Bierbower v. Polk*, 17 Neb., 278; *Ward v. Parlin*, 30 Neb., 376; *Brown v. Williams*, 34 Neb., 376; *Kavanaugh v. Oberfelder*, 37 Neb., 647.)

A stockholder who has a deposit in the bank, subject to check, may, in consideration of not withdrawing the deposit, take security for the payment thereof. (*Twin-Lick Oil Co. v. Marbury*, 91 U. S., 589; *Omaha Hotel Co. v. Wade*, 97 U. S., 13; *Santa Cruz R. Co. v. Spreckles*, 65 Cal., 193; *Hallam v. Indianola Hotel Co.*, 56 Ia., 178; *Duncombe v. New York, H. & N. R. Co.*, 88 N. Y., 1; *Borland v. Haven*, 37 Fed. Rep., 406.)

The court in giving the seventh instruction asked by defendant that a stockholder could loan money to a bank and take security for payment, and in giving the seventh instruction asked by plaintiff that such a loan was void if the intention was also to obtain security for other money due him, had a tendency to confuse and mislead the jury. (*McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523; *Wasson v. Palmer*, 13 Neb., 376; *Fitzgerald v. Meyer*, 25 Neb., 77; *School District v. Foster*, 31 Neb., 501.)

R. S. Norval and *R. P. Anderson, contra.*

RYAN, C.

The Northwestern Banking Company was, from the year 1884 till January 29, 1889, engaged in the business of banking at Milford, in Seward county. There was no copy of its articles of incorporation filed in the office of the county clerk of said county, though during the entire interval of time above indicated this company did business as, and

claimed to be, a corporation. The decision of this case does not require us to give great weight to this omission and the company will therefore be treated as though incorporated in exact compliance with the statutes of this state. Henry Wortendyke, the plaintiff in error, was an owner of a small amount of the company's capital stock on January 28, 1889. Mr. Emerson, the company's general manager, on that day said to Mr. Wortendyke that there was a run on the bank and that it was short of currency. It was then arranged between these two persons that Mr. Wortendyke should borrow a thousand dollars at Seward for the use of the banking company. For this purpose he proceeded to Seward and borrowed on his own credit the sum of $2,000. One-half of this he left in the bank at the place last named, and with the other half, between 10 and 11 o'clock in the forenoon of January 29, 1889, he returned to Milford. The amount left at Seward seems for the most part, if not altogether, to have been drawn out upon the checks of Mr. Wortendyke in payment of deposits owing by the banking company. It is not disclosed what was done with the cash brought by Mr. Wortendyke to Milford in the forenoon of January 29, aforesaid, but it is very certain that in the afternoon of that day the banking company ceased to do business. A few days thereafter Mr. Salladin became its assignee and in that capacity brought this action, the occasion and nature of which we shall now describe.

At the time that Mr. Wortendyke went to Seward he was associated, as a partner in the insurance business, with Richard Spelts. The style of this firm was Wortendyke & Spelts, and on January 28, 1889, it had a deposit with the banking company to the amount of about $430. Mr. Wortendyke's deposit with the same banking company was to the amount of $212.50. To indemnify Mr. Wortendyke in respect to the money borrowed by him at Seward, and to secure the above deposits, Mr. Emerson transferred

to Mr. Wortendyke notes held by the banking company to the amount of $3,500. When the assignee shortly afterward took possession of the assets of the banking company, it was found that they amounted to but little over $2,000, while its liabilities, as it has since transpired, exceeded $20,000. This action was brought by the assignee to recover from Mr. Wortendyke $2,475, which it was alleged was the amount of the collaterals which Mr. Wortendyke had, upon demand, wrongfully refused to pay to said assignee. The theory upon which this was claimed was that Mr. Wortendyke, a stockholder of the banking company, by means of a fraudulent arrangement with the general manager, had secured possession of a large part of its assets, and, with intent to defraud its depositors and other creditors, had wrongfully converted the aforesaid amount thereof to his own use. In his answer Mr. Wortendyke averred that of the sum he had borrowed at Seward he had turned over to the banking company $1,644, which had been used to pay its depositors; that he had retained $213, which the banking company owed him as depositor, and the sum of $431.15, likewise a deposit, which was due Wortendyke & Spelts, and that he had paid out $186 as attorney's fees and other expenses of collecting the aforesaid notes. There was a reply in denial of each of these allegations of the answer. A trial was had of the above issues to a jury, which returned a verdict in favor of the assignee for the sum of $700, upon which judgment was duly rendered. This was on March 17, 1892. This verdict was for less than the aggregate amount of the deposits of Wortendyke & Spelts and Mr. Wortendyke, with seven per cent thereon computed from January 29, 1889. Upon consideration of the entire evidence we see no reason for reversing the judgment of the district court whereby the verdict was sanctioned.

In respect to the money borrowed for and used by the bank to tide over an emergency the language of Mr. Jus-

tice Miller in *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 589, was perhaps applicable. This language, quoted with approval in *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548, was as follows: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given." These considerations, however, have no applicability to such deposits as were due Wortendyke & Spelts and Mr. Wortendyke when the latter, just before the banking company suspended business, obtained collateral security for the full amount in which, as a creditor, he was in any way interested. Whether or not the preference was fraudulent was a question of fact for the jury, and with its verdict in the light of the evidence we find no cause for complaint by the plaintiff in error. The seventh instruction given by the court was a fair statement of the rule which should govern the jury in considering the effect of taking security for the deposits hereinbefore referred to, and the criticism of this instruction cannot receive our sanction.

Instructions numbered 3, 6, and 7, asked by the plaintiff and given, are in gross assailed by one assignment, which questions the correctness of the general rule hereinbefore held applicable to the security taken for the deposit due from the banking company to Mr. Wortendyke and to Wortendyke & Spelts. An extended review of these instructions is therefore unnecessary.

The refusal of the court to give instructions requested by the defendant numbered 1, 2, 3, 4, 5 is called in question by a single assignment. The rules of law applicable to this case, and embodied in the instructions which were numbered 4 and 5, were by the court upon its own motion stated to the jury as favorably as the defendant was entitled to have them stated, hence this assignment must be disregarded. There is found no error in the record and the judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

MARY C. RINGWALT v. WABASH RAILROAD COMPANY ET AL.

FILED SEPTEMBER 17, 1895. No. 6142.

1. Carriers: LIABILITY FOR BAGGAGE OF PASSENGERS. A common carrier undertaking to transport the baggage of its passengers is held by the law to the strictest accountability; and if the carrier receives such baggage, and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but a carrier is not liable for the baggage of its passenger unless the evidence shows that the baggage claimed to be lost and sued for came into the possession of the carrier.

2. ———: ———: EVIDENCE. R. purchased from the Wabash Railroad Company at Omaha, Nebraska, a ticket from that place to Lexington, Kentucky. In making the journey according to the terms of the ticket R. traveled first over a line of the Union Pacific Railway Company, then over a line of the Wabash Railroad Company, thence over the lines of other carriers to Lexington. On the afternoon of the day she began her journey from Omaha, R. placed her jewelry in her trunk, locked it, and delivered it to a drayman, by whom it was transported from her residence to the depot of said Union Pacific Railway Company, whose agent then accepted the trunk and checked it through to Lexington. The last carrier, at its depot in Lexington, deliv-

ered the trunk to a drayman, who hauled it to R.'s residence where it was opened, and R. then discovered that her jewelry was missing. The trunk bore no indication of having been opened or tampered with. In a suit by R. against the Wabash Railroad Company for the value of said jewelry, *held*, (1) that the trunk while in the possession of the draymen at Omaha and Lexington was in the possession of R.'s agents; (2) that until some evidence was introduced showing the trunk was not opened nor tampered with while in the possession of said draymen the presumption would not arise that the jewelry was lost from the trunk while in the possession of any of the said railroad companies.

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

Morris & Beekman, for plaintiff in error, cited: *Candee v. Pennsylvania R. Co.*, 21 Wis., 587; *Illinois Central R. Co. v. Copeland*, 24 Ill., 332; *Gray v. Jackson*, 51 N. H., 9; *Morse v. Brainerd*, 41 Vt., 550; *Root v. Great Western R. Co.*, 45 N. Y., 524; *Atchison, T. & S. F. R. Co. v. Roach*, 35 Kan., 740; *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass., 122; *Ohio & M. R. Co. v. McCarthy*, 96 U. S., 258; *Peet v. Chicago & N. W. R. Co.*, 19 Wis., 119; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cases [Tex.], 392; *Texas & P. R. Co. v. Ferguson*, 9 Am. & Eng. R. Cases [Tex.], 395; *Louisville, N. A. & C. R. Co. v. Nicholai*, 30 N. E. Rep. [Ind.], 424; *Beard v. St. Louis, A. & T. H. R. Co.*, 79 Ia., 528; *Evansville & C. R. Co. v. Androscoggin*, 89 U. S., 594.

John L. Webster, contra, cited: 2 Beach, Railways, sec. 906; *Kessler v. New York C. & H. R. R. Co.*, 61 N. Y., 538; *Montgomery & E. R. Co. v. Culver*, 75 Ala., 587; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. [U. S.], 318; *Croft v. Baltimore & O. R. Co.*, 1 McA. [D. C.], 492; *Kerrigan v. Southern P. R. Co.*, 81 Cal., 248; *Myrick v. Michigan C. R. Co.*, 107 U. S., 107.

RAGAN, C.

In April, 1890, Mrs. Mary C. Ringwalt purchased of the Wabash Railroad Company at Omaha, Nebraska, a railroad ticket from that city to Lexington, Kentucky. In the journey on the ticket Mrs. Ringwalt traveled over the line of the Union Pacific Railway Company from Omaha to Council Bluffs, Iowa; from Council Bluffs, Iowa, to St. Louis, Missouri, over the lines of the Wabash Railroad Company and the Omaha & St. Louis Railroad Company; from St. Louis, Missouri, to Cincinnati, Ohio, over the line of the Ohio & Mississippi Railroad Company; and from Cincinnati, Ohio, to Lexington, Kentucky, over the line of the Cincinnati Southern Railway Company. On the day that Mrs. Ringwalt left the city of Omaha to make her journey she delivered her trunk, containing certain articles of personal property, to the Wabash Railroad Company for transportation as baggage to Lexington. The delivery of the trunk was made to the Wabash Railroad Company by delivering it to the Union Pacific Railway Company at its depot in the city of Omaha, the first carrier over whose line of road Mrs. Ringwalt would travel in making her journey according to the terms of her ticket. The agent of the Union Pacific Railway Company examined the ticket held by Mrs. Ringwalt, punched the same, accepted the trunk or baggage of Mrs. Ringwalt, and checked the same through to Lexington, delivering at the same time to Mrs. Ringwalt the ordinary railroad check or receipt used by common carriers in this country, and the production of which at Lexington would authorize the delivery of the trunk to the holder of said check or receipt. Mrs. Ringwalt brought this suit in the district court of Douglas county against the Wabash Railroad Company to recover the value of certain jewelry belonging to her and which she alleges was in said trunk when it was accepted and checked by the Wabash Railroad

Company, and which jewelry was stolen from said trunk while in transit between the cities of Omaha, Nebraska, and Lexington, Kentucky. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of the Wabash Railroad Company, and to reverse the judgment of dismissal entered upon this verdict against her Mrs. Ringwalt has prosecuted to this court a petition in error.

There are a number of interesting and important legal questions extensively discussed in the briefs of counsel for the respective parties to this case, but an examination of these questions becomes unnecessary in view of the fact that we have reached the conclusion that the judgment of the district court must be sustained solely on the ground that the evidence in the record is insufficient to sustain a finding and judgment against the Wabash Railroad Company for the property sued for. The evidence is that the jewelry was placed in the bottom of the trunk by Mrs. Ringwalt at her residence, or where she was stopping, in the city of Omaha, about 3 o'clock in the afternoon; that the trunk was locked and sent by an expressman or drayman to the Union Pacific depot, where it was checked about 4 o'clock in the afternoon of the same day. The trunk appears to have reached Lexington, Kentucky, late in the afternoon and was taken from the depot of the carrier last transporting it to the residence or stopping place of Mrs. Ringwalt in Lexington by an expressman or drayman. In the night of the arrival of said trunk Mrs. Ringwalt opened the same and then discovered that the jewelry sued for was missing. The condition of the trunk was apparently in all respects the same when received by Mrs. Ringwalt in Lexington that it was when she started it from Omaha. The lock of the trunk had not been broken, nor had the trunk been opened, so far as could be ascertained.

We assume for the purposes of this case the competency of the Wabash Railroad Company to enter into a contract

with Mrs. Ringwalt to transport herself and baggage from the city of Omaha, Nebraska, to Lexington, Kentucky, and that the Wabash Railroad Company would be liable to Mrs. Ringwalt for any default in the performance of such contract. We also assume that the Union Pacific Railway Company, in all that it did towards the transporting of Mrs. Ringwalt on the ticket she held from Omaha to Council Bluffs, and in accepting, checking, and forwarding her trunk or baggage was acting for and on the behalf of the Wabash Railroad Company; and if the evidence would support a finding that the jewelry sued for in this action was in the trunk of Mrs. Ringwalt at the time the trunk was accepted and checked by the agent of the Union Pacific Railway Company at the depot in Omaha, by virtue of the ticket held by Mrs. Ringwalt, and if the evidence would support the further finding that said jewelry was not in said trunk at the time it was delivered to Mrs. Ringwalt by the last carrier at Lexington, then we have no doubt as to the accountability of the Wabash Railroad Company to Mrs. Ringwalt for the value of said jewelry. There is, however, a lack of evidence to show that the jewelry sued for was in the trunk when checked at the Union Pacific depot at Omaha, Nebraska. Had the expressman or drayman who hauled the trunk from the residence of Mrs. Ringwalt to the depot at Omaha been called and testified that he transported the trunk to the depot and delivered it to the agent there in the same condition in which he received it, we think that this would have been sufficient evidence to sustain a finding that the trunk when delivered to the Wabash Railroad Company contained the jewelry sued for. A common carrier undertaking to transport the baggage of its passenger is held by the law to the strictest accountability; and if the carrier receives such baggage and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but while the law holds the carrier to this rigid

accountability, we know of no rule of law that will render a carrier liable for the baggage of a passenger unless the evidence shows that the baggage sued for came into the possession of the carrier.

There is one thing further to be said of this judgment. If we should hold that the evidence is sufficient to support a finding that the jewelry sued for was in the trunk of Mrs. Ringwalt when it was accepted for transportation by the Wabash Railroad Company at Omaha, still there is no evidence which shows or tends to show that this trunk may not have been opened and the jewelry abstracted from it after it was delivered by the last carrier at Lexington to the expressman or drayman who transported it from the depot there to the stopping place of Mrs. Ringwalt. The Wabash Railroad Company cannot be held liable to Mrs. Ringwalt for this jewelry on mere conjectures. The law does not presume that the expressman who hauled the trunk from Mrs. Ringwalt's residence in Omaha, Nebraska, to the depot there opened the trunk and stole the jewelry. It does not presume that the agent or servants of any of the carriers between Omaha and Lexington opened the trunk and stole the jewelry, or that the jewelry was stolen by the drayman in Lexington who transported the trunk from the depot at that place to the residence of Mrs. Ringwalt. The law presumes dishonesty in no man, and to hold the Wabash Railroad Company liable in this action on the evidence in this record would be to indulge the presumption of honesty on the part of the draymen at Omaha and Lexington and dishonesty on the part of the servants of the railroad carriers. If the evidence in the record before us showed affirmatively that the trunk was not opened nor tampered with between the house of Mrs. Ringwalt and the Union Pacific Railway depot at Omaha, and that the trunk was not opened nor tampered with from the time it was delivered to the agent of Mrs. Ringwalt at the last carrier's depot at Lexington until it reached the hands of Mrs. Ringwalt, the

case would be entirely different and the liability of the Wabash Railroad Company for the property fixed; but the trunk while in the possession of the drayman at Omaha and in the possession of the drayman at Lexington was in the hands of the agents of Mrs. Ringwalt, and the presumption will not arise that the jewelry was lost or stolen while in the possession of the Wabash Railroad Company until she produces such evidence as will sustain a finding that the jewelry was in the trunk when it was accepted by the Wabash Railroad Company for carriage, and that the trunk had not been opened nor tampered with from the time it was delivered by the last carrier to her agent in Lexington until she opened it and found the jewelry missing. For the sole reason that the evidence will not support such findings the judgment must be and is

AFFIRMED.

GRANT GUTHRIE ET UX. V. HAMILTON LOAN & TRUST COMPANY.

FILED SEPTEMBER 17, 1895. No. 6261.

Usury. The facts in this case are substantially the same as those in *Upton v. O'Donahue*, 32 Neb., 565, and *Pierce v. Davey*, 43 Neb., 45. On the authority of those cases the decree of the district court in this action is affirmed.

ERROR from the district court of Sioux county. Tried below before BARTOW, J.

Grant Guthrie, for plaintiffs in error.

Wharton & Baird and *H. T. Conley, contra.*

RAGAN, C.

The facts in this case are substantially the same as those in *Upton v. O'Donahue*, 32 Neb., 565, and *Pierce v. Davey*, 43 Neb., 45. On the authority of those cases the decree of the district court in this action is

AFFIRMED.

N. N. ERSKINE V. KNUTE SWANSON ET AL.

FILED SEPTEMBER 17, 1895. No. 6398.

1. **Sales:** WARRANTY. To constitute a warranty it is not necessary that the word "warranty" should be used. It is sufficient if the language used by the vendor amounts to an undertaking or an assertion on his part that the thing sold is as represented. *Patrick v. Leach*, 8 Neb., 530, and *Little v. Woodworth*, 8 Neb., 281, followed.

2. ———: ———: EVIDENCE: QUESTION FOR JURY. Whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property, or whether by such statements the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for a jury. *Halliday v. Briggs*, 15 Neb., 219, followed.

3. **Estoppel:** SALES: WARRANTY. If a vendor of property knows that representations made by him as to the soundness or condition of the property sold are regarded by his vendee as warranties on the part of the vendor and believed in, relied, and acted upon as such by the vendee, then the vendor is estopped from asserting that such representations were not warranties.

ERROR from the district court of Antelope county. Tried below before KINKAID, J.

O. A. Williams, for plaintiff in error, cited: 1 Thompson, Trials, secs. 1198, 1205, 1207; *Halliday v. Briggs*,

15 Neb., 221; Newmark, Sales, secs. 318, 320; *Wallace v. Wren*, 32 Ill., 148; *Chandler v. Lopus*, 4 Croke [Eng.], 4.

J. F. Boyd, and *J. S. Robinson, contra*, cited: *Little v. Woodworth*, 8 Neb., 284; *Patrick v. Leach*, 8 Neb., 536.

RAGAN, C.

N. N. Erskine sued Knute Swanson and others in the district court of Antelope county on a promissory note. The note was given Erskine by Swanson and others in part payment of a stallion purchased by the latter of Erskine. The Swansons pleaded as defenses to the action that at the time of the purchase of the stallion and the execution of the note Erskine represented to them that the stallion was free from all defects except a small bunch on one hind foot, which Erskine stated was caused from the foot having been stepped upon, and "that the bunch was not a permanent one," and that he, Erskine, would warrant the stallion's recovery from said defect within thirty to sixty days; that Erskine further warranted said stallion to be a sure foal getter; that they, to the knowledge of Erskine, were desirous of purchasing a stallion for breeding purposes; that they relied upon the representations as to the condition and quality of the stallion made by Erskine, and purchased him in consequence of such representations, and their belief in their truth; that the representations were false; that the "bunch" on the foot of the stallion was not caused by his having been stepped upon, but was a "ring bone," from which the stallion never recovered, and which rendered him lame, unfit for service, and worthless, and that he was not a sure foal getter. The Swansons had a verdict and judgment, and Erskine has prosecuted to this court a proceeding in error.

To reverse the judgment of the district court counsel for Erskine urge upon us three arguments:

1. That the evidence does not establish a warranty. We

think it does. The evidence is undisputed that at the time of the sale of the horse he was lame in the left hind foot; and the evidence on behalf of the Swansons is that on their making inquiries of Erskine as to the cause of the lameness Erskine said that he had had the horse shod shortly before and that he had corked himself; "You needn't be afraid of that lameness. I guaranty that horse. In a few weeks you won't notice it." "Why, the horse will be all right. I guaranty to you it will be all right." "He is a good, sure horse." The testimony on behalf of Erskine is to the effect that he told the Swansons that the horse had become lame after he was shod, and that he gave it as his opinion that the hoof was pared a little too much, that the horse's leg had become strained, and that in his opinion the horse would be all right in a little while. To constitute a warranty it is not necessary that the word "warrant" should be used. It is sufficient if the language used by the vendor amounts to an undertaking or assertion on his part that the thing sold is as represented. (*Patrick v. Leach*, 8 Neb., 530; *Little v. Woodworth*, 8 Neb., 281.) Whether the statements made by Erskine about the lameness and condition of the horse were intended by him to be warranties of the horse's soundness and qualities, or whether by such statements he intended merely to express an opinion, were questions for the jury. (*Halliday v. Briggs*, 15 Neb., 219; *Wolcott v. Mount*, 36 N. J. Law, 262.) If Erskine knew that the representations made by him in regard to the soundness and qualities of the horse were regarded by the Swansons as warranties on the part of Erskine, and believed in, relied, and acted upon by the Swansons, then such representations amounted to warranties on the part of Erskine. (*Hahn v. Doolittle*, 18 Wis., 206.)

2. That the evidence does not show a breach of warranty. There is a sharp conflict in the evidence, but it supports the finding of the jury that the horse at the time of his sale was permanently lame; that he was diseased with "ring

bone" or "thrush of the foot;" that his lameness destroyed his usefulness as a stallion and that he was not a sure foal getter.

3. The court erred in giving to the jury the following instructions:

a. "You are instructed that if you should find from the evidence that the plaintiff, at the time of the making of the sale of the stallion to the defendants, or either of them, stated that said horse was sound, and that the lameness from which the horse was suffering, at the time of the sale, was not of a permanent character, and that the horse would recover from said lameness within a short period of time, and if plaintiff intended that defendants should rely upon such statements as true, and if made to induce defendants to buy, and if you should further find from the evidence that defendants relied upon said statements of plaintiff and were induced thereby to purchase said stallion, and if you should further find from the evidence that the lameness from which the said stallion was suffering at the time of said sale was of a permanent character and impaired the usefulness and value of said horse, then your verdict should be for defendants, provided you further find that by reason of the lameness the value of said horse was depreciated in an amount equal to or exceeding the face of the note in suit."

b. "The jury are further instructed that it is not necessary that in a contract of warranty that the word 'warranty' should be used by the seller in making of the said contract of warranty; but that any language which implies that the animal referred to is sound and adapted to the purpose for which it is sold, if such words were used by the seller, with the intent to lead the buyer to believe that a certain condition existed with reference to the chattel sold, and if the buyer relied upon such statements and was induced thereby to purchase the said property, this will constitute a warranty that the property is as represented, and

in this case, if you should find from the evidence that the plaintiff at the time of making the sale of the horse referred to in the evidence stated to the purchasers, or either of them, that the horse was all right, and that he would recover in thirty to sixty days from the lameness from which he was suffering and that said lameness was caused from being stepped upon, and if such statements were made with the intent to induce defendants to buy and they did thereby induce them to buy, and if you should further find from the evidence that the lameness referred to was of a permanent character and existed from causes which did not arise from being stepped upon, but from disease or ailment with which the horse was then suffering, and which rendered the horse unfit for the purpose for which it was purchased, and rendered the stallion less valuable to the extent equal to or exceeding the face of the note in suit, then your verdict should be for the defendants."

We think these instructions a correct statement of the law as applied to the evidence in this case, and that the court did not err in giving them. The judgment of the district court is

AFFIRMED.

JAMES F. CAMP v. WILLIAM A. POLLOCK.

FILED SEPTEMER 17, 1895. No. 6421.

1. **Chattel Mortgages:** TITLE TO CHATTELS. In this state the title to chattels mortgaged remains in the mortgagor. The mortgage creates merely a lien. *Musser v. King*, 40 Neb., 892, followed.

2. **Replevin:** CLAIM UNDER CHATTEL MORTGAGE: PLEADING. A plaintiff in replevin, claiming under a chattel mortgage, must in his petition allege the facts creating his interest and facts entitling him to possession.

3. **Chattel Mortgages:** POSSESSION OF CHATTELS. There is no presumption that a mortgagee of chattels before condition broken has any right to the possession as against the mortgagor.

4. ———: ———: REPLEVIN. A mortgagee of chattels cannot maintain a possessory action against a stranger unless as between mortgagor and mortgagee the latter has the right of possession.

5. **Pleading:** AMENDMENT. Leave to amend a pleading may be properly refused where the motion does not disclose the nature of the proposed amendment.

6. **Liquidated Damages:** DIRECTING VERDICT. Where damages are liquidated and there is no conflict of evidence as to their amount, the court may direct the jury as to the precise amount, and not leave it to the assessment of the jury.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

The facts are stated in the opinion.

Wilbur F. Bryant and *J. C. Robinson*, for plaintiff in error:

The title to mortgaged chattels is vested in the mortgagee. He is therefore entitled to recover as a general owner. The petition states a cause of action. (*Adams v. Nebraska City Nat. Bank*, 4 Neb., 370; *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 69; *Alexander v. Graves*, 25 Neb., 453; *Robinson v. Fitch*, 26 O. St., 659; Jones, Chattel Mortgages, secs. 426, 699; 1 Cobbey, Chattel Mortgages, secs. 448, 499; *Fletcher v. Neudeck*, 30 Minn., 125; *Robinson v. Fitch*, 26 O. St., 663; *Lindemann v. Ingham*, 36 O. St., 1; *Stevenson v. Lord*, 15 Col., 131; *Person v. Wright*, 35 Ark., 169.)

Mell C. Jay and *Barnes & Tyler, contra.*

IRVINE, C.

This was an action in replevin for certain live stock, the plaintiff claiming under two chattel mortgages, and the de-

fendant, a judgment creditor of the mortgagor, who was substituted for the sheriff, the original defendant, claiming under a levy of execution upon his judgment. At the close of the evidence the court directed a verdict for the defendant. Judgment was entered on this verdict, and the plaintiff seeks a reversal.

The assignments of error chiefly argued relate to the action of the court in excluding from evidence one of the mortgages under which plaintiff claims. Many objections were urged to the mortgage, among them being that the petition stated no cause of action. The court seems to have based its ruling on other grounds, but if the objection were well taken on this ground, a consideration thereof practically disposes of the case. The petition alleged that the plaintiff "has a special ownership and property in, and is now, and was at the commencement of this suit, entitled to immediate possession of the following goods and chattels, to-wit." Then, after describing the property, the petition proceeds: "The special ownership and property of plaintiff in said property consists in, and arises by virtue of, two certain chattel mortgages thereon, as follows: One executed and delivered by one A. Burrall to plaintiff on or about April 24, 1888, covering the four bulls above described with other property; and one executed and delivered by the said A. Burrall and one R. E. Burrall to the plaintiff on or about October 15, 1889, covering all the property above described except the four bulls, both of which said mortgages are still in full force and unsatisfied, and of the existence of said mortgages and plaintiff's lien and rights thereunder the said defendant had both actual and constructive notice prior to the issuance and levy of his execution on said property." The remaining allegations are not material to the question presented. It is claimed that this petition is defective, in that it avers no facts entitling the plaintiff to the possession of the property. It will be observed that it nowhere appears in the

petition that the debt to secure which the mortgages were given was due, or that by breach of condition or stipulation in the mortgage the plaintiff had a right to possession. In many states it is the law that a mortgage on chattels passes title to the mortgagee. Where this is so a general allegation of ownership is sustained by proof of a mortgage, and proof of title raises a presumption of the right of possession. In a few early cases in this court there were *dicta* to the effect that the foregoing was the law of this state; but in several recent cases the point was distinctly presented, the *dicta* referred to disapproved, and the law declared to be that the legal title remains in the mortgagor, and until foreclosure the mortgagee has merely a lien on the property. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165.) It follows that a general allegation of ownership will not be supported by proof of a chattel mortgage, but that the special claim must, in such case, be pleaded. Indeed, this was the precise point presented in the cases cited.

The plaintiff in this case did plead specially his mortgages, but he has not pleaded sufficient to establish his right of possession, unless either the general allegation that he is entitled to the immediate possession is sufficient for that purpose, or unless a right to possession is implied in the mortgagee as against third persons, although the mortgage confers merely a lien and does not pass title. Section 182 of the Code of Civil Procedure requires the affidavit in replevin to aver "that the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same." It is possible that if the facts in relation to the plaintiff's special ownership or interest be sufficiently stated, the general averment as to the right of possession would under this statute be sufficient in the affidavit. This, however, is a question not here presented or decided. We are here dealing with

the petition, and not with the affidavit. In *Curtis v. Cutler*, 7 Neb., 315, a somewhat similar case, it was said: "The general averments in the amended petition of the defendant in error, that 'he has a special property in the goods and chattels (describing them), and that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him,' are mere propositions of law," and the petition containing such averments was held insufficient. We hold, therefore, that where the plaintiff in replevin relies upon a special ownership, he must specially plead not only the facts in regard to such ownership, but also facts entitling him to possession. If, however, the mortgagee of chattels, before condition broken and in the absence of stipulation, has a right to possession as against third persons, then the pleading of the mortgage would be sufficient, as it would imply the right of possession. An examination of the authorities convinces us, however, that the law is not so. On the contrary, the authorities are to the effect that where, by the terms of a mortgage, the mortgagor is entitled to possession, the mortgagee cannot maintain a possessory action against an officer who has levied upon the goods as the property of the mortgagor. (*Shinners v. Brill*, 38 Wis., 648; *Hamilton v. Mitchell*, 6 Blackf. [Ind.], 131. See, also, *Fenn v. Bittleston*, 7 Exch. [Eng.], 153; *Fairbanks v. Bloomfield*, 5 Duer [N. Y.], 434.) Opposed to some of these cases, in one feature, are *Levi v. Legg*, 23 S. Car., 282, and *McLeod v. Bernhold*, 32 Ark., 671. The two cases last cited hold that where a mortgage contains a stipulation that the mortgagor shall retain possession until condition broken, the mortgagor may, notwithstanding, maintain replevin against a third person who has taken the goods from the mortgagor; but both these cases are based upon the ground that title passed to the mortgagee, and that the stipulation for possession was personal to the mortgagor, and did not operate in favor of a stranger to the mortgage. In this state, as we have seen,

the legal title does not pass. The right of possession, before condition broken at least, is presumably in the mortgagor, and it follows that under such circumstances the mortgagee cannot maintain an action even against a stranger. The petition was, therefore, defective in not averring a state of facts entitling the plaintiff to possession and the judgment for the defendant was right.

During the trial, and immediately before resting his case, a request was made as follows: "The plaintiff asks leave to amend his petition herein generally, subject to any penalty of costs or otherwise that may be imposed by the court." This request was refused. The court did not err in this ruling, for the reason that the request did not disclose the nature of the amendment which was desired.

It is contended that the court erred in directing the amount of the verdict, and that the amount should have been left for the jury to assess. The plaintiff sought to show a partial payment by the mortgagor of the judgment on which the execution was issued. The mortgagor testified that he had delivered certain grain to the defendant, amounting in value to about $200. He testified, however, that there was no agreement or understanding that this was to be applied on the judgment, but that he understood that the judgment was rendered for rent of a farm for a certain period, and that he delivered the grain in payment of rent for a portion of that period. The transcript of the judgment in evidence shows that it was based on a certain contract, and on a promissory note, and this evidence from the record was not impeachable. There was, therefore, no sufficient evidence to go to the jury to prove a part payment. The evidence as to the measure of damages was in other respects uncontradicted, and the instruction and verdict conformed thereto. The court properly directed a verdict for the amount proved.

JUDGMENT AFFIRMED.

RICHARDSON & BOYNTON COMPANY V. SCHOOL DISTRICT NUMBER ELEVEN OF NUCKOLLS COUNTY.

FILED SEPTEMBER 17, 1895. NO. 5795.

1. **Principal and Agent:** PROOF OF AGENCY. Agency cannot be proved by the acts or declarations of the alleged agent not brought home to the principal.
2. **Master and Servant:** SCOPE OF EMPLOYMENT. A master is not bound by the acts or declarations of his servant beyond the scope, or apparent scope, of the servant's employment.

ERROR from the district court of Nuckolls county. Tried below before MORRIS, J.

Gregory, Day & Day and *S. A. Searle*, for plaintiff in error.

W. F. Buck, contra.

IRVINE, C.

The Richardson & Boynton Company sued the school district to recover the unpaid purchase money of three heating furnaces which it alleged it had sold to the school district under a certain written contract. The school district denied that it had entered into the contract sued upon, and alleged a different contract containing an absolute warranty that the furnaces would work satisfactorily, and that if they failed to so work, the vendor would substitute furnaces of a different size, or would remove the furnaces and refund the money paid. The school district then counterclaimed for the amount of money paid on the furnaces, and for other damages. It recovered a verdict for the amount paid with interest. The plaintiff prosecutes error.

The furnaces were bought in 1886. The evidence tended to show that they were used during the winter of 1886 and

1887, and that in severe weather they proved insufficient to heat the building. Finally, plaintiff replaced two of the furnaces by others of a larger size. After a short trial the school district abandoned these and notified the plaintiff of that fact, and that the furnaces were at its disposal. There was much testimony as to the manner in which the furnaces had operated, and as to transactions between the parties in regard thereto. Mr. Buck, who was principal of the schools when the furnaces were first used, was interrogated as follows:

Q. During the winter did any agent of the plaintiff visit the school building for the purpose of inspecting or improving the operation of the furnaces?

A. They did.

Q. Were you present when they were there?

A. I was.

Q. State who it was and what was said and done.

A. His name was Mr. Springer, if I recollect correctly, and in company with me,—

Objected to by plaintiff, as incompetent, and does not disclose the fact that he is the agent of the plaintiff.

A. He represented himself as being an agent.

Objection by plaintiff to any statement of said party, as there is no proof of agency. Objection overruled. Plaintiff excepts.

Q. State who it was and what was said and done.

Objection by plaintiff to any statement of said party, as there is no proof of agency. Objection overruled. Plaintiff excepts.

A. He said the name was Springer. That he came there for the—he said the furnaces were not successfully operating in the heating of the building, as he expected they would be, and he asked me to observe their operation for a few weeks and write him at Chicago, giving them my observations as to the operation of the furnaces. He went to the various furnaces and was there for some time with

the janitor, and assisted the janitor in operating the furnaces. That is the substance of what was said and done by Mr. Springer.

Q. Did he make any changes or alterations in the construction of the heating apparatus?

A. I think he did. I would not state positively that he did, but I think he did.

Q. What was the result as to heating the building after the visit?

A. There was no change in the result.

The plaintiff assigns as error the overruling of the objection to the question calling for what Mr. Springer said and did. There is no testimony in the record as to Mr. Springer, other than we have quoted, except the following in the cross-examination of the manager of the plaintiff company:

Q. State who Mr. Springer was, if you know. Was he a member of your firm?

A. No.

Q. Was he an employe?

A. Yes.

Q. Was he sent to Superior for the purpose of observing the operation of those furnaces?

A. No.

Q. The plaintiff sent him to Superior?

A. Yes.

It will be observed that the only foundation for the evidence objected to was proof that Mr. Springer was in the employ of the plaintiff, that the plaintiff sent him to Superior, but not for the purpose of observing the operation of the furnaces, and that Springer represented himself to be plaintiff's agent. The manager's testimony was certainly insufficient to establish such a relation between Springer and the plaintiff as to make his acts and declarations competent. No general agency was shown. It was not shown that he had any authority at all in the premises,

and it was not shown that his business in Superior had any connection with the subject-matter of this controversy. It does not appear that the plaintiff ever acted upon, or ratified Springer's statements or acts while in Superior, or that it was ever informed thereof. The testimony of the witness that Springer represented himself to be plaintiff's agent was incompetent to establish agency. (*Stoll v. Sheldon*, 13 Neb., 207; *Nostrum v. Halliday*, 39 Neb., 828; *Burke v. Frye*, 44 Neb., 223.) There is no doubt that the relation of principal and agent may be inferred from the acts of the parties, as contended by defendant, and as held in *Columbus Co. v. Hurford*, 1 Neb., 146. But such acts must be in some way brought home to the principal. The acts of one claiming to be agent not so brought home are incompetent.

The warranty in the contract alleged by plaintiff was conditional, while that alleged by defendant was absolute. The court in stating the issues seems to have overlooked this feature, which was very important under the evidence to the rights of the parties, and submitted only the question as to whether the warranty alleged by the defendant had been broken. The admission in evidence of Mr. Springer's statement that the furnaces were not successfully operating was, therefore, particularly prejudicial.

Several other errors are argued, but for want of proper exceptions or assignments of error they cannot be considered. For the error in the admission of evidence the judgment is reversed.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

ADAM BRANDHOEFER, APPELLEE, V. E. BAIN, APPELLANT.

FILED SEPTEMBER 17, 1895. No. 6210.

1. **Judgment Under Invalid Statute:** VALIDITY: CONSTITUTIONAL LAW: JURISDICTION. Where a court proceeds in an action according to the provisions of a statute which is unconstitutional, its judgment is not void but at most erroneous, provided its jurisdiction of the action does not depend upon the statute, but exists independently thereof.
2. **Exemption:** HOMESTEAD. Lands acquired under the federal homestead law are forever exempt from liability for the debts of the patentee created before the issuing of the patent, and this although the patentee convey the lands and afterwards re-acquire the title.

APPEAL from the district court of York county. Heard below before BATES, J.

George B. France, for appellant.

Gilbert Bros., *contra.*

IRVINE, C.

Adam Brandhoefer entered the west half of the southeast quarter of section 20, in township 11 north, of range 1 west, in York county, under the federal homestead law. A patent was issued to him in 1878. In 1885 Brandhoefer and wife conveyed the land to Leonidas A. Brandhoefer, and in 1886 Leonidas Brandhoefer conveyed it to Eliza Brandhoefer, the wife of Adam. In 1891 Eliza Brandhoefer died, and on February 29, 1892, the county court of York county, on application of Adam Brandhoefer, set aside the land in question as the homestead of the husband, the county court apparently acting under the provisions of chapter 57 of the Session Laws of 1889, which has since

been declared unconstitutional. (*Trumble v. Trumble*, 37 Neb., 340.) In 1876, prior to the issuing of the patent, Adam Brandhoefer had become indebted to E. Bain, and in 1879 Bain recovered judgment against him. On July 14, 1892, an order was entered by the county court reviving this judgment. Bain then brought this action, alleging facts which he claimed rendered the land exempt from liability for the satisfaction of the judgment, and praying that it be decreed to be free from the apparent lien thereof. A decree was rendered in favor of the plaintiff, from which Bain appeals. Certain other matters were involved in the case, but the foregoing is all which relates to the subject-matter of the appeal.

Among the questions discussed are several relating to the force and effect of the order of the probate court setting apart to the plaintiff the land in question as his homestead, it being contended on the one hand that the act of 1889 being unconstitutional, these proceedings were void, and, on the other hand, that the declaration of the unconstitutionality of that act did not affect the validity of any proceedings had thereunder, or if it did, that chapter 32 of the Session Laws of 1895, which was intended as a curative act, validated such proceedings. None of these questions do we consider properly involved in a determination of the case. Prior to the passage of the act of 1889 it had been determined that the county court had jurisdiction to assign dower, and, therefore, curtesy, from the lands of a decedent, and also to set aside the homestead of the surviving husband or wife. (*Guthman v. Guthman*, 18 Neb., 98.) Therefore the jurisdiction of a county court to assign an estate by curtesy or a homestead did not depend upon the act of 1889, and irrespective of that act, the county court had jurisdiction of the proceedings which led to the setting aside to Brandhoefer of the land in question as his homestead. This being so, the action of the court in setting aside the homestead in pursuance of the act of 1889 affected only the

regularity of the proceedings, and not the jurisdiction of the court. While its action may have been erroneous, it was not void, and is not open to collateral attack. Therefore, when the plaintiff showed an estate assigned to him by decree of a court having jurisdiction of the subject-matter, this was sufficient proof of title to, *prima facie* at least, establish in him an actionable interest. The force of the decree of the county court does not, therefore, depend in any manner upon the act of 1889. Independent of that act questions are presented as to the effect of the decree as against one not a party to the proceedings, as determining the right of exemption. These questions we shall not determine, because the judgment must in any event be affirmed on another ground.

This land was entered by the plaintiff as a homestead under the federal law, and the debt upon which the judgment was rendered was one created before the patent was issued. Section 2296, Revised Statutes, U. S., provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The validity of this act of congress has been determined beyond question, and we refer to one case on the subject merely for the purpose of calling attention to the reason of the act. In *Seymour v. Sanders*, 3 Dill. [U. S.], 437, it is said that congress has plenary power over the disposition of public lands to dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best, and that the object of section 2296 is to benefit the poor man who is unable to pay for the land at once, and receive his title without condition, congress conceiving that the creditor in such cases has no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government. The state courts have uniformly given effect to the provision by holding that judgments rendered for debts contracted prior to the

patent are not dormant liens, to become valid when the entryman shall convey the land, but, on the contrary, that the provision referred to is a condition attached to the grant of the land which inures not only in favor of the patentee, but in favor of his grantees. (*Smith v. Steele*, 13 Neb., 1; *Baldwin v. Boyd*, 18 Neb., 444; *Jean v. Dee*, 5 Wash., 580; *Sorrels v. Self*, 43 Ark., 451; *Miller v. Little*, 47 Cal., 348; *Russell v. Lowth*, 21 Minn., 167; *Gile v. Hallock*, 33 Wis., 523.) There can be no doubt, therefore, that the land was not subject to the payment of this debt before Brandhoefer conveyed it; nor did it become liable for the debt in the hands of his grantees; but it is urged that, having again reached him, it is now liable. In other words, that while it was not liable as long as he retained it, or in the hands of any one deriving title through him, still, whenever he should acquire a new title to the land, it would then become liable. We cannot find that the precise question has ever been determined. In the absence of direct authority, the apparent analogy of the law of commercial paper at once suggests itself. It is a familiar rule that if a negotiable instrument once reaches the hands of a *bona fide* holder for value, it is discharged from equities, although he should transfer it to a third person with notice of such equities; but still, if the transferee should happen to be the original payee of the instrument, it would be subject to the equities in his hands. This rule and the reasons therefor are strongly stated by Judge Cooley in *Kost v. Bender*, 25 Mich., 515. By examining that case it will be seen that the reasons for the rule are that, while the protection of the innocent holder requires that those taking from him should also be protected, it is not very important that there should be one person in the world incapable of succeeding to his equities. The rule protecting innocent purchasers is for the benefit of the purchaser, and not for the benefit of the culpable payee. Against him the payor, were he compelled to pay the paper, would have his remedy

by action, and to avoid circuity of action if the paper comes back to his hands, the payor should be permitted to set up the defense. The reasons, therefore, for changing the rule in regard to commercial paper, when it returns to the original payee, are in no sense applicable to this case. The policy of the law merchant is to afford full currency to commercial paper. The policy of the homestead law is not to facilitate the free conveyance of the property. The policy of the law merchant is not to protect a payee without equity, but to protect innocent purchasers, while the first object of the homestead act is to protect the patentee. We are satisfied that no analogy can be drawn from the law merchant.

Recurring to the statute its language is of the broadest character: Lands acquired under the homestead act shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." If we should hold that when the patentee has conveyed the land to another, and then re-acquires it, it then becomes subject to liability for debts created prior to issuing of the patent, we should hold that in one event the exemption should not apply, thus, as we believe, engrafting an exception upon a statute couched in universal terms. Furthermore, as will be seen by an examination of the cases already cited, the courts have not regarded this act merely as one of exemption, simply staying the hands of the officers so long as the land is retained as a homestead, but, on the other hand, they have always treated it, not as an exemption, strictly speaking, but as a reservation or condition in the grant itself, whereby, acting under its sovereign authority in the disposal of its public land, the federal government has refrained from conveying the land in such a manner as to subject it to the payment of this particular class of debts. No lien for such a debt ever attached to the land during the patentees' original tenure, or while it remained in his grantees, and we can perceive

no sound reason why when he became reinvested with the title a lien should then for the first time attach. It is said that when the entryman has been protected in the possession of the land so long as he retains it as his homestead, and when he is permitted to dispose of it for full value without subjecting it to the debt in the hands of his grantee, he has received the full benefit of the exemption, and he should not be entitled to claim the exemption should he become reinvested with the title. This argument has force, but we do not think that it should prevail against the strong language of the exempting statute, and the manifest object to make the land not merely temporarily exempt from execution, but to grant it absolutely and forever free from liability. Our conclusion is that a particular tract of land acquired under the federal homestead law is forever exempt from liability for the debts of the patentee, created before patent issued, and this, without regard to whether he remains the owner or regains the ownership. The judgment of the district court was therefore right.

JUDGMENT AFFIRMED.

HIRAM G. MCMILLIN V. DE FOREST RICHARDS.

FILED SEPTEMBER 18, 1895. No. 7132.

1. **Office and Officer:** ACTION FOR EMOLUMENTS: PROOF. In an action against a *de facto* officer to recover the fees and emoluments of the office received by him during his incumbency thereof, the plaintiff, in order to recover, must establish that he is the *de jure* officer. *Richards v. McMillin*, 36 Neb., 352, followed.

2. ———: ———: PLEADING. Plaintiff must allege in his petition such facts as show that the strict legal title to the office is vested in him.

3. ———. An officer *de jure* is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has legally qualified himself to exercise the duties thereof according to the mode prescribed by law.

4. ———: APPROVAL OF OFFICIAL BONDS. Under the statute of this state which provides that the official bonds of all county officers, except county commissioners and supervisors, shall be approved by the county board, the approval to be indorsed on the bond, and that no bond shall be filed and recorded until so approved, where the bond of a county treasurer is not accepted and approved by the county board, but is rejected, such person is not a *de jure* officer.

5. **Mandamus**: APPROVAL OF OFFICIAL BONDS. Where an official bond, sufficient in form and substance, on being tendered for approval by one having a *prima facie* title to the office, is rejected, the appropriate remedy for the party is *mandamus* to compel the proper officer or board to accept and approve his bond. (*State v. Lynn*, 31 Neb., 770; *State v. Plambeck*, 36 Neb., 401.)

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

C. H. Bane and *D. B. Jenckes*, for plaintiff in error.

Albert W. Crites, contra.

NORVAL, C. J.

This was an action by plaintiff in error against defendant in error to recover the fees and emoluments of the office of county treasurer of Dawes county during defendant's incumbency thereof as treasurer *de facto*. From a judgment in favor of the plaintiff the defendant prosecuted a petition in error to this court, where a judgment of reversal was entered and the cause remanded to the district court for further proceedings therein on March 1, 1893. (See *Richards v. McMillin*, 36 Neb., 352.) After said reversal, an amended petition was filed in the district court, to which the defendant interposed a general demurrer, which

was sustained by the court, and the plaintiff electing to stand on his pleading, the action was dismissed. Plaintiff prosecutes error.

The plaintiff for cause of action alleges, in substance:

1. That on the 27th day of June, 1885, at the first election held in Dawes county, he was elected county treasurer of said county and on the 11th day of the following month he filed his bond as required by law, which was duly approved by the county board, and that he took the oath of office and entered upon the discharge of the duties of county treasurer.

2. That at the general election held in said county on November 3, 1885, the defendant De Forest Richards, being a candidate for the office of county treasurer, received a majority of the votes cast for said office, and received his certificate of election from the county clerk.

3. That on November 20, 1885, plaintiff instituted proceedings in the county court to contest the election of defendant, on the ground of ineligibility at the time of said election, and that said election was null and void, which judgment, on being appealed to the district court, was affirmed at the February, 1888, term thereof, and still remains in full force and effect.

4. That under the judgment of the county court plaintiff continued to hold, occupy, and discharge the duties of county treasurer of said county, "and that on, to-wit, the 17th day of January, 1886, said date being within ten days from the time when said Richards would have been obliged to qualify as such county treasurer under the statutes, if eligible to said office, plaintiff made out and tendered to said board of county commissioners of Dawes county a new bond as such county treasurer, with good and sufficient security thereto, for their approval, and said plaintiff took and subscribed to the oath of office thereon as provided by law, and in all respects complied fully with all the requirements as provided by law, and was eligible

to said office and is eligible to fulfill the duties of said office; and that said board of county commissioners, believing at the time said plaintiff tendered his bond and oath of office as hereinbefore recited that they had appointed the defendant as treasurer of said county, refused to approve and accept the said bond and oath of office of the plaintiff."

5. The plaintiff legally held over his said office and was entitled to, and it was his duty to exercise the functions of said office and to receive the fees and emoluments thereof until his successor should be elected and qualified, and that the term which the plaintiff held over did not expire until the first Thursday after the first Tuesday in January, 1888.

6. That on January 9, 1886, the board of county commissioners declared the office of county treasurer vacant, and appointed the defendant to fill the same.

7. That defendant obtained possession of the tax lists of the county, exercised the powers and duties of the office, and received the fees and emoluments thereof and kept the plaintiff therefrom. That plaintiff has repeatedly demanded from the defendant said office and the books, papers, and moneys belonging thereto, with which demand the defendant refused to comply.

8. The fees and emoluments of said office received and kept by the defendant from the time he entered upon the duties thereof until the end of said term amounted to $1,757.20.

9. That plaintiff was ready, willing, and at all times desirous to perform the duties pertaining to said office during the period he was deprived thereof by defendant.

10. The plaintiff made demand of the defendant for said sum of $1,757.20, but payment was refused.

Upon the former hearing it was held, substantially, that in an action against a *de facto* officer to recover the emoluments of a public office received by the defendant during his incumbency thereof the plaintiff will not be entitled to

recover, unless it be established that he is the *de jure* officer; and further, that the evidence failed to disclose that plaintiff herein is an officer *de jure*, in that there was an entire lack of evidence that he qualified as a hold-over officer within the period fixed by statute. It being essential that the plaintiff in an action like this prove he is the *de jure* officer, it follows that he must aver such facts in his petition as show him to be one. Has McMillin done so in this case? The only substantial difference between the original petition, the one on which the cause was first tried, and the amended pleading now before us, is the allegation quoted above, from which it appears that plaintiff, on January 17, 1886, executed and tendered to the county board a bond as a hold-over officer, and took and subscribed the oath of office, and that said county board refused to accept and approve said bond. We do not believe the giving of the bond and the taking of the oath prescribed by law alone were sufficient to invest in the plaintiff the legal title to the office of the county treasurer, or to constitute him a *de jure* officer. An officer *de jure* is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law. (19 Am & Eng. Ency. of Law, 394; *Plymouth v. Painter*, 17 Conn., 585; *City of Philadelphia v. Given*, 60 Pa. St., 136; *Kimball v. Alcorn*, 45 Miss., 151.) While it appears from the averments made in the amended petition which the defendant by his demurrer admits to be true, the plaintiff filed his bond as a hold-over officer with the county board, yet the same was never approved by said board, but was rejected by them. Section 7 of chapter 10, Compiled Statutes, requires the official bonds of all county officers, except county commissioners and supervisors, to be approved by the county board, and section 11 of said chapter provides that such approval shall be indorsed upon the bond by the approving officer,

and that no bond shall be filed and recorded until so approved. As we construe the statute, plaintiff was not a *de jure* officer, nor qualified to perform the duties of the office until the bond he presented was duly approved. Simply taking the oath and filing the bond prescribed by law, it is obvious, were not sufficient to entitle the plaintiff to legitimately perform the duties of county treasurer. Manifestly, it was the intention of the legislature that a county officer elect should not enter upon the duties of his office until his bond and the sureties thereon have been approved by the proper officer or board. Without such approval, plaintiff is not a *de jure* officer, and, therefore, cannot maintain the action.

State v. Lewis, 10 O. St., 128, was a proceeding by *quo warranto* to determine the right of the relator and respondent to the office of sheriff of Marion county. The relator was elected to succeed the respondent and tendered to the proper officers a good and sufficient bond, which they declined to accept and approve because it was claimed the same was not presented in time. The court, in the opinion, observe: "He [relator] was not authorized to enter upon the duties of his said office and oust the defendant, until his official bond had been accepted and approved by the county commissioners. If the bond was, in fact, rejected by them, though for an insufficient or improper reason, the sureties in that bond could hardly be held responsible for his subsequent official delinquencies. If the facts stated in the information are true, he should have applied for *mandamus* to compel the county commissioners to accept and approve his bond instead of proceeding by *quo warranto* against the former incumbent, who rightfully retains the office until his successor has been, in all respects, qualified to assume its duties. For these reasons the present application must be refused."

In *State v. Lynn*, 31 Neb., 770, which was *quo warranto* to oust the respondent from the office of justice of the peace

and to install the relator therein, the court uses this language: "The relator's bonds were both filed within the ten days required by statute. The cause for failing to approve the same is not shown. It must be presumed that a sufficient cause existed to justify the action of the county board, although the action of that board has somewhat the appearance of being arbitrary; but we cannot determine that matter in this action. The remedy of the relator, upon filing a good and sufficient bond with the county clerk, and upon taking the oath required by law, within the time limited, was to proceed by *mandamus* against the board to compel the approval of the bond. The board can then be heard in its own defense, and unless adequate cause was shown for its rejection of the bond, it will be compelled to approve the same. The bond has no force or validity until approved, because the party required by statute to approve the same refuses to accept it as a sufficient bond."

If the approval of a bond by the proper authority is indispensable to the complete qualification of an officer so as to entitle him to maintain an action to recover the office by *quo warranto*, it would seem clear then, by a parity of reasoning, that such actual approval is also necessary to authorize such officer to recover the compensation attaching to the office, since, as ruled in the former opinion, the right to the emoluments of an office depends upon the strict legal title to the office. The plaintiff, upon the failure of the county board to accept and approve his bond, could have applied for a writ of *mandamus* to compel it to do so. But it is said in the brief that the board having already approved the bond of Richards, an application for a writ of *mandamus* would have been unavailing, inasmuch as the writ may not issue to control the discretion of an officer, and, further, such a proceeding would have involved the question of the title of the office, and this cannot be tried in such an action. There is no allegation in the petition that Richards ever gave a bond, much less that the board

ever approved it. From the record before us, if plaintiff was legally entitled to the office, the approval of his bond would not have been discretionary with the board, inasmuch as it is alleged, and by the demurrer admitted to be true, that the bond was in due form and executed by sufficiently competent sureties. Although *mandamus* is not the appropriate action to try the title of an office, yet in an application for such a writ to compel the approval of an official bond of the relator sufficient inquiry may be made to ascertain whether he has a *prima facie* right or title to the office. A party having such a title has the right to have his bond, if sufficient, approved. This was expressly decided in *State v. Plambeck*, 36 Neb., 401. The conclusion reached makes the consideration of the other questions argued by counsel wholly unnecessary. The judgment is

AFFIRMED.

KILPATRICK-KOCH DRY GOODS COMPANY V. STRAUSS, UHLMAN & GUTHMAN.

FILED SEPTEMBER 18, 1895. No. 5951.

1. **Fraudulent Conveyances:** CHATTEL MORTGAGES: EXCESSIVE SECURITY. The fact that a chattel mortgage covers property largely exceeding in value the amount of the debt secured raises no conclusive presumption of fraud as to creditors of the mortgagor. Such fact is at most evidence of fraud, to be given such consideration as it may be entitled to, in connection with the other circumstances surrounding the transaction involved.
2. **Replevin.** The rights of parties to an action of replevin under our practice must as a rule be determined by the facts as they existed at the time the action was commenced.

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

Montgomery, Charlton & Hall, for plaintiff in error.

Harwood, Ames & Pettis, contra.

POST, J.

This was an action of replevin in the district court for Merrick county by the plaintiff in error against W. H. Crites, sheriff, who was, when the action was commenced, in possession of the property in controversy by virtue of two orders of attachment issued by the county court of said county in favor of the defendants Strauss, Uhlman & Guthman and against J. J. Gallogly. On trial to the court, a jury being waived, there was a finding and judgment for the defendants in error, who had in the meantime been substituted for the sheriff, and which judgment has been removed into this court for review upon the petition in error of the plaintiffs.

The facts out of which the controversy arose, so far as they are necessary to an understanding of the question presented, are as follows: For several years previous to December 2, 1889, James J. Gallogly was engaged in the business of a general merchant at Chapman, in Merrick county. On the day named, for the express consideration of $5,079.38, he executed in favor of his wife, Alice E. Gallogly, a chattel mortgage, whereby he conveyed to her his entire stock of merchandise, store fixtures, five horses, one carriage, and three sets of harness. On February 5, 1890, said mortgage was released and satisfied by the mortgagee in consideration of an absolute conveyance to her by her husband of all the mortgaged property. The last mentioned transaction was evidenced by a bill of sale in the usual form, which was filed for record on the day of its execution. Five days later, on February 10, Mrs. Gallogly, at the request of her husband, executed five separate chattel mortgages upon the said stock of merchandise and

store fixtures, to-wit: To the Kilpatrick-Koch Dry Goods Company, for $1,413.23; to Darrow & Logan, for $158.88; to Kirkendall, Jones & Co., for $574.23; to McCord, Brady & Co., for $1,909.23; and to the defendants Strauss, Uhlman & Guthman, for $1,128.29. Said mortgages were all given to secure the indebtedness of Gallogly, and each subject to those preceding it in the order above named. With the exception of the last mentioned mortgage, which was voluntarily executed by Gallogly without the knowledge or consent of defendants, they were all made at the solicitation of Mr. Kilpatrick, president of the plaintiff company, who immediately took possession of the property conveyed in the name of the several mortgagees. By agreement of the parties other than the defendants the plaintiff company proceeded to sell and dispose of the mortgaged property at private sale, and which continued without interruption until March 8, when the defendants, who had repudiated the mortgage in their favor, began two actions against Gallogly in the county court of Merrick county for the amount of the latter's indebtedness to them, and in which the orders of attachment above mentioned were issued. The property in controversy having been seized by the sheriff to satisfy the aforesaid orders of attachment, this action was instituted by the plaintiff for the purpose of asserting its right of possession under the several mortgages. The facts as found by the district court are as follows:

"1. That the bill of sale from Gallogly to Mrs. Gallogly was valid.

"2. That on February 10, 1890, for an adequate consideration paid by Gallogly, his wife joined him in conveying the stock of goods in question to the plaintiffs. This transaction was in substance and legal effect a surrender of the title to Gallogly and a transfer of the stock to him.

"3. The petition declares the giving of each mortgage to the several plaintiffs to be a separate and distinct transac-

tion. It should be so considered. The subsequent mortgages are strengthened by the prior ones, but the prior mortgages receive no reciprocal support from the subsequent mortgages.

"4. Each of the plaintiffs took excessive security for his claim.

"5. The mortgages of each of the plaintiffs are fraudulent and void by reason of the taking of such excessive security.

"6. From the sale of the goods described in the mortgages of the plaintiffs their claims have been filed fully paid, leaving a surplus more than sufficient to pay the amount due the defendants Strauss, Uhlman & Guthman.

"7. The goods in controversy have been sold and cannot be returned.

"8. The defendants Strauss, Uhlman & Guthman should have judgment for the amount of their claim, being $1,302, and the costs due on the orders in dispute.

"9. The court further finds that at the beginning of this suit the right of possession and the right of property of the goods and chattels in controversy herein were in the defendants, and that the said defendants were entitled to the possession of the same. To each and all of said findings the plaintiffs jointly and severally except, and said exceptions are allowed."

A motion for a new trial was interposed, in which the following grounds were alleged:

1. Errors of law occurring at the trial.

2. The findings and judgment are not sustained by the evidence.

3. The findings and judgment are contrary to law.

It is urged that the plaintiff has no standing in this court, for the reason that the assignments of the motion for a new trial are indefinite and that the findings assailed should have been specifically pointed out. It is, however, deemed unnecessary to examine that question, since the

judgment is, in our opinion, unsupported by the findings and therefore contrary to law. By the fourth and fifth findings we understand the district court to hold that the taking of excessive security is *per se* a fraud upon creditors, for which the mortgage will be held void as a matter of law, without regard to the motives of the parties. That conclusion, it must be confessed, is not without support in the opinions of this court. (See *Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800; *Thompson v. Richardson Drug Co.*, 33 Neb., 714.) But the cases cited, in so far as they assert the doctrine of the findings, are in evident conflict with our later decisions announced subsequent to the entry of the judgment here involved, which hold that the taking of security greatly in excess of the debt due is a matter of evidence only, to be given such consideration as it may be entitled to in view of all of the surrounding circumstances, in determining whether the transaction involved is fraudulent in full. (See *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Sherwin v. Gaghagen*, 39 Neb., 238; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863; *Grand Island Banking Co. v. Costello*, 45 Neb., 119.) It follows that the judgment cannot be sustained on the ground that the mortgages represented by the plaintiff are fraudulent as to creditors.

The only remaining question is the effect to be given the sixth finding, viz., that the money in plaintiff's hands, the proceeds of the mortgaged property after discharging the claims represented by it, is sufficient to satisfy the amount due defendant. It is contended on the authority of *Blue Valley Bank v. Bane*, 20 Neb., 295, that the finding mentioned will support the judgment, which is for the return of the property, or, in case a return cannot be had, for the amount of the defendants' claim, to-wit, $1,333.34. That contention, it is evident, rests upon an entire misconception of the doctrine of the case cited. From an examination of the concluding paragraph of the opinion it appears that

the judgment, in so far as it determined the question of the right of possession in favor of the plaintiff below, is affirmed, while the provision thereof in favor of the defendants for the recovery of the surplus in plaintiff's hands derived from the sale of the mortgaged property is reversed. The precise question involved was presented in *Gillespie v. Brown*, 16 Neb., 457, and determined adversely to the claim of defendants herein, and the doctrine of the last mentioned case is expressly approved in *Kay v. Noll*, 20 Neb., 380, and *Fischer v. Burchall*, 27 Neb., 245. In *Gillespie v. Brown* REESE, J., uses this language: "It is also claimed that the proof shows a surplus in the hands of the defendants in error, and if their mortgage be held valid, the plaintiff in error should by virtue of his levy have a lien on such surplus. That question cannot arise in this case. The contention is only for the possession of the property." The reasoning as well as the conclusion of the cases cited are decisive of the present controversy. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

ENOS CLARK, APPELLEE, V. CAMBRIDGE & ARAPAHOE IRRIGATION & IMPROVEMENT COMPANY, APPELLANT, ET AL.

FILED SEPTEMBER 18, 1895. No. 7594.

1. **Navigable Waters.** The courts of this country have not as a rule adopted the common law definition of the term "navigable waters," which here include those waters only which afford a channel for useful commerce, whether the beds thereof are public or private property, and without regard to the influence of the ocean tide.

2. **Evidence**: JUDICIAL NOTICE. The courts of this state take notice without proof that the Republican river is unnavigable.

3. **Riparian Rights.** Except as abrogated or modified by statute, the common law doctrine with respect to the rights of private riparian proprietors prevails in this country.

4. ———: DAMAGES. The right of a riparian proprietor, as such, is property, and when vested can be impaired or destroyed only in the interest of the general public, upon full compensation and in accordance with established law.

5. **Constitutional Law**: IRRIGATION: RIPARIAN RIGHTS. The provision of the irrigation law of 1889, and the act of 1893, amendatory thereof, abolishing riparian rights in all streams over twenty feet in width, is a clear invasion of private property and within the prohibitive features of the constitution.

6. **Injunction**: LACHES. A suitor who has by his laches made it impossible to prevent the completion or use of public works without great injury to his adversary, or inconvenience to the public, is not entitled to the preventive remedy of injunction, but will be confined to the relief obtainable by ordinary means in a court of law.

APPEAL from the district court of Furnas county. Heard below before WELTY, J.

There is a statement of the case in the opinion.

F. I. Foss and *W. R. Matson*, for appellant:

As to title to the water rights and character of the stream the following authorities are cited: *Illinois C. R. Co. v. People*, 146 U. S., 387; *Jones v. Soulard*, 24 How. [U. S.], 41; *Smith v. City of Rochester*, 92 N. Y., 463; *Chenango Bridge Co. v. Paige*, 83 N. Y., 178; *Avery v. Fox*, 1 Abb. [U. S.], 246; *The "Montello,"* 20 Wall. [U. S.], 430.

The mill is a public nuisance and subject to abatement. (Wood, Nuisance [2d ed.], 80, 792; Cooley, Torts, 612, 614; *Rhodes v. Whitehead*, 27 Tex., 304; *Mills v. Hall*, 9 Wend. [N. Y.], 315; *Santa Clara County v. Southern P. R. Co.*, 18 Fed. Rep., 423; Gould, Waters, 78; *Lammers*

v. Nissen, 4 Neb., 245; *Bissell v. Fletcher*, 19 Neb., 725; *East Omaha Land Co. v. Jeffries*, 40 Fed. Rep., 386.)

The title of the United States is perfect. A stream of water running through a tract of land is part and parcel of it. Prescription does not avail against the United States. (*Union Mill and Mining Co. v. Ferris*, 2 Sawyer [U. S. C. C.], 176; *Vansickle v. Haines*, 7 Nev., 249; *Gibson v. Chouteau*, 13 Wall. [U. S.], 93.)

The appropriation of water for the purpose of irrigation affords no ground of complaint by the lower proprietor, though the water be entirely consumed. (*Rhodes v. Whitehead*, 27 Tex., 304; *Evans v. Merriweather*, 3 Scam. [Ill.], 492.)

The appropriation is made with regard to the ordinary stream. (*Proctor v. Jennings*, 6 Nev., 83; *Inhabitants of China v. Southwick*, 12 Me., 238; *Bell v. McClintock*, 9 Watts [Pa.], 119; Angell, Water Courses [7th ed.], sec. 491*b*; *Thurber v. Martin*, 2 Gray [Mass.], 394; *Smith v. Agawam Canal Co.*, 2 Allen [Mass.], 357; *Monongahela Navigation Co. v. Coon*, 6 Pa. St., 383; *Pixley v. Clark*, 35 N. Y., 520.)

The remedy by injunction does not apply in this case, for the invasion of the right in question is not difficult of estimation and can be adequately compensated in damages. (*Quackenbush v. Van Riper*, 2 Greene Ch. [N. J.], 350; *Woodin v. Wentworth*, 57 Mich., 278; *Bull v. Valley Falls Co.*, 8 R. I., 42; *Spangler's Appeal*, 64 Pa. St., 387; Gould, Waters, sec. 511; *Nosser v. Seeley*, 10 Neb., 467; *De Necochea v. Curtis*, 80 Cal., 397; *Burrows v. Burrows*, 82 Cal., 564.)

There has been such an acquiescence on part of plaintiff in the appropriation complained of as to estop him from claiming the equitable relief sought. (*State v. Graham*, 21 Neb., 329; *Nosser v. Seeley*, 10 Neb., 460; *Forbes v. McCoy*, 24 Neb., 702; *Gillespie v. Sawyer*, 15 Neb., 536; *Richardson v. Doty*, 25 Neb., 426; *Menard v. Hood*, 68

Ill., 121; *Owen v. Ford*, 49 Mo., 436; *Cole v. Duke*, 79 Ind., 107; *East Saginaw Street R. Co. v. Wildman*, 58 Mich., 286; *Mayor v. Mitchell*, 79 Ga., 807; *Brown v. Merrick County*, 18 Neb., 355; *Fremont Bridge & Ferry Co. v. Dodge County*, 6 Neb., 18; *Western Union Telegraph Co. v. Pacific & Atlantic Telegraph Co.*, 49 Ill., 90; *Hazlehurst v. Savannah & N. A. R. Co.*, 43 Ga., 13; *Roberts v. Davidson*, 83 Ky., 279; *Thomas v. Woodman*, 23 Kan., 217; *Swift v. Jenks*, 19 Fed. Rep., 641; *Mayor of Jersey City v. Gardner*, 33 N. J. Eq., 622; *City of Logansport v. Uhl*, 99 Ind., 531; *Westbrook Mfg. Co. v. Warren*, 77 Me., 437; *East & W. R. Co. v. East Tennessee & V. R. Co.*, 75 Ala., 275; *Outcalt v. Helme Co.*, 42 N. J. Eq., 665; *Roath v. Driscoll*, 20 Conn., 533; *Prentiss v. Larnard*, 11 Vt., 135; *Sheboygan v. Sheboygan & F. R. Co.*, 21 Wis., 667; *Bliss v. Kennedy*, 43 Ill., 67; *Varney v. Pope*, 60 Me., 192; *Peters v. Hansen*, 55 Mich., 276.)

McClure & Anderson, for intervenors.

Thomas H. Matters, for appellee:

As to right of appellee to the water, the following authorities are cited: Consolidated Statutes, sec. 2057; *Pugh v. Wheeler*, 2 Dev. & B. [N. Car.], 55; 6 Lawson, Rights, Remedies & Practice, 2914; *Vansickle v. Haines*, 7 Nev., 249; *Bliss v. Kennedy*, 43 Ill., 76; *Merrifield v. Lombard*, 90 Am. Dec. [Mass.], 172; *Lux v. Haggin*, 10 Pac. Rep. [Cal.], 674; *Davis v. Getchell*, 79 Am. Dec. [Me.], 638; Kinney, Irrigation, 521; Gould, Waters, secs. 304, 305; Angell, Water Courses, sec. 135.

The appellee claims that by virtue of purchase, chain of title from the United States, ten years' uninterrupted possession, appropriation, and more than ten years' user of the water, he has a clear title to the premises and vested rights in the land and use of the water, which cannot be disturbed by legislation. (Constitution, sec. 21, art. 2; *Traver*

v. Merrick County, 14 Neb., 333; Compiled Statutes, sec. 27, ch. 57; *Monroe v. Ivie*, 2 Utah, 535; *Mud Creek Irrigation Co. v. Vivian*, 74 Tex., 170.)

The Republican river is not in law or in fact a navigable stream. (Kinney, Irrigation, 54; *The "Daniel Ball,"* 10 Wall. [U. S.], 563; *Propeller "Genesee Chief" v. Fitzhugh*, 12 How. [U. S.], 443; *Nutter v. Gallagher*, 24 Pac. Rep. [Ore.], 250.)

The mill is not a public nuisance. (*Traver v. Merrick County*, 14 Neb., 327; *State v. Clay County*, 20 Neb., 452.)

Any user of a stream by an upper proprietor which substantially diminishes its volume or defiles its capacity to such a degree as to essentially impair its purity, and to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied is improper and will be enjoined. (*Merrifield v. Lombard*, 90 Am. Dec. [Mass.], 172.)

POST, J.

This is an appeal from a decree of the district court for Furnas county perpetually restraining the defendant the Cambridge & Arapahoe Irrigation and Improvement Company from diverting the waters of the Republican river for the purpose of irrigation by means of a ditch or canal of which the defendant company is the owner and proprietor. It is in the petition, in substance, alleged that the plaintiff, in the year 1879, in said county, erected a mill for the purpose of grinding grain, and has since the completion thereof in the year mentioned continuously used and operated said mill for the purpose aforesaid; that his said mill is supplied with water power by means of a dam constructed by him in the Republican river in the year 1879, on land then and now owned by him; that he has since said date until the year 1891 had the continued and uninterrupted use of the water of said river, and which is, when not interfered

with by the defendant, sufficient to supply all of his needs, but that in the year last named the defendant company commenced the construction of a ditch or artificial waterway in said county, which taps the Republican river about fourteen miles above his said mill, and now threatens to divert the water from said stream or so much thereof as to deprive the plaintiff of his water power and render his mill worthless, etc. The defendant for answer, after charging that it is an irrigating company duly and legally organized under the laws of this state, alleges that in the month of August, 1891, it in due and legal form appropriated the waters of the Republican river to the amount of 300,000 cubic inches measured under a four-inch pressure; that it immediately began the construction of an irrigating canal, commencing at the point where said appropriation was made, and that said canal was within a reasonable time fully completed, and by means of which the defendant is now engaged in furnishing water for the purpose of irrigation to divers persons along the line of its said ditch. It is also alleged that the water flowing in the Republican river during ordinary seasons is ample to supply the necessities of the plaintiff notwithstanding the diversion thereof by the defendant company, and notwithstanding the fact that there have been since the year 1885 constructed twenty-seven irrigating canals in this state and the state of Colorado, all of which have acquired by appropriation a valid right to, and are now actually using, the water of the Republican river for the purpose of irrigation. There is a further allegation to the effect that the plaintiff, who was aware of said appropriation and contemplated diversion of water, interposed no objection thereto, but, on the contrary, by his silence encouraged the defendant to undertake and complete the said canal, which was done at great expense, to-wit, at the cost of $40,000, wherefore he should not now for the first time be heard to assert any rights in the premises superior to those of the defendant, and that his remedy, if

any, is by an action for damage and not by injunction. At this stage of the controversy Swan Freeman and six others were permitted to intervene for the purpose of asserting their rights in the premises adverse to the plaintiff. In the pleading interposed by them, in addition to the allegations contained in the answer of the defendant company, it is charged that said intervenors are the owners of farming lands situated under the aforesaid canal, that the defendant is by law required to supply them with water for the irrigation of the several farms, and that their equities in the premises are superior to those of the plaintiff. The statements of the answer and also of the intervenor's petition are met by a reply which may be treated as a general denial. The foregoing statement omits many allegations of the pleadings, some of which are foreign to the real questions involved and others tender issues of law only.

The able arguments with which we have been favored include many questions of vital importance in view of the prominence given to the subject of irrigation in the recent legislation of this state, but a few of which, for reasons hereafter appearing, call for notice in this opinion.

The first proposition to which we will give attention is that inasmuch as the original surveys meander along the banks of the Republican river and the adjoining lands were conveyed by patents which do not include the bed of that stream, the title thereof remained in the general government, and subsequently passed to and became the property of this state upon its admission into the Union as such,—in short, that the Republican is in legal effect a navigable river, and that plaintiff's dam therein is a public nuisance, and not within the protection of the law. At common law navigable streams are held to be those in which the tide ebbs and flows. (3 Kent, Commentaries, 413, and note; Black's Pomeroy, Waters, sec. 216.) But the doctrine of the common law has not, as a rule, been accepted in this country, and has been entirely repudiated by

the courts of the United States in determining the jurisdiction of congress over lakes and streams, whether situated in two or more states or within the boundaries of a single state. In those courts navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce (see *United States v. Steamer "Montello,"* 87 U. S., 430; *Miller v. Mayor of New York*, 109 U. S., 385), and although the decisions of the state courts are not altogether harmonious, the rule stated is in accordance with the decided weight of authority. (See 16 Am. & Eng. Ency. of Law, title "Navigable Waters," and the valuable collection of cases therein by Mr. Charles S. Lobingier.) The courts of this state will take notice of this fact, which is also established by abundant proof, that the Republican is not a navigable river within the foregoing definition.

The appellant's next contention is that conceding the Republican to be unnavigable, the water thereof is public property and may be acquired by appropriation without regard to the claims of riparian proprietors. That contention is based upon the provisions of the act of March 27, 1889, and which, for convenience, may be referred to as the "Rayner Irrigation Law," the first section of which, as amended in 1893, reads as follows: "The right to the use of running water flowing in any river or stream, or down any canyon or ravine, may be acquired by appropriation by any person, company or corporation, organized under the laws of the state of Nebraska; *Provided*, That in all streams not more than twenty (20) feet in width the rights of the riparian proprietor shall not be affected by the provisions of this act." (Session Laws, 1893, p. 377, sec. 1, ch. 40.) Authority is by other sections conferred upon persons and corporations in certain cases to condemn the right of way over and upon any lands for irrigating ditches and for the enforced access thereof to the public

waters of the state; and by a subsequent act, water for the purpose of irrigation is declared to be a natural want. (Session Laws, 1895, p. 268, sec. 65, ch. 69.) It is conceded that the Republican river exceeds twenty feet in width and is therefore not within the exception of the section quoted. It is important in giving effect to these statutes to examine them in the light of the laws in force at the time of their adoption. Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev., 269; *Stowell v. Johnson*, 26 Pac. Rep. [Utah], 290), the common law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. (*Eidemiller Ice Co. v. Guthrie*, 42 Neb., 238; Black's Pomeroy, Waters, secs. 127, 130, and authorities cited.) At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purpose of life (3 Kent, Commentaries, 439; Angell, Water Courses, sec. 95; Gould, Waters, sec. 204; Black's Pomeroy, Waters, sec. 8), and any unlawful diversion thereof is an actionable wrong.

It is a well known fact that our irrigation laws are modeled after the statutes of California, and we may with profit look to the interpretation there given them, in determining to what extent, if at all, they abrogate or modify common law rules. In *Lux v. Haggin*, 69 Cal., 255, a leading and instructive case, the question presented was the effect of section 1422 of the Civil Code of that state, viz., "The rights of riparian proprietors are not affected by the provisions of this title." It was held, after an exhaustive examination of the subject, that the statute, so far as it authorizes the appropriation of water, applies to such water only as flows over the lands of the state and the United

States, and that the section quoted was intended to save the rights of all riparian owners whose titles were acquired before or since the adoption of the Code; and that construction of the statute accords with the views of both Mr. Pomeroy and Mr. Black. (See Black's Pomeroy, Waters, sec. 127.) It may be that our statute, unlike the Code of California, was intended to embrace all waters of the state, since it is an historical fact, of which we take notice, that the public lands along the streams of this state had practically all been disposed of previous to 1889. But it is unnecessary to pursue the subject at this time, for, assuming such to have been the intention of the legislature, it is a clear invasion of private rights and within the prohibition of the constitution. The right of a riparian proprietor, as such, is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law. (*Lux v. Haggin, supra; Yates v. City of Milwaukee*, 10 Wall. [U. S.], 497; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S., 672; *Delaplaine v. Northwestern R. Co.*, 42 Wis., 214; *Bell v. Gough*, 23 N. J. Law, 624; *Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335.) That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility within the meaning of the constitution is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the constitution and can take or damage private property only upon the conditions thereby imposed. The proposition that the rights of riparian proprietors were abolished by operation of the statutes is, therefore, without merit. It does not, however, follow that equity will interfere to prevent the use of the water in this instance at the suit of the plaintiff, although actions to

prevent the invasion of private rights by persons claiming public powers is a favored subject of equitable cognizance. It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies. (*Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq., 283; *Traphagan v. Mayor of Jersey City*, 21 N. J. Eq., 206; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind., 490; *Midland R. Co. v. Smith*, 113 Ind., 233; *Organ v. Memphis & L. R. Co.*, 11 S. W. Rep. [Ark.], 96; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 O. St., 169; *Curtis v. La Grande Water Co.*, 20 Ore., 34; High, Injunctions, sec. 643; Rorer, Railroads, 741-757; Wood, Railway Law, 794.) And the same principle is recognized by this court in *Nosser v. Seely*, 10 Neb., 460, *State v. Graham*, 21 Neb., 329, and *Forbes v. McCoy*, 24 Neb., 702.)

We are asked to determine in this action the question of the plaintiff's rights in the premises by reason of his alleged adverse use of the water of the Republican river for more than ten years, and also whether the several irri-

gating companies engaged in directing the water of the river are joint wrong-doers in the sense that an action will lie against the defendant company for all of the damage resulting therefrom to the plaintiff; but those questions are, as we have seen, not presented by this record and will not be examined at this time. It follows, however, from reasons stated that the decree of the district court must be reversed and the action dismissed.

REVERSED.

ROBERT HARE V. E. W. MURPHY.

FILED SEPTEMBER 18, 1895. NO. 6159.

Mortgages: SALE OF PREMISES: ASSUMPTION OF DEBT. Where real estate incumbered by a mortgage is sold and conveyed and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause, or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtednesss existing against the land, he becomes personally liable for the payment of the mortgage debt, and this is true whether his immediate grantor was so liable or not, and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made.

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

F. S. Howell, for plaintiff in error.

Grimes & Wilcox and *T. C. Patterson, contra.*

HARRISON, J.

The plaintiff, as assignee and owner of two promissory notes, and a mortgage on certain real estate given to secure

their payment, instituted this action against the defendant, to whom the real estate had been sold by the grantee or party purchasing from the mortgagor, to recover the amount due upon the notes and mortgage, basing the suit upon a clause in the conveyance of the lands to defendant, by which it is claimed defendant assumed and agreed on his part to pay the mortgage indebtedness. The petition in the case recites that on December 26, 1889, D. A. Spraul executed and delivered to Maggie Callender two promissory notes, each in the amount of $250, and a mortgage, to secure their payment, on tracts of land therein described and situate in Logan county. The conveyance by the mortgagor, on the succeeding day, to William L. Schuster, and the sale and conveyance of the lands again on the 31st day of December, 1889, by Schuster to the defendant E. W. Murphy, and his agreement, as a part of the consideration or purchase price of the property, to pay the indebtedness shown by the notes and mortgage, and that pursuant to such promise, and evidencing it, there was inserted in the deed of the lands by Schuster to defendant a clause in which it was stated that the real estate was incumbered and that the purchaser assumed and agreed to pay the incumbrance. It also states the purchase of the notes and mortgage by the plaintiff and their transfer and assignment to him and non-payment, etc., and closes with a prayer for judgment. The answer contained a denial of any assumption of or agreement by defendant to pay the mortgage indebtedness; a statement that defendant never received or accepted the conveyance or deed described in plaintiff's petition, and that no deed of the lands had ever been delivered to him; that he never entered into or had possession of the premises described in the petition; that a deed, a copy of which was attached to the petition, was caused to be recorded in Logan county by some person unknown to defendant and without his knowledge or consent; that there was no consideration in the purchase of the lands or the "equity" of the vendor,

Schuster, therein for an assumption or agreement on his part to pay the amount of the incumbrances or mortgages, and further, that his grantor, Schuster, had not assumed the payment of the incumbrances, and no liability existed against such grantor for their payment. The reply of plaintiff was, in the main, a general denial of the allegations of the defendant's answer, and also stated that the deed of the lands executed by Schuster and to defendant, as grantee, was filed for record in the office of the county clerk of Logan county on or about January 2, 1890; that on or about the 7th day of January, 1890, the plaintiff, in the course of some business affairs or settlement between him and another party, was offered the notes and mortgage, the basis of this action, and their purchase by him was solicited; that he made, or caused to be made, an examination of the lands and the titles to the same, and thus discovered of record the conveyance to the defendant and the clause asserting the assumption and agreement of the defendant to pay the notes and mortgages, and also investigated or caused inquiries to be made with reference to the financial standing or circumstances of the defendant and ascertained that he was solvent, and that plaintiff, in the purchase of the notes and mortgage, was influenced by and relied upon the responsibility assumed by and of the defendant for their payment, and had it not been for the clause in the deed to defendant, which in terms bound him to such payment, plaintiff would not have purchased the notes and mortgage, and that such purchase was consummated March 1, 1890; that very soon after the deed in question was recorded, the defendant had knowledge thereof and of its contents and recitals, and possessed such knowledge at the time of its execution, and for more than thirty days prior to the date of plaintiff's purchase of the notes and mortgage, and permitted it to remain of record without any effort to have the same annulled or reformed. There was a trial of the issues to the court and a jury, and at the close of the testimony

the trial judge instructed the jury to return a verdict for defendant, which instruction was complied with by the jury, and after motion for new trial heard and overruled, judgment was rendered, and the plaintiff brings the case here by petition in error.

Counsel for the parties, in the briefs filed, agree in the statement that the trial judge was moved to instruct the jury to return a verdict for the defendant by the following considerations: That the petition did not allege, and the evidence failed to show, that defendant's grantor was in any manner or to any extent connected with the mortgage debt, or liable or bound for the payment of it; that the rule of law applicable and governing in such cases is that a mortgage indebtedness assumption clause in a deed, or an agreement by the purchaser of lands to pay incumbrances existing against their lands, will not become operative, or is of no validity, and cannot be enforced by the mortgagee unless it further appears that the grantor in the conveyance, or the person to whom the promise is made, was personally liable for the payment of the mortgage debt. In adopting this view of the law, we think, the learned judge who presided during the trial in the district court erred. It is undoubtedly supported by decisions, many of which are cited by counsel for defendant in their brief, of courts of last resort, the opinions of which, as authority, rank among the very highest and are entitled to great weight, but we do not think best to follow them. It is an established rule of law that where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. (*Shamp v. Meyer*, 20 Neb., 223; *Sample v. Hale*, 34 Neb., 220; *Barnett v. Pratt*, 37 Neb., 349; *Doll v. Crume*, 41 Neb., 655.) In *Keedle v. Flack*, 27 Neb., 836, a case in which the right of a mortgagee to enforce such a promise as the one in the case at bar was in controversy, the rule just quoted was applied

and held to be the basis of the mortgagee's right to recover. Where a party, purchaser of lands, agrees as a part of the contract of purchase to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial and of no consequence to the grantee that his grantor may or may not be personally liable or bound for the payment of the mortgage debt, and by such promise the promiser becomes personally liable to the mortgagee, or assigns, for the mortgage debt, regardless of whether his grantor was so liable or not. (*Merriman v. Moore*, 90 Pa. St., 78; *Dean v. Walker*, 107 Ill., 540; *Bay v. Williams*, 1 N. E. Rep. [Ill.], 340.)

There were some issues of fact in regard to which the evidence was conflicting, and if the view of the law with reference to the liability of a grantee who assumes and agrees to pay a mortgage debt, which we have announced herein as the correct one, had been taken, they should, and doubtless would, have been submitted, under proper instructions, to the jury for their consideration and determination. It follows that the judgment of the district court will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN GRAN ET AL. V. MARY J. HOUSTON ET AL.

FILED SEPTEMBER 18, 1895. No. 7120.

1. **Trial:** INSTRUCTIONS: REPETITION OF PROPOSITIONS. Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a

proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous.

2. ———: ———: ———. It is not ground for the reversal of a case that the trial court repeated a proposition of law in its instructions, where it does not appear that the effect was to perplex or mislead the jury.

3. **Intoxicating Liquors:** LOSS OF SUPPORT: DAMAGES: SLOCUMB LAW: BOND OF SALOON-KEEPER. Within the meaning of the words "all damages" in what is known as the "Liquor" or "Slocumb Law" (Compiled Statutes, ch. 50), and required by the law to be a condition of the bond given by each person licensed to sell intoxicating liquors, is included the loss of means of support of a wife and the children of the husband, who, by drinking liquors sold or given to him in whole or in part by the vendor, principal in the bond, or his agents or employes, becomes intoxicated, and, by the intoxication, disabled or disqualified, physically or mentally, either partially or totally, for labor; also his death caused by the intoxication.

4. ———: ACTION FOR LOSS OF SUPPORT. The action accorded by this act for the death caused by intoxication is not an action proper for the death, but for the loss of means of support resulting from the death.

5. **Action Upon Saloon-Keeper's Bond:** LIABILITY OF SURETIES. In an action upon the bond the liability of the sureties is co-extensive with that of the principal, and to the extent of the sum therein stated they are bound for the payment of all damages adjudged against him, and testimony which in such action establishes his liability fastens it upon the sureties.

6. **Statutes:** RULE OF CONSTRUCTION. It is a rule of interpretation, universally accepted, that in giving construction to a statute the court will consider its policy and the mischief to be remedied and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. (*Wilber v. Paine*, 1 O., 255.)

7. **Intoxicating Liquors:** ACTION ON BOND OF SALOON-KEEPER: LOSS OF SUPPORT: EVIDENCE. "In an action on the bond of a saloon-keeper the fact essential to be shown is the disqualification to support those thereto entitled, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support, and this disqualification may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as by

death." Rule announced in first paragraph of *Chmelir v. Sawyer*, 42 Neb., 362, approved and followed.

8. **Instructions:** HARMLESS ERROR. Where there is no controversy in the evidence as to the existence of a particular fact, an instruction given in which there is an assumption of its truth will not furnish sufficient reason for a reversal of the judgment.

9. **Damages:** FAILURE TO REQUEST PROPER INSTRUCTIONS. An instruction given in regard to the rule for estimating damages, *held*, correct and proper to the extent that it stated the rule, and, further, that if the defendants desired a more extended or explicit statement upon any portion of the subject therein embraced, it should have been prepared and presented to the court with a request that it be read. Failure to do so precludes error.

10. **Objections to Instructions.** An objection to instruction numbered 16, in which it was stated that certain admissions were made in the answer, *held*, not well founded.

11. ———. Objections to the language employed in certain of the instructions examined, and *held* not tenable.

12. **Intoxicating Liquors:** SALE TO HUSBAND: ACQUIESCENCE BY WIFE: DAMAGES. The fact that the wife consented to or acquiesced in the sale or gift of intoxicating liquors to the husband is no defense or bar to an action for damages by the wife and in behalf of her minor children for loss of means of support through the disability or disqualification of the husband for labor caused by drinking the intoxicating liquors.

13. **Pleading.** In order to be available in an action, new matter constituting a defense must be pleaded in the answer. It cannot be introduced under a general denial.

14. **Intoxicating Liquors:** DEATH BY INTOXICATION: INSTRUCTIONS. Refusal to give instructions requested on the question of the proximate cause of the death of a person alleged to have been caused by intoxication, *held*, not erroneous within the rule announced in *McClay v. Worrall*, 18 Neb., 44, *Sellars v. Foster*, 27 Neb., 119, and *Cornelius v. Hultman*, 44 Neb., 441.

15. **Verdict:** IMPEACHMENT: TESTIMONY OF JUROR. The testimony of jurors in relation to matters which are essentially inherent in the verdict is incompetent and will not be received to impeach the verdict.

16. **Damages from Sale of Liquor:** AMOUNT OF VERDICT: EVIDENCE. The verdict, in its amount, when viewed in connection with the evidence, *held* to show that it was not the result

of the influence of passion and prejudice, but sustained by the testimony.

17. **Trial:** JURY. The action of the court in excusing jurors *held* not erroneous.

18. **Witnesses:** ORDER OF EXCLUSION: EFFECT OF DISOBEDIENCE. Where an order has been entered excluding the witnesses and a witness is called who, it appears, has disobeyed the order and has been present in court during the examination of a prior witness, and it further appears that the evidence of the witness called will be upon a branch of the case entirely different and distinct from that testified upon by the witness preceding him and have no connection in substance therewith, and it does not appear that the party desiring to use the witness was at fault in any manner for his disobedience of the order of exclusion, it is not error for the court to allow the witness to testify.

19. **Rulings on Evidence:** EXCEPTIONS: REVIEW. In order to render an alleged error in the admission of testimony available in a review of a case by this court the record must disclose an objection made in the trial court to the introduction of the particular piece of testimony, a ruling obtained thereon, and, if adverse, an exception taken.

20. **Misconduct of Attorney:** OBJECTIONS: RECORD FOR REVIEW. Where it is assigned for error that there was misconduct of an attorney for the prevailing party during the course of argument to the jury, consisting of language used or statements made prejudicial to the rights of the adverse party, the attention of the trial court must be called to the language or statements by an objection, and, if overruled, an exception taken, and this portion of the proceedings incorporated in the bill of exceptions. It will then be reviewed by this court; otherwise not.

21. **Evidence to Show Manner of Death.** Where, so far as the evidence discloses, no one was present at the time of the death of deceased, *held*, that the evidence of the coroner, who was also a physician and surgeon, in which he stated his opinion on the subject, was admissible to show the manner of death.

22. **Trial:** WITNESSES: RULING ON MOTION TO STRIKE OUT ANSWER. Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection and motion is then made by counsel to strike out the evidence contained on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not.

23. **Intoxicating Liquors**: DAMAGES FROM SALE: EVIDENCE. "The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made." The rule announced in the third paragraph of the syllabus in *Houston v. Gran*, 38 Neb., 687, followed and adhered to.

24. ———: ———: ———. Evidence which tended to prove that the money earned by the husband while living was the source of and devoted to the support of the wife and children, *held*, admissible.

25. ———: ———: ———. The ruling of the court as to the admissibility of certain evidence during the cross-examination of one of the defendants in regard to his connection with the saloon business examined and approved.

26. **New Trial**: NEWLY-DISCOVERED EVIDENCE. A motion for new trial will not be granted on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict.

27. **Misconduct of Jury**: EVIDENCE. The statements of an affidavit in relation to the misconduct of a juror, examined, and *held* insufficient.

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

G. M. Lambertson, for plaintiff in error.

Ricketts & Wilson, contra.

HARRISON, J.

On the 5th day of December, A. D. 1889, Mary J. Houston, for herself and on behalf of her minor children, instituted this action in the district court of Lancaster county against John Gran, a retail dealer in liquor in the city of Lincoln, and the sureties on his bond, Jerry Harrington and Thomas Carr. In the petition it is alleged that on the 30th day of March, 1889, John Gran was engaged in the business of selling malt, spirituous, and vi-

nous liquors in the city of Lincoln, under a license authorizing him to conduct such a business, granted to him on or about the 11th day of April, 1889, by the proper authorities of the city; that on March 19, 1889, John Gran, together with Thomas Carr and Jerry Harrington, as his sureties, entered into a bond to the state of Nebraska in the sum of $5,000, and which bond contained the conditions required by our statutory law regulating the execution of such bonds; "that on the 13th day of March, 1889, the plaintiff Mary J. Houston was, and for more than fifteen years prior thereto had been, the wife of one James Houston, now deceased, and that said Houstons were residents of the city of Lincoln, Lancaster county, Nebraska, and the other plaintiffs are their lawful children.

"4. That on the 30th day of March, 1889, the said James H. Houston, deceased, her husband and the father of the plaintiff's children, became greatly intoxicated and continued in a fit of intoxication the whole of the said day and evening of the 30th day of March, 1889, and that he spent the afternoon and evening of said day in the saloon and place of business of the defendant John Gran in said county and said state.

"5. That the defendant John Gran sold, gave, and furnished to him, the said James H. Houston, the liquors that caused his intoxication on the said 30th day of March, 1889, and furnished him the said liquors in sufficient quantities to cause his intoxication, and did cause his intoxication, and he continued to sell and furnish liquors to said James H. Houston, deceased, after he had become so intoxicated.

"6. That on the evening of the said 30th day of March, 1889, the said James H. Houston, while intoxicated from the effects of the liquors so sold and given and furnished to him as aforesaid, in so much so as to not be able to care for himself or protect his person from surrounding danger, wandered upon the tracks of the Chicago, Burlington &

Quincy Railroad Company in said city of Lincoln in the dark of the night, where he was, by reason of said intoxication and his debauched and imbecile condition caused by said liquor, run over and killed by the cars of said company, and where he was subsequently found, mutilated by the trains of said company.

"7. The plaintiffs were all dependent upon the said James H. Houston for their means of support, and the proceeds of his labor and earnings amounted to about $1,500 per year, which he applied to the support of these plaintiffs; that he was about forty years of age, healthy, energetic, and industrious, and a skilled mechanic.

"8. The plaintiff Mary J. Houston and said minor children constitute one family, and are entirely without the means of support. The plaintiffs have sustained damages in the premises in the sum of $5,000, together with interest thereon from the 30th day of March, 1889."

The prayer of the petition was for judgment in the sum of $5,000, interest, and costs. To the petition Gran and his sureties filed the following answer: "They admit that John Gran was engaged in the business of selling malt, spirituous, and vinous liquors under a license duly granted by the city of Lincoln at the time and place mentioned in the petition. They also admit that they executed and delivered a bond to the city of Lincoln, and that the bond in question is described in the plaintiffs' petition, but they deny each and every other allegation contained in said petition except as herein expressly admitted." A trial of the issues resulted in a verdict against Gran and his sureties in the sum of $100. This, in an error proceeding to this court on the part of Mrs. Houston and the children, was reversed and the case remanded to the district court. For report of this decision see 38 Neb., 687. In the second trial of the case in the district court Mrs. Houston and the children recovered a verdict for $5,000. A separate motion for new trial was filed for Jerry Harrington and a joint one for

John Gran and Thomas Carr, which were, on hearing, overruled and judgment rendered in accordance with the verdict. A separate petition in error has been filed in this court on behalf of Harrington and a joint one for the other two interested parties, Gran and Carr, to obtain a review of the proceedings during the trial of the case in the district court.

The first error of which complaint is made and argued in the brief filed for plaintiff in error is therein stated as follows: "The trial judge erred in the instructions given as a whole and in giving undue prominence to the idea that the amount of liquor furnished and the time when given, and the condition of the deceased as to being drunk or sober, was of little importance." It is ably and strenuously contended that the proposition that "every person who sells or gives intoxicating liquors to another, and thereby in whole or in part causes such intoxication of such person, is liable for the consequences of such intoxication" was given and many times in different form or phrase and in several instructions repeated, and thus undue prominence was given to the idea expressed, to the exclusion of other important issues in the case; that the tendency was to mislead the jury and that it had the effect of misleading the jury. As the result of a careful examination of the instructions in which any expression appears in reference to the particular idea or portion of the issues which it is claimed was unduly repeated in connection with the other instructions given and the testimony adduced during the trial, we are convinced that they are not open to the criticism made by counsel, at least not to the extent urged in the argument. It was necessary in properly instructing the jury as to the different phases of the case as presented by the evidence to embody this idea in several of the instructions; and while there may have been repetitions which were not necessities, or which in the opinion of counsel or this court were unnecessary, yet there were none which

tended, nor did they as a whole tend, to mislead the jury, nor can we believe the jury was misled by them, hence there was no prejudice to the rights of plaintiff in error, and the action of the court, the grounds for this complaint, furnishes no tenable reason for a reversal of the case. (*Seebrock v. Fedawa*, 30 Neb., 424; *Carstens v. McDonald*, 38 Neb., 858; *Hill v. State*, 42 Neb., 503.)

It is further urged that the instructions were unfair and erroneous in so far as the rights and interests of the sureties on the bond were involved, and that a distinction should be drawn between the liability of the sureties upon the bond of a liquor dealer and that of the principal, and, as against the surety, the proof that the injuries were the direct result of the intoxication caused by the principal in the bond should be of the clearest character; that, quoting from the opinion in *Curtin v. Atkinson*, 36 Neb., 110, "An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement." The rule announced in that case was applied to sureties on statutory bonds of retail liquor dealers. The condition of the bond required by statute to be given by a retail liquor dealer is "that he will not violate any of the provisions of this act; and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act," (Compiled Statutes, sec. 6, ch. 50, entitled "Liquors,") and to this the sureties bind themselves. In section 15 of the same chapter it is provided: "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, his traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section 6 of this act, a copy of which, properly

authenticated, shall be taken in evidence in any court of justice in this state;" and in section 16: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children." It is clear that the sureties, by signing the bond, bind themselves that the principal shall pay "all damages" for which he may become liable under the provisions of the liquor act, or, as it is popularly designated, "Slocumb Law," and that such damages may accrue to any individual and be recovered by civil action on the bond, and the term "individual" includes a married woman who may sustain any damages on account of the traffic in liquors by the vendor, principal in the bond, and that her suit may be for all damages sustained by herself and her children. Within "all damages" is included loss of means of support, and within "means of support" the disability or disqualification of a husband through intemperance caused by drinking liquors, either partial or total, physical or mental, as partial or total insanity caused by intoxication and incapacitating for labor; also the death, not in an action for the death of the party, except in that its eventuating from the intoxication, causes a loss of support. The liability of the sureties with reference to the damages is co-extensive with that of the principal in the bond, and to the extent of the sum therein named they are bound for the payment of all damages adjudged against him, and the testimony which establishes a liability against him in an action on the bond fastens it upon them; and the instructions in this case which it is claimed were objectionable, and more particularly so in their effect upon the interests of the sureties, if competent and unobjectionable when viewed as affecting the rights and liabilities of the principal in the bond, were equally so as to the sureties and their liabilities arising from their contract evidenced by the bond.

Some particular stress is given by counsel, in the argument, to the use of the word "injured" in section 6 of the liquor law, in the portion thereof wherein it is stated: "Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed, or by his agent or servant," but we think the word "injured" here is synonymous with the word "damaged," and the true reading and meaning of the part of the section referred to is "any person who may be injured,"—in other words, may suffer damage.

It is further insisted, and here we have the pith of the argument of counsel on this branch of the case, that the doctrine that any dealer who furnished any of the liquor by which intoxication was produced is liable cannot be extended or held to cover a case where death is the ultimate result of the intoxication; that this appears from section 18 of the liquor law, which is as follows: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." (Compiled Statutes, sec. 18, ch. 50.) That the statement "it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification" refers

to the disqualification of intemperance alone and does not include death, especially when strictly construed, as is contended it must be as against the sureties upon a bond. In General Statutes of 1873, section 579, chapter 58, identical with section 18, except in the last clause thereof, which is the one now under consideration, it was provided as follows: "It shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person in quantities sufficient to produce intoxication or when under the influence of liquor." In 1881 the chapter containing section 579 was repealed and the chapter, section 18 of which we have quoted, was enacted and section 579 reproduced with the exception and change we have shown. In the law as it existed in 1873 the idea was expressed that it was only when liquor had been given or sold to a person in quantities sufficient to produce intoxication, or the person was, at the time of the furnishing of the liquor, under the influence of liquor, that liability would arise. In the enactment of 1881 this was abandoned and the "contribution" idea adopted by the legislature and embodied in this later act on the subject. It was undoubtedly the intention of the law-makers in enacting the law of 1881 to pass a statute upon the subject involved complete within itself, and to embrace in particular the matter of any damages arising from the traffic licensed under its provisions, even to the quantity and quality of evidence necessary to be introduced in an action instituted therefor. Its wording is "all damages." The intent is unmistakable. To say that where the intoxication produces a partial disqualification, an action will lie; where it produces a total disability, either mentally or physically, but the mere breath of life remains, a liability arises; but where death ensues or is caused and the means of support are permanently destroyed, there is no cause of action,—would be a construction violative and destructive of the legislative intent. Although the meaning which includes the damages

for loss of support by death of the husband caused by intoxication may be said to be not strictly within the words or language employed in the phrase in relation to the proof to be adduced, it is clearly within the language of the other portion, and expressive of the apparent design of the legislature and entirely harmonious with the spirit and policy of the law; and the section in regard to evidence must be interpreted in connection with the other portions of the law and in unison with its spirit and policy, to be applicable in such an action as the one at bar, where it is predicated upon the loss of support of the wife and children claimed to have been caused by intoxication of the husband, and as against the vendor of the liquors drank, which in whole or in part caused the intoxication, or his bondsmen. It is a rule of interpretation, universally accepted, that in giving a construction to a statute the court will consider its policy and the mischief to be remedied and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. (*Wilber v. Paine*, 1 O., 255.) "In an action on the bond of a saloon-keeper the fact essential to be shown is the disqualification to support those thereto entitled, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support, and this disqualification may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as in death." (*Chmelir v. Sawyer*, 42 Neb., 362.) The preponderance of authority and the weight of argument may be said to sustain a right of action for damages consisting of an injury to or loss of the means of support of the plaintiff, the result of the death of the husband from intoxication caused by drinking liquors. (*Smith v. Reynolds*, 8 Hun [N. Y.], 128; *Emory v. Addis*, 71 Ill., 273; *Schroder v. Crawford*, 94 Ill., 357; *Mead v. Stratton*, 87 N. Y., 493; *Hackett v. Smelsley*, 77 Ill., 109; *Davis v. Standish*, 26 Hun [N. Y.],

608; *Rafferty v. Buckman*, 46 Ia., 195; *Chmelir v. Sawyer, supra; Roose v. Perkins*, 9 Neb., 304; *Thomas v. Hinkley*, 19 Neb., 324; *Scott v. Chope*, 33 Neb., 41; Black, Intoxicating Liquors, sec., 310; *Brockway v. Patterson*, 40 N. W. Rep. [Mich.], 192; *Kerkow v. Bauer*, 15 Neb., 150.)

It is assigned for error that "the court erred in giving the eighth instruction." This instruction was as follows: "If you find from the evidence in this case that the intoxication of James H. Houston was such as to deprive him of the normal use of his faculties, either physical or mental, so that he was rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he was subjected, and that by reason of such deprivation of his normal powers of body or mind, his death was produced by his inability to protect or defend himself against the circumstances which threatened his life, and that his death was caused by such inability to so protect and to defend himself, then you are instructed that such intoxication is to be deemed and taken as the cause of his death." It is claimed that the court in the first sentence of the instruction assumed the fact of the intoxication of James H. Houston, and further that the instruction was inconsistent or in conflict with others of the charge in which the jury were told that if the party obtained a portion of the liquor which caused the intoxication of the defendant, it was sufficient to fix a liability upon defendant, while in this the jury were informed that the intoxication must be such as to deprive the deceased of his normal powers of body and mind and render him incapable of caring for himself. As to the first portion of the objection, there was no conflict in the evidence as to the intoxication of the deceased during a part of the day and evening prior to his death. It was a fact which was not controverted, and it was not error for the court to state it as it did in the instruction. (2 Thompson, Trials, sec. 2295.) With reference to the second objection it will suffice to say

that the court charged that the intoxication must be such as to become the cause of death, in the eighth instruction and in the others as to the liability arising from contributing to the existence of such condition, which was entirely competent and proper.

It is urged that the fifteenth instruction was erroneous, in that it told the jury that it was proper in estimating the damages to take into consideration the probable length of life of the deceased, but took no notice of the fact that the period during which the plaintiff in the action would be entitled to the support of the husband would be during their joint lives, and further, that it should have called attention to the drinking habits of the deceased. The instruction referred to was such a one as has been approved by this court in similar cases (*Roose v. Perkins*, 9 Neb., 304; *Sellars v. Foster*, 27 Neb., 118; *King v. Bell*, 13 Neb., 409), and was, to the extent that it purported to cover the issues in the case, correct; and in it the jury were told to take into consideration the habits of the deceased. If a more extended and explicit instruction had been desired upon the subject embraced in this, it should have been prepared and presented by the party, with a request that it be given. Even conceding that there was error committed in the respect claimed by counsel, *i. e.*, that there was a failure to notice and call attention to the expectancy of the joint lives of plaintiff and deceased, it may be said that it was not prejudicial to the rights of defendants. The rights of the five children, of ages ranging from three years to fifteen, were to be weighed, and in view of the sum which it was testified that deceased could earn per day, etc., the amount of the verdict cannot be said to be excessive for lack of consideration by the jury of the element which it is claimed was omitted in the instruction.

It is claimed that the court erred in giving the sixteenth instruction, in which the jury were told that if they found against the principal defendant, the saloon-keeper, they

should also find against the bondsmen, as the execution of the bond was admitted by the answer. We do not think that this objection is tenable. A fair construction of the averments of the answer in regard to the bond may, we think, be said to support the statement of the court in the instruction.

It is next claimed that the court erred in giving on its own motion the sixth, seventh, eighth, ninth, tenth, fifteenth, and sixteenth instructions, and the seventh is attacked as being erroneous and prejudicial in the portion wherein it was said: "You are instructed that if you find from the evidence that the defendant Gran, by himself or by his servants or employes, sold, gave, or furnished to said Houston intoxicating liquors in any quantity whatever, which liquors aided in producing a state of intoxication," etc., and more particularly the words "any quantity whatever," by which it is claimed the jury would be induced to believe that if liquor had been obtained by deceased in Gran's saloon, in even the smallest quantity, it would be sufficient to raise a liability. It must be remembered that the words were followed by others in which the jury received the information that the liquor, whatever the quantity, must have been sufficient to aid in producing the intoxication, and must have contributed to the intoxication. The words used were probably not the best which could have been employed, and it is probable that the idea of contribution in producing the intoxication was more finely drawn or minimized than was entirely proper, but even if this be true, in view of the evidence in relation to the point involved and sought to be conveyed by the instruction, *i. e.*, the amount of liquor, if any, furnished to Houston at Gran's saloon, we cannot believe that it misled the jury or prejudiced the rights of the complaining parties.

It is next argued that the ninth instruction proceeds upon the assumption that defendant Gran had furnished the means of intoxication. We do not think the instruction is open

to the objection urged against it. Counsel contends that the law only makes defendants liable when liquors are sold or given to the party by the dealer, his agents or servants; that other persons may have purchased liquors in Gran's saloon and given them to Houston without the knowledge of Gran, and if so the sureties would not be liable; that all the evidence agrees that Houston had no money, and if he drank in Carr's saloon the liquors were purchased by others; that defendants are only liable, if liable at all, for liquors sold or given by defendant Gran to the deceased. Without discussing the point attempted to be presented by the foregoing statement, we will say that it appears from the evidence of witnesses for both plaintiff and defendants that Houston had money and displayed it in the saloon in question on the day on which it is alleged in the petition he obtained the liquors there, and there is sufficient testimony to support a finding that he received some liquor there on that day for which he paid. The remainder of the argument under this head is mainly devoted to combating, with the vim and skill possessed by counsel, the contribution idea and the manner of its exposition and conveyance through the instrumentality of the instructions to the jury, and, as we have hereinbefore noticed and disposed of this question, it need not be further commented upon here.

It is alleged, "The court erred in giving on its own motion the eleventh instruction and in refusing to give the twelfth instruction asked by the defendants." By these instructions the question is raised of whether the consent or acquiescence of Mrs. Houston in the selling or furnishing of the liquors to her husband constituted a defense to the action, or should, if shown, be taken into consideration by the jury in estimating the damages and in mitigation thereof. The rule governing this question was announced by this court in the case of *Buckmaster v. McElroy*, 20 Neb., 557, in which it was held that a party who purchased, paid for, and drank liquors could maintain an action for damages

resulting to himself from the intoxication produced by the liquors. The principle involved in the present case, where it is sought to interpose the consent of the wife, one of the injured parties, as a defense is the same. We are unable to agree with counsel in the proposition that there is a distinction between the two cases. The rule announced in *Buckmaster v. McElroy* was mentioned in the case of *Curtin v. Atkinson, supra,* in connection with other decisions involving the liability of liquor dealers, and more especially that of the sureties on the bonds of retail liquor dealers, and it was said: "And in *Buckmaster v. McElroy*, 20 Neb., 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on Intoxicating Liquors, 291." We do not care to enter into a discussion of the reasons for and against the rule announced in the first of the two cases mentioned in this connection, but will say that we will adhere to the doctrine formerly established. The consent or acquiescence of Mrs. Houston to the giving or sale of liquors to her husband was matter constituting an affirmative defense, even if it could be allowed in any degree as a defense, and to be available must have been pleaded, and this was not mentioned in the answer, and could not have been taken advantage of under general denial, hence this assignment is clearly without merit. New matter constituting an entire or partial defense to a cause of action must be pleaded in the answer and cannot be shown or made available under a general denial. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610.)

It is alleged as error that the court erred in refusing to instruct the jury as asked upon the question of proximate cause. This assignment refers to the request to give the

twelve instructions offered on behalf of the defendants, three of which were given and the rest refused. The doctrine of proximate cause as set forth in these instructions was discussed and passed upon by this court and disapproved in the case of *McClay v. Worrall*, 18 Neb., 44, also in *Sellars v. Foster*, 27 Neb., 133, and following the rule then announced the trial court did not err in refusing to give the instructions on the subject of proximate cause.

It is claimed by counsel that the verdict of the jury was evidently the result of passion and prejudice. It is argued that this is shown by an excessive verdict and the affidavits of the jurors. A careful examination of the evidence bearing on the point of the amount to be allowed, if any, convinces us that the verdict in this particular is fully sustained by the evidence and cannot be said to show, when viewed in connection with the testimony on this point, that it was fixed in amount by considerations of passion and prejudice. The affidavits of the jurors filed in support of the motion for new trial were in relation to the conversations which occurred among the jurors in the jury room after the jury had retired to consider the case, and were devoted mainly, if not entirely, to making it appear that the jurors were influenced to render the verdict by improper motives and through prejudice. The motives which finally influenced each particular juror to render a verdict must necessarily be and remain within his own conscience, and cannot be correctly judged, as a rule, by chance remarks made or heard during the arguments and conversations which take place while deliberating upon a verdict. These are matters essentially inhering in the verdict. The affidavits presented in the case at bar were objectionable in this respect and cannot be received to impeach the verdict. (*Johnson v. Parrotte*, 34 Neb., 26; *Harris v. State*, 24 Neb., 803; *Gottleib v. Jasper*, 27 Kan., 775; *Bryson v. Chicago, B. & Q. R. Co.*, 57 N. W. Rep. [Ia.], 430.)

One of the grounds of error assigned is that the court excused one Adolph Wagner, a juror who was being examined with reference to his qualifications to serve in that capacity in this particular case, without any sufficient reason for so doing. We have carefully examined the record relating to such alleged erroneous action of the court in respect to this juror, and do not feel warranted in concluding that there was any abuse of the discretion always to be exercised by the court in the discharge of jurors during the impaneling of a jury to serve in a particular case. (*Richards v. State*, 36 Neb., 18; *Omaha & R. V. R. Co. v. Cook*, 37 Neb., 435.) In this connection we will notice the complaint that another juror was challenged and excused on the ground that he was a party defendant in a suit pending in the trial court for trial at that term. This is a statutory cause for challenge. (Code of Civil Procedure, sec. 668*l*.) It is contended by counsel for defendants that, while the record discloses that the juror was a party to a pending action in the trial court, it also shows that it was not at issue, and does not show that it was for trial at that term, and as a matter of fact it was not then tried. On the other hand, counsel for plaintiff contend that the case to which the juror was a party stood for trial May 7, 1894, a day of the term at which this case was tried. There was an entry in what is marked "From Law Docket, District Court, Lancaster County, Nebraska, page 53," introduced during the examination of this juror, in which appears the following: "April Term, A. D. 1894. May 7th, A. D. 1894. Day 157," in connection with the title of a cause in which the name of the juror appeared as a party defendant, upon which we presume counsel for plaintiff base the statement that the case was set for trial May 7, 1894. To us, this entry, without some explanation or further knowledge, is not intelligible, or cannot be said to contain the information claimed by counsel; but it will be presumed that the trial court understood the entry on its

own docket, and, in the absence of any definite showing to the contrary, that it acted advisedly as to the facts necessarily involved in its action in excusing the juror for the cause stated.

It appears that the witnesses were excluded from the court room during the progress of the trial, and that one J. Bush was a witness for plaintiff, and when this witness was called to the stand, counsel for defendants objected to his testifying, the following being the record of what occurred at that time:

"Jacob Bush, sworn and examined by Wilson.

"Lambertson: I object to this witness testifying, on the ground that he has been present in court this morning while the preceding witness was testifying.

"Wilson: Mr. Heaton's examination was restricted to one point and this man's examination will be restricted to the earnings of which Mr. Heaton said nothing.

"The Court: That is all you wish to prove?

"Wilson: Yes.

"The Court: Overruled, on the ground that counsel states that the witness is only to testify to earnings. Exception."

It is true that the evidence of the prior witness was on an entirely different branch of the case from the one to which the testimony of this one was directed, and it does not appear, and no claim is made, that the party calling this witness was in any way or to any degree at fault for his action, which, it is claimed, disqualified him as a witness, and because of which he should not have been allowed to testify. Under the facts and circumstances as they appear of record there was no error in allowing the witness to testify. (1 Thompson, Trials, sec. 281.)

It is alleged that the court erred in admitting a certified copy of the bond, with justification of the sureties, over the objection of counsel for defendants. In the section of the statute which provides for the taking of a bond of a

party who obtains a license to sell liquors it is also stated: "The board taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security." Pursuant to the provisions of this portion of the section referred to, the sureties on the bond, upon which this suit was based, were required and did swear to a written or printed statement regarding their pecuniary ability to become security, and this sworn statement appeared on the bond, immediately below the signatures attached to the bond. Probably in taking the bond a prepared form was used which included in blank a form for the justification of the sureties. It is all included within the certificate of the city clerk to the copy of the bond as a part of it, but as we have only a copy, we cannot say whether it was all upon the one form or not. The record in regard to the offer and admission of the bond is as follows: "Wilson offered in evidence certified copy of the bond sued on in this case. Lambertson objected, as incompetent, immaterial, and not the best evidence; the execution not proved. Overruled and exception." The copy of the bond offered was duly certified to by the city clerk and was admissible under the provisions contained in section 15 of the liquor law, wherein it is stated: "Said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section 6 of this act, a copy of which, properly authenticated, shall be taken in evidence in any court of justice in this state, and it shall be the duty of the proper clerk to deliver, on demand, such copy to any person who may claim to be injured by such traffic;" and the objection was confined to the admissibility of the bond and no reference was made to the justification, either as a portion of the paper, or in and of itself; hence, there was no error, if any committed, which is of any avail.

It is further alleged in this connection that the attorney for plaintiff in his argument to the jury made mention of the sworn statement of the sureties as to their financial responsibility and argued to some extent in respect to facts therein set forth, and that this was misconduct on his part, which was prejudical to the rights of defendants. The portion of the record to which this complaint is directed is as follows: "In the course of the argument of Mr. Wilson for the plaintiff to the jury, and on the subject of the responsibility of the bondsmen, Mr. Wilson said: 'All the time, as far as I can find out, they have never paid one dollar upon the bond.' Lambertson: 'I object to that. There is no proof of it.' The Court: 'There is no evidence of that.' Wilson: 'Carr swears in the bond he is worth more than $5,000 over and above all his liabilities and debts.' Lambertson: 'I object to that. That is over five years ago.' Wilson [reading from the bond]: 'The sureties being duly sworn, each for himself says he is a resident freeholder in the county of Lancaster, and is worth the sum of $5,000 over and above all debts and liabilities which he has incurred.' Lambertson: 'What was the date of that?' Wilson: 'The date of the bond is March, 1888.'" There was also an affidavit filed on behalf of defendants purporting to state the facts and circumstances of the alleged misconduct of the attorney for the prevailing party and an affidavit in behalf of plaintiff in regard to the same matter. It will be noticed that no objection was made to the language used by counsel for plaintiff and a ruling obtained thereon. Where a question of this nature is sought to be presented to this court for review, the attention of the trial court should be directed to the language employed by counsel which is thought to be prejudicial, by an objection, and, if the objection is overruled, an exception taken and such portion of the proceedings made part of the record by the bill of exceptions. It will then be reviewed by this court. This course was not pursued in

the present case. Therefore the assignment of error will not be considered. (*McLain v. State*, 18 Neb., 154; *Bolar v. Williams*, 14 Neb., 386; *Bradshaw v. State*, 17 Neb., 147.)

It is argued that it was error for the court to allow Charles Shoemaker, the coroner, to give his opinion as to the cause of Houston's death. The question calling for his opinion was objected to, the objection overruled, and exception taken by counsel for defendants. The witness was the coroner, and as such took charge of Houston's body, and was a physician and surgeon and his evidence was admissible. (Rogers, Expert Testimony [2d ed.], sec. 49, [1st ed.], sec. 50.)

A question was asked of the plaintiff when testifying, which was answered without objection. Counsel for defendants then moved to strike out the answer as incompetent. This was overruled, to which counsel excepted, and the action of the trial court is now claimed to have been erroneous. The answer given was responsive to the question, and when allowed to be received without objection, whether or not the court will sustain the motion to strike it out becomes discretionary, and we have discovered nothing prejudicial to defendant's rights in the refusal of the court in this particular instance. (1 Thompson, Trials, sec. 718; Abbott, Trial Brief, 62.)

This witness was asked the following question in reference to her husband: "What was his chance of getting work when there was any brick-laying to be done, if you know?" This was objected to, as incompetent, immaterial, irrelevant, and calling for the opinion of the witness. The objection was overruled and error is assigned. The question, while probably susceptible of an interpretation by which it might be said to be calling for an opinion, has a more obvious meaning; *i. e.*, what had been his ability to get work, or was his skill in his trade such as to enable him to obtain work when there was any of the kind in progress,

and so viewing it, it was competent and not error to allow it to be answered. The answer which was given was not responsive, and not in any respect or degree prejudicial or harmful to the rights of defendants.

It is claimed that "The court erred in permitting the plaintiff to testify as to what the deceased would usually do with his money when he was paid off, and permitting her to testify as to who handled the money usually, and who bought food, clothing, and other necessaries." We do not think there is any merit in this objection. The tendency of this evidence, as we read it in the record, was to prove that the money earned by the husband was the source of and devoted to the support of the wife and children and which they claimed was lost to them by his death.

The next complaint is that the court sustained an objection to the following question: "You may state whether or not any instructions had been given by you to your bartender relative to the sale or refusal to sell or give intoxicating liquors to the deceased, James Houston, prior to this date," and excluded the evidence sought to be elicited by it. This question was passed upon when this case was formerly before this court, and it was held: "The fact that a saloonkeeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made," and will now be adhered to without further discussion. (*Houston v. Gran*, 38 Neb., 687.)

During the cross-examination of Thomas Carr he was asked this question: "What capacity were you in in 1883?" [referring to what position he occupied in the saloon business], which was objected to, as incompetent, irrelevant, and immaterial. The objection was overruled and the witness answered: "I was acting as manager then." Counsel for defendant argued that the death of Houston was in 1889, and to permit the defendant Carr to be interrogated in re-

gard to his connection with the liquor business six or seven years prior to such date was prejudicial and could have been but for one purpose, that of showing that Carr was a saloon-keeper during that time, and for that reason was unworthy of belief. It had been shown by this witness during direct examination that he was manager of the saloon business March 30, 1889,—the date when it was alleged in the petition Houston obtained liquors in the saloon in question, and further, that the witness first engaged in the saloon business in 1881. We do not believe that the fact being shown of his being manager in 1883 tended to prejudice his rights in the respect argued by counsel, or in any degree, and must hold this assignment without merit.

We will next notice the statement that the court erred in permitting the following question to be answered (this refers to the cross-examination of Carr): "Since 1881 have you been operating a saloon as principal?" As shown in the record there was no objection made to this question, and the assignment, therefore, cannot be considered.

It is urged that the court erred in not granting plaintiff in error a new trial on account of newly-discovered evidence. In support of this part of the motion for a new trial affidavits were filed setting forth the facts to be proved by the newly-discovered witnesses. This evidence, according to the detailed statements in the affidavits, was cumulative in character, and it cannot be said that it would be sufficient to render clear that which was before doubtful, or of so controlling a nature as to probably change the verdict. Hence, the trial court did not err in refusing to grant this ground of the motion for new trial. (*Schreckengast v. Ealy*, 16 Neb., 510.) A new trial will not be granted on account of newly-discovered evidence merely cumulative in its character. (*Campbell v. Holland*, 22 Neb., 589; 16 Am. & Eng. Ency. of Law, 575–577.)

To support the motion for a new trial in its allegation of misconduct of the jury there appears in the affidavit of

William A. Cadman, one of the jurors on the case, the following statement: "Affiant further says that on the same day, but after the jury were discharged, the defendant Jerry Harrington came to this affiant and had a conversation with him, in which said Harrington said that he was greatly surprised at the verdict, for the reason that he was out with one of the jurors one night during the trial in which he and said juror were drinking together; that said juror said he would never permit a verdict to go against him, Harrington, and he, Harrington, was surprised that he, the said juror, had gone back on his statement." It is claimed on behalf of the defendants John Gran and Thomas Carr that this, if true, was such misconduct of the juror, referred to in the affidavit, as to disqualify him to sit as a juror and vitiated the verdict and entitled them to have it set aside and a new trial awarded. We do not view this position of counsel as tenable. There is no substantive evidence contained in the statement in the affidavit of any misconduct of the juror. The most that can be claimed for it is that it shows that the conversation occurred between the affiant and defendant Harrington, in which the latter stated that a juror had acted in a certain manner. This is wholly incompetent and insufficient. If the statements of the affidavit in regard to the actions of the juror were true, the parties to what transpired deserved punishment. Nothing appears from which it can be said the rights of Harrington's co-defendants were liable to be in any particular or degree prejudiced or for which, at their motion, the judgment should be vacated and a new trial granted. The judgment of the district court is

AFFIRMED.

GEORGE GRAVES V. NORFOLK NATIONAL BANK.

FILED SEPTEMBER 18, 1895. No. 5941.

Review: TRIAL: OBJECTIONS NOT RAISED BELOW. Where the answer in the district court was a general denial of the averments of the petition, the defendant, having urged in that court but one ground for the avoidance of the effect of his alleged indorsement of a promissory note, will not be permitted, for the first time by brief in this court, to urge that he should be held not liable on a radically different ground.

ERROR from the district court of Antelope county. Tried below before HARRISON, J.

J. F. Boyd and *Allen, Robinson & Reed*, for plaintiff in error.

Powers & Hays, contra.

RYAN, C.

This action was brought by the Norfolk National Bank in the district court of Antelope county, and a judgment was rendered in its favor as prayed. The plaintiff alleged as its cause of action that on or about August 30, 1887, C. F. Ellison made and delivered to the defendants George Graves and John M. Leeper, under and by the name of Graves & Leeper, his promissory note for the sum of $400, drawing ten per cent per annum, due August 31, 1888; that before the maturity thereof the payees indorsed their names on said promissory note; that said George Graves and John M. Leeper were liable on said note as indorsers; that it was, at the time the suit was brought, wholly unpaid, and had been duly protested and notice of non-payment had been duly given each indorser. By an amendment to the petition it was averred that Graves & Leeper had no partnership property at the time

the amendment was made, and had had none since plaintiff had become the owner of the note with respect to which it was alleged that they were liable as indorsers. The answer was a general denial and was made by George Graves alone. The trial was to a jury. The evidence showed that on June 1, 1885, George Graves and John M. Leeper entered into a copartnership relation for the purpose of dealing in live stock, and particularly in horses; that notice of this partnership was filed with the county clerk of Antelope county, in which notice it was stated that the object of the partnership was as above described, and that the firm name and style was Graves & Leeper; that on February 4, 1888, a notice of the dissolution of this partnership firm, signed by both parties, was inserted in a newspaper published at Oakdale, in Antelope county. It was also shown that the note sued upon was given for horses sold by the above named firm; that while there was published the above notice of dissolution no knowledge of a dissolution of this firm was possessed by the bank at the time it purchased the above described note; that the bank before it purchased this note had purchased a like note from Graves & Leeper, and, as collateral to the note purchased, had taken assignments of about $3,300 in notes, or thirty-three notes aggregating that amount, the president of the bank could not say which, and that nearly all of these were payable to Graves & Leeper, and, with the assent of both these gentlemen, were indorsed in like manner as was the note in respect to which they were herein sought to be held as indorsers. The contention on the trial, as disclosed by the bill of exceptions, was as to the propositions last above indicated, that is, whether it was so customary to indorse to plaintiff notes made to Graves & Leeper in the same manner as was made the indorsement upon which this suit was brought, that plaintiff was justifiable in purchasing this note as he did and accepting the indorsement of the defendant Graves, appearing thereon when presented, as hav-

ing been duly authorized. When the note and the evidence of protest accompanying it were offered in evidence, the bill of exceptions recites that there was no objection made to either. The objections to the admission and rejection of testimony were of a character which shows clearly upon what line the defense was made, as the following example will serve to illustrate: Mr. Rainbolt, president of the bank, was asked if the note had been indorsed when presented to him for discount, and how it was indorsed. Mr. Graves was not permitted to testify whether or not he had ever authorized any one to make the particular indorsement upon which he had been sued, and that the firm of Graves & Leeper or the witness himself had never received any benefit from the sale of said note. It is possible that under certain conditions of the proofs the proposed testimony of Mr. Graves might have been proper, but it was not when offered, for there was no attempt to prove that Graves had specially authorized Leeper to indorse his name, and whether the proceeds were properly applied was not a matter with which the bank was chargeable, provided the discount upon the faith of the indorsement of Graves was justified by the facts.

There was one instruction given by the court which defined the issues presented by the pleadings. With this exception all instructions were addressed to rules applicable to the consideration of the above indicated questions of fact, which, as has already been said, had been the grounds of contention throughout the trial. On behalf of the defendant Graves no instructions whatever were requested. The instructions given were in no respect faulty; if other instructions were necessary they should have been asked. There was no intimation, however, that there would be a question made as to the form of the indorsement, so far as we can discover, until that point was presented in the brief filed on behalf of Graves, the plaintiff in error, in this court. The principal argument made in this brief is that

the note was made to the partnership firm as such and that the indorsements thereon purport to be of individuals alone, and that, therefore, these indorsements not being those of a payee or indorsee, the individuals whose names are indorsed are not liable as indorsers, for only the firm could be so held. It is hardly fair to the district court to raise such a question for the first time in this court. In *Hawley v. Robeson*, 14 Neb., 435, there were under consideration alleged errors of the district court in respect to an error proceeding brought thither from a justice of the peace, and COBB, J., delivering the opinion of this court, said: "It does not appear that any exception was taken to the bill of exceptions in the district court. The case is brought here for a review of the rulings and judgment of the district court, in which it is alleged there is error. While it is unnecessary to say here—and it is not said that this court will in no case consider objections or points not raised in the court immediately below—yet it may be safely said that no technical point, or one involving mere matter of form, will be considered by this court when raised here for the first time." The point now insisted upon is so far technical in its nature that it should have been insisted upon to some extent in the district court to entitle it to be considered in this court.

The jury found upon questions of fact in favor of the defendant in error, and as thereby was settled all matters really contested, the judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM A. POLLOCK v. DAVID W. WHIPPLE.

FILED SEPTEMBER 18, 1895. No. 5905.

1. **Pleading**: ELECTION AS TO COUNTS: PRACTICE. Error cannot be predicated on the refusal of a district court to compel the plaintiff to elect on which one of two causes of action set out in his petition he will proceed to trial when the two causes of action are identical. The remedy of a defendant in such a case is to move the court to strike out one of the causes of action as surplusage.
2. **Sales**: BONA FIDE PURCHASERS. One who purchases personal property from a conditional vendee, contractee, or lessee in possession thereof, with actual knowledge of the conditions on which his vendor holds possession of such property, is not an innocent purchaser thereof and acquires only such title as his vendor had.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

Barnes & Tyler, *H. A. Miller*, and *Wilbur F. Bryant*, for plaintiff in error.

John Bridenbaugh and *J. S. Lothrop*, *contra*.

RAGAN, C.

On December 9, 1885, D. W. Whipple entered into a contract in writing with Sylvester K. Smith and wife in and by which he leased or bailed to them seventeen head of cows and heifers. By the terms of the contract Smith and wife were to return to Whipple, on the 1st of March, 1890, thirty-four head of cows and heifers. The contract further provided that Smith and wife should not sell or dispose of any of the cattle or their increase let or bailed to them without the consent of Whipple, and if they did so the contract should terminate and Whipple have authority to

take possession of the cattle. Mrs. Smith was the daughter of Whipple, and at the time of the making of this contract resided on a farm of Whipple's in Cedar county. Whipple furnished Smith and wife with seventeen head of cows and heifers, which, with their increase, were kept on the farm upon which Smith resided. In the spring of 1889 these cows and heifers and their increase amounted to about forty head. About that time Smith made a bill of sale of all the cattle in his possession to W. A. Pollock in payment of a debt owing to the latter by Smith, and Pollock took possession of all the cattle on the Smith farm, and Whipple then brought this suit in replevin in the district court of Cedar county against Pollock for said cattle and their increase. There was a trial to a jury, with a verdict and judgment in favor of Whipple, to reverse which Pollock prosecutes to this court a petition in error. Of the errors assigned we notice the following:

1. That the court erred in overruling Pollock's motion to require Whipple to elect on which of the two causes of action set out in his petition he would proceed to trial. The petition contains but one cause of action. It alleges that Whipple is the owner and entitled to the immediate possession of certain cattle, describing them, and contains the usual allegations that the property is wrongfully detained from the possession of the plaintiff by the defendant, to his damage, etc. The second count or cause of action in the petition is identical with the first, except that it sets out the contract referred to above entered into between Whipple and Smith and wife by which the cattle were let or bailed to the latter, and that Pollock had actual knowledge of the contents of this contract before his unlawful taking possession of the cattle replevied. Counsel might have moved the court to strike out of this petition one of the so called causes of action as surplusage, and had they done so no doubt the motion would have been sustained. But the court did not err in refusing to compel Whipple to

election on which of the two so called causes of action set out in his petition he would proceed to trial.

2. The second assignment is that the court erred in admitting in evidence the contract for the letting or bailing of the cattle between Whipple and Smith and wife. We do not think the court erred in admitting this contract in evidence. The principal question in this action, as in every other action of replevin, was whether Whipple at the time he brought this suit was entitled to the possession of the property replevied. The contract between him and Smith and wife, by which he let or bailed to the latter the seventeen head of cows and heifers, and in consideration of which they agreed to return to him thirty-four head of cows and heifers, and by the terms of which they agreed that in case they sold or disposed of any of the property that he should be entitled to take possession of the seventeen head of cows and heifers and their increase, was a material link in the chain of evidence necessary to be produced by Whipple to support the allegations of his petition that at the time the suit was brought he was the owner and entitled to the possession of the property replevied.

3. That the court erred in giving instructions 3, 5, 6, and 7 on his own motion. We have examined the instructions assailed far enough to ascertain that one of the instructions complained of was properly given, and as the assignment is that the court erred in giving all the instructions it is accordingly overruled.

4. The fourth assignment is that the court erred in giving instructions 1 and 3 at the request of Whipple. Instruction No. 1 complained of was properly given, and for the reason stated above the assignment cannot be sustained.

5. The fifth assignment is that the court erred in refusing instructions 1, 2, 3, and 4 requested by Pollock. The second instruction complained of is in the following language: "The plaintiff claims title to the property and the right to the possession thereof under and by the terms of

the contract or agreement in evidence herein, signed by Sylvester K. Smith and Mrs. Sylvester K. Smith. And you are instructed as a matter of law that if you find from the evidence that said contract was violated by the parties signing it, plaintiff can only recover so much of the stock in controversy herein as is shown to be a part of the original cattle delivered by the plaintiff to said Smith and wife at the time the said contract was executed. The plaintiff is not entitled to recover the increase, if any, thereof, nor other cattle except the identical animals so delivered to said Smith and wife." By this instruction the court was requested to tell the jury that if Smith and wife had violated their contract of the letting or bailment of the original cattle by selling any of the original cattle or their increase that Whipple could only recover the original cattle let or bailed. We think this an incorrect interpretation of the contract between Whipple and Smith and wife. By the terms of that contract, if Smith and wife, without Whipple's consent, sold or disposed of any of the original cattle or their increase, then Whipple was "to have the power to take possession of the stock." We conclude, therefore, that the court did not err in refusing to give the instruction quoted above, and as the assignment is that the court erred in giving all the instructions mentioned it is overruled.

6. The sixth assignment is that the verdict is not sustained by sufficient evidence. The principal issue litigated at the trial related to the identity of the cattle replevied and the cattle and their increase originally let or bailed by Whipple to Smith and wife. The evidence on this issue was conflicting, but it sustained the finding of the jury that the cattle replevied were the original cattle and their increase let or bailed by Whipple to Smith and wife. Some attempt was made at the trial to place Pollock in the position of a purchaser for value without notice, but this was a signal failure. The evidence discloses beyond all question that Pollock had actual knowledge of the existence and the con-

tents of the contract between Whipple and Smith and wife, by which the latter had possession of the said seventeen head of cows and heifers and their increase. Indeed, it appears from Pollock's own evidence that he had the contract in his possession prior to the time he took the bill of sale from Smith under which he claims title to the cattle in controversy. He seems to have held this contract as collateral security for a debt which Smith owed him. Pollock does not then come within the protection afforded by the statute to innocent purchasers of personal property from a conditional vendee, contractee, or lessee thereof. Smith and wife had possession of these cattle, but they did not have title to them, and they could convey to Pollock no greater title than they themselves possessed. The verdict and judgment rendered in this case are amply supported by the evidence and the judgment of the district court is

AFFIRMED.

J. B. DICKEY, APPELLANT, V. THOMAS B. PATERSON ET AL., APPELLEES.

FILED SEPTEMBER 19, 1895. NO. 6478.

Validity of Tax Deeds. The provision of section 127 of the revenue law, for the execution of tax deeds under the hand and official seal of the county treasurer, being mandatory, it follows that there is under existing laws no authority for a valid conveyance by said officer of lands sold for delinquent taxes. (*Larson v. Dickey*, 39 Neb., 465.)

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

Saunders, Macfarland & Dickey, for appellant.

Howard B. Smith, contra.

POST, J.

This was an action by the appellant in the district court of Douglas county for the purpose of quieting his title to the east half of lot No. 97, and all of lot No. 98, in Gise's addition to the city of Omaha. The basis of the plaintiff's claim to the property described is a treasurer's tax deed executed September 14, 1889, in which it is recited that said property was, on the 1st day of August, 1887, sold for delinquent taxes for previous years. On final hearing before the district court the petition was dismissed and a decree entered in accordance with the prayer of the defendant's cross-bill, quieting his title as against the plaintiff upon the satisfaction of the latter's claim on account of money paid for taxes.

It is sufficient on this appeal to notice one of the many objections to the tax deed above mentioned as a basis of the plaintiff's claim of title, viz., that it is not attested by the official seal of the county treasurer. In *Larson v. Dickey*, 39 Neb., 463, it was held (1) that the provision of section 127 of the revenue law, requiring tax deeds to be executed under the official seal of the county treasurer; is mandatory; (2) that in the absence of a provision for a seal by said officer, he is without authority to consummate the sale of lands for taxes by the execution of valid deeds therefor. That decision, which is not only the reasonable and natural construction of the revenue law, but the logical and necessary result of previous cases, is decisive of this controversy. It follows that the decree of the district court must be

AFFIRMED.

IRVINE, C., not sitting.

NELLIE FRANK BENTON V. GERMAN-AMERICAN NATIONAL BANK OF KANSAS CITY, MISSOURI.

FILED SEPTEMBER 19, 1895. No. 5754.

1. **Negotiable Instruments:** CONTRACTS OF INDORSEMENT: LIABILITY OF MARRIED WOMEN: CONFLICT OF LAW: LEX LOCI. A married woman and her husband were citizens and residents of the state of Missouri. The wife there indorsed, as an accommodation merely, the promissory note of the husband payable to a bank in that state. The statutes of Missouri in force at the date of the execution of said contract of indorsement provided: "A married woman shall be deemed a *femme-sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity with or without her husband being joined as a party." (Revised Statutes, Mo., sec. 6864, ch. 109.) In a suit at law in this state against the wife on her contract of indorsement, *held*, (1) that the contract of indorsement should be construed and governed and the married woman's liability thereon determined by the laws in force in the state of Missouri at the date of the execution of the contract of indorsement, and not by the laws of the state of Nebraska.

2. ———: ———: ———: EVIDENCE. That the evidence established that the contract of indorsement in the state where made was neither void nor voidable by the married woman because of her coverture, and was as valid and binding upon her as though she had been a man.

3. ———: ———: ———. The contract having been made by a married woman, a citizen of another state, and being a valid and binding contract under the laws of that state, the fact that it was not made with reference to or upon the faith and credit of her separate estate or business afforded no sufficient reason why the contract should not be enforced by the courts of this state.

4. ———: EXTENSION OF TIME FOR PAYMENT: PLEDGES. Evidence that notes deposited as collateral security for the payment of other notes were from time to time renewed, interest collected thereon in advance, and the time of payment extended will not of itself support a finding that the holder of such original notes thereby extended their time of payment.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated by the commissioner.

A. S. Churchill, for plaintiff in error:

The transaction should be governed by the law of Nebraska. Plaintiff in error is not liable, for the reason she did not contract with reference to her separate estate. (*Gillespie v. Smith*, 20 Neb., 455; *Barnum v. Young*, 10 Neb., 309; *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 84; *Davis v. First Nat. Bank*, 5 Neb., 242; *Hale v. Christy*, 8 Neb., 264; Wharton, Conflict of Laws [2d ed.], sec. 273; *Boyce v. Grundy*, 9 Pet. [U. S.], 289; *Norris v. Chambres*, 29 Beav. [Eng.], 246; *Kerr v. Moon*, 9 Wheat. [U. S.], 565; *United States v. Crosby*, 7 Cranch [U. S.], 115; *McGoon v. Scales*, 9 Wall. [U. S.], 23; *Loving v. Pairo*, 10 Ia., 282; *Doyle v. McGuire*, 38 Ia., 410; *Frierson v. Williams*, 57 Miss., 451; *Shacklett v. Polk*, 51 Tenn., 104; *Odell v. Rogers*, 44 Wis., 138; *Chapman v. Robertson*, 6 Paige [N. Y.], 627; *Sell v. Miller*, 11 O. St., 331; *United States v. Fox*, 94 U. S., 315; *Brine v. Hartford Fire Ins. Co.*, 96 U. S., 627.)

Plaintiff in error is released, because the time of payment was extended for a valuable consideration without her consent. It was error to direct a verdict for plaintiff below. (*Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Blake v. White*, 1 Young & C. [Eng.], 420; *Walters v. Swallow*, 6 Whart. [Pa.], 446; *Scott v. Saffold*, 37 Ga., 384.)

James W. Carr, also for plaintiff in error.

Isaac E. Congdon and *Haff & Van Valkenburg*, *contra*:

Plaintiff in error became liable to the defendant in error

by her indorsement of the notes. She has been sued in the proper form under the laws of Nebraska. The courts of Nebraska should enforce her liability which accrued and became fixed in Missouri. (*Thurston v. Rosenfield*, 42 Mo., 474; Story, Conflict of Laws, sec. 241; Wharton, Conflict of Laws, secs. 96, 101, 119, 401, 419; *Meyers v. Van Wagoner*, 56 Mo., 115; Revised Statutes, Mo., sec. 6864, ch. 109; *Osborne v. Doherty*, 38 Minn., 430; *Lomersan v. Johnston*, 44 N. J. Eq., 93; *Bowery Nat. Bank v. Snffiin*, 7 N. Y. Sup., 520; *Sypert v. Harrison*, 88 Ky., 461; *Robinson v. Queen*, 87 Tenn., 445; *Bell v. Packard*, 69 Me., 105; *Binney v. Globe Nat. Bank*, 150 Mass., 574; *Milliken v. Pratt*, 125 Mass., 374; *Bank of Louisiana v. Williams*, 46 Miss., 618; *Thompson v. Ketcham*, 8 Johns. [N. Y.], 189; *Delahaye v. Heitkemper*, 16 Neb., 475; *Joslin v. Miller*, 14 Neb., 93; *Olmstead v. New England Mortgage Security Co.*, 11 Neb., 487.)

RAGAN, C.

The German-American National Bank of Kansas City, Missouri, (hereinafter called "the bank,") brought this suit in the district court of Douglas county against Mrs. Nellie Frank Benton on her indorsement of certain promissory notes previously made by certain parties and delivered to the bank. The notes and Mrs. Benton's contract of indorsement were executed and delivered in the state of Missouri, the notes were payable there, and Mrs. Benton was at the time a married woman and a citizen and resident of said state. The jury, in obedience to an instruction of the district court, returned a verdict in favor of the bank and against Mrs. Benton for the amount due upon the notes. To reverse the judgment pronounced against her upon this verdict Mrs. Benton has prosecuted to this court proceedings in error.

1. One of the defenses to the action interposed by Mrs. Benton in the court below was that the bank, without her

knowledge or consent, had granted to the makers of the notes indorsed by her an extension of time of payment; and it is now insisted that the court erred in instructing the jury to return a verdict in favor of the bank because there was sufficient evidence introduced at the trial to support a finding of the jury that such extension of time for the payment of the notes had been given by the bank to the makers thereof as pleaded by Mrs. Benton. The evidence, and all the evidence, is in substance that some time after the notes indorsed by Mrs. Benton had matured that some of the makers or indorsers of said notes deposited with the bank as collateral and additional security for said notes certain other notes. These collateral notes were from time to time by the bank renewed, their time of payment extended, and interest collected thereon in advance; but these facts did not constitute a contract of extension of time of payment of the notes indorsed by Mrs. Benton. The district court then did not err in directing the jury to find a verdict against Mrs. Benton in so far as this defense is concerned.

2. At the trial, counsel for Mrs. Benton requested the district court to instruct the jury as follows: "You are instructed that the defendant being a married woman at the time she signed the notes in question, she will not be liable for the payment thereof unless it was given with reference to and on the faith and credit of her separate property and estate." The refusal of the district court to give this instruction is now assigned as error. The argument is that the pleadings and evidence conclusively establish that Mrs. Benton at the time she executed the contract of indorsement on which she is sued was a married woman, and that such contract of indorsement was not made by her with reference to or upon the faith and credit of her separate estate or business, and that therefore the contract is voidable by her at her election. We assume that counsel is correct in his contention as to what the pleadings

and evidence establish, and for the purposes of this case only we assume that had the contract of indorsement been made by Mrs. Benton in this state, she being then and there a citizen and resident of this state and a married woman, such contract would have been voidable at her election, unless it appeared that such contract was made by her with reference to and upon the faith and credit of her separate property or business; but the contract made by Mrs. Benton was made in the state of Missouri. Mrs. Benton was a citizen of that state at the time, and the contract was to be performed in that state. Clearly, then, such a contract as this is to be construed and governed by the laws of the state where made, and not by the laws of the state of Nebraska. In *Robinson v. Queen*, 87 Tenn., 445, a married woman, domiciled in the state of Kentucky, signed a note there as surety for her husband. She was afterwards sued on this note in the state of Tennessee. She pleaded her coverture as a defense to the action, and the question arose whether her contract was to be construed and her liability thereon determined by the laws of Tennessee or Kentucky, and the supreme court of the state of Tennessee said: "The first question to be disposed of in this cause is whether a married woman, domiciled in the state of Kentucky, is liable in the courts of this state upon a note made by a firm of which her husband was a member, and executed by her as surety for such firm, where under the laws of Kentucky she had, before the execution of the note, been emancipated from all the disabilities of coverture, and clothed with all the powers of a *femme-sole*, so far as the right to contract and to sue and be sued was concerned. This inquiry we answer in the affirmative. Though some authorities may be found to the contrary, it may now be said to be well-settled law that the validity of a contract, the obligation thereof, and capacity of the parties thereto is to be determined by the *lex loci contractus*, * * * unless there be something in the contract which is deemed

hurtful to the good morals, or injurious to the rights, of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country. The notes involved in this suit were made in Kentucky, payable there, the makers and payees resident there, and, as we have already stated, were valid there, and binding and enforceable against the married woman as fully as if she were a *femme-sole.*" We think this is a correct statement of the law, and that the contract of indorsement made by Mrs. Benton is to be construed and governed and her liability thereon determined by the laws in force in the state of Missouri at the date of the execution of the contract of indorsement. On the trial of this action there was introduced in evidence the statutes of the state of Missouri on the subject of the power of married women to enter into contracts and their liability for contracts made by them. So much of the said statutes as is material here is as follows: "A married woman shall be deemed a *femme-sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity with or without her husband being joined as a party." (Revised Statutes, Mo., sec. 6864, ch. 109.) Here then is evidence that under the laws of Missouri the contract of indorsement made there by Mrs. Benton was neither void nor voidable because of her coverture, but was as valid and binding upon her as though she had been a man; and since the contract of Mrs. Benton was valid and binding in the state where made, the record contains no suggestion of a reason why it should not be enforced by the courts of this state, even though it was not made with reference to or upon the faith and credit of her separate estate or business. We conclude, then, that the learned district judge was right in refusing to give the instruction.

There are some other points argued by counsel for Mrs. Benton in his brief, but it would subserve no useful purpose to examine them, as the judgment of the district court is the only one that could have been correctly rendered under the evidence in the case and the law applicable thereto. The judgment of the district court is

AFFIRMED.

ANDREW DEBNEY V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6807.

1. **Murder:** TIME COMMITTED. The crime of murder is regarded as having been committed at the time when the fatal blow or wound is inflicted, although the death occurs on a subsequent date, and the party is to be tried by the laws in force at the time the injurious act is done.
2. **Criminal Law:** ERRONEOUS INSTRUCTIONS: HARMLESS ERROR. It is not reversible error to give an erroneous instruction where it could not have prejudiced the complaining party.
3. **Homicide:** DELIBERATION. *Held*, That the eighth instruction defining the term "deliberation" was as favorable to the accused as he was entitled to have given.
4. **Criminal Law:** REVIEW OF INSTRUCTIONS. Instructions given to a jury should be construed together; and if, when so considered as a whole, they properly state the law, it is sufficient.
5. ———: INTOXICATION. *Held*, That the twenty-fourth paragraph of the charge to the jury, upon the subject of intoxication, is applicable to the evidence adduced on the trial.
6. **Murder:** CONVICTION: SUFFICIENCY OF EVIDENCE. Evidence *held* to sustain a conviction for murder in the first degree.
7. **Criminal Law:** ADDRESS OF COUNSEL: APPLAUSE BY BY-STANDERS. When the county attorney finished his closing address to the jury some of the by-standers, without the knowledge or connivance of any one connected with the prosecution, applauded, which was quickly suppressed by the presiding

judge, and who administered a rebuke to the persons making the applause. *Held*, That the record failed to disclose that the defendant was prejudiced by the demonstration.

ERROR to the district court for Nance county. Tried below before SULLIVAN, J.

The facts are stated in the opinion.

Reid & Morgan, *M. V. Moudy*, and *Albert & Reeder*, for plaintiff in error:

The accused was entitled to the benefit of the provision of the act passed in 1893, fixing the punishment for murder in the first degree at death or imprisonment for life, at the discretion of the jury. (State Constitution, sec. 24, art. 3; 15 Am. & Eng. Ency. Law, 712; *Brown v. Williams*, 34 Neb., 376; Bishop, Written Law, sec. 110*a*.)

Murder cannot be committed until the injured person dies. (1 Wharton, Criminal Law [8th ed.], sec. 538; Criminal Code, sec. 254; *Heldt v. State*, 20 Neb., 493; 4 Am. & Eng. Ency. Law, 723.)

The twelfth paragraph of the charge to the jury is erroneous. (*Heldt v. State*, 20 Neb., 493; *Long v. State*, 23 Neb., 33.)

The eighth instruction of the court defining the word "deliberation" is erroneous. (*Simmerman v. State*, 14 Neb., 570; *Milton v. State*, 6 Neb., 136; *Craft v. State*, 3 Kan., 450.)

The twenty-fourth paragraph of the charge in reference to intoxication is erroneous. (*Smith v. State*, 4 Neb., 277; *Ballard v. State*, 19 Neb., 609; *Clark v. State*, 32 Neb., 246; *Union P. R. Co. v. Ogilvy*, 18 Neb., 639; *Walrath v. State*, 8 Neb., 90; *City of Crete v. Childs*, 11 Neb., 252; *Dunbier v. Day*, 12 Neb., 596; *Bowie v. Spaids*, 26 Neb., 635; *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb., 33; *Bain v. Wilson*, 10 O. St., 17; *Union Central Life Ins. Co. v. Cheeber*, 36 O. St., 210.)

The applause after the county attorney's closing argument prevented a fair and impartial trial. (*Carr v. State*, 23 Neb., 749.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Nance county, charging the plaintiff in error, Andrew Debney, with murder in the first degree. The prisoner was found guilty as charged, and was by the court sentenced to be hanged, which judgment he seeks to reverse by this proceeding.

It appears from the record before us that the plaintiff in error and his wife, Catherine Debney, being unable to live happily together, a separation took place. Subsequently, a reconciliation was brought about, and, after a time, a second separation occurred. Afterwards, on the 4th day of July, 1893, the accused went to the place where his wife was staying in Nance county and asked her if she would go home with him, and she replied she would not. He then inquired if she never intended to go with him, and upon receiving a negative answer he drew his revolver and shot at his wife five times, three of the balls penetrating her body. After she fell to the ground he jumped upon her and stamped her head and breast. From the wounds thus inflicted Mrs. Debney died in Platte county on the 9th day of the same month. The verdict of the jury found the prisoner guilty of murder in the first degree, but did not fix the penalty.

The first question argued by counsel is whether the accused was entitled to the benefit of the amendment to section 3 of the Criminal Code adopted by the legislature of 1893, fixing the punishment for murder in the first degree at death or imprisonment in the penitentiary for life, in the discretion of the jury. The act of the legislature contain-

ing the aforesaid amendment to the Criminal Code contained no emergency clause; therefore, under the provisions of section 24, article 3, of the state constitution, it did not become operative until three calendar months after the adjournment of the session of the legislature at which it was enacted. The twenty-third legislative assembly finally adjourned on the 8th day of April, 1893, and it is contended by counsel for plaintiff in error that the act, to which reference is made above, went into effect at the expiration of three calendar months from such adjournment, or on July 9, 1893, the day on which the death of Mrs. Debney occurred. On the other hand, the attorney general argues that the amendment did not go into effect until August 1, 1893. In other words, that the "three calendar months" begins to run at the expiration of the month within which the legislature adjourned *sine die*. In our view it is unnecessary, indeed it would be quite out of place, to decide at this time between these conflicting positions of counsel, or to review their arguments or the authorities cited in support thereof, since the time when the amendment of 1893 to section 3 of the Criminal Code went into force does not on the record arise in this case, unless the crime with which the plaintiff in error is called upon to answer was committed on July 9, the day Mrs. Debney died, and not on the 4th day of the same month, when the fatal wounds were inflicted. Undoubtedly the concurrence of both the wounds and the consequent death were necessary for the consummation of the crime of murder, for until death ensues the crime is not complete. The question has been frequently before the courts for adjudication, where is the crime committed when the wounds or blows and the death resulting therefrom occur in different counties or states? The great weight of the decisions hold that, independent of any statutory provision upon the subject, the crime is committed, and is punishable in the jurisdiction, where the fatal wound or blow is given. In other words,

that it is not the place of the death, but the place where the criminal act is perpetrated to which the jurisdiction to try and punish is given. It was the inflicting of the fatal wounds by the prisoner, coupled with the requisite contemporaneous intent or design, which constituted the felony, the subsequent death of Mrs. Debney being a result or consequence rather than a constituent element of the offense. The doctrine is stated thus by Mr. Bishop, section 51, volume 1, of his work on Criminal Procedure: "The true view appears to be that the blow is murder or not, according as it produces death within a year and a day or not; and, therefore, in all cases an indictment lies in the county where the blow was given." To the same effect see 1 Wharton, Criminal Law, 292; Kerr, Homicide, sec. 226; *Rex v. Hargrave*, 5 Car. & P. [Eng.], 170; *Green v. State*, 66 Ala., 40; *State McCoy*, 8 Rob. [La.], 545.

In *Riley v. State*, 28 Tenn., 645, it was held that the venue is proved in a murder case by establishing that the mortal blow was inflicted in the county in which the prosecution is brought, without proving the county where the deceased died. Green, J., in delivering the opinion of the court, says: "For although at common law it was said the offense was not complete until the death, yet it would be doing violence to language to say that the offense was committed in the county where the death happened, although the strokes were given in another county. * * * East says the common opinion was that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act and the death is only a consequence."

United States v. Guiteau, 1 Mackey [D. C.], 498, was a prosecution for the murder of President Garfield. In that case the fatal shot was fired in Washington, in the District of Columbia, from which the president died three months later at Elberon, in the state of New Jersey. Guiteau was indicted and tried for the crime in the District of Colum-

bia. The point was made in the case that the court had no jurisdiction, on the ground that the crime was committed at the place where the death occurred. The court, in an opinion by Justice James, held that the murder was committed within the District of Columbia, since the fatal wound was given there, although the consequent death happened without the district and in one of the states.

State v. Kelly, 76 Me., 331, was a prosecution for murder. The wound which produced the death was inflicted within the limits of Fort Papham, a fort of the United States, from the effects of which wound death ensued at Phippsburg outside the limits of the fort. It was held the crime was committed where the mortal blow was given, and not where the person died. The court, in the opinion, observe: "But it is said that, although a mortal wound may be inflicted within a fort, still, if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort, but at the place where the person dies, and that in such a case the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction; but we are satisfied that when this is so, it is not because the crime is regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime."

State v. Carter, 3 Dutch. [N. J.], 499, was an indictment for murder. The blows were struck in Hudson county, New York, from which the injured party died in New Jersey, where the prosecution was brought. Vredenburgh, J., in speaking for the court upon the question of jurisdiction, uses this language: "The only fact connected with the offense alleged to have taken place within

our jurisdiction is that after the injury the deceased came into, and died in, this state. This is not the case where a man stands on the New York side of the line and shooting across the border kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile, passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state as where he stands in it. Here no act is done in this state by the defendant. He sent no missile, or letter, or message, that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then, for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter in its various degrees in one place, murder in its various degrees in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel."

In the case of *State v. Bowen*, 16 Kan., 475, Brewer, J., after reviewing the authorities bearing upon the question, says: "It seems to us, without pursuing the authori-

ties further, reasonable to hold that as the only act which the defendant does toward causing the death is in the giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least that those movements do not, unless under express warrant of the statute, change the place of offense; and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

In *State v. Gessert*, 21 Minn., 369, it appeared that the defendant was indicted for murder in Washington county, in that state, by feloniously stabbing and wounding one Savazyo, in said county, from which he died in the county of Pierce, in the state of Wisconsin. The indictment was demurred to on the ground that it did not charge the commission of an offense in Washington county. The court sustained the indictment. Berry, J., in passing upon the question of jurisdiction, said: "It is for his acts that defendant is responsible. They constitute his offense. The place where they are committed must be the place where his offense is committed, and, therefore, the place where he should be indicted and tried. In this instance, the acts with which defendant is charged, to-wit, the stabbing and wounding, were committed in Washington county. The death which ensued in Pierce county, though it went to characterize the acts committed in Washington county, was not an act of defendant committed in Wisconsin, but the consequence of his acts committed in Washington county."

If the crime was deemed committed in the county where the fatal wounds were given, as the authorities hold, it follows that the offense was committed when such wounds were inflicted. True, the death occurred at a subsequent date, but it relates back to the time the mortal injury

was received. The accused committed all the acts constituting the offense on July 4. The death which ensued in Platte county on July 9 merely characterized his acts. The crime of murder consists in intentionally and unlawfully causing the death, and while it is true that the crime is not complete until death occurs, yet it is incorrect to say that the death is an element in the crime. It is merely a necessary condition to it. The elements of the crime are the acts of the perpetrator, such as the malice, intent, and the wound or blow. The crime was committed when the mortal wounds were inflicted, and he is to be tried by the laws then in force. A case precisely in point is *People v. Gill*, 6 Cal., 637. The defendant was indicted for the crime of murder. After the blow, but prior to the death of the victim, a change in the statute was made by the legislature. A conviction was had under the amended law, and upon a review of the case the supreme court held the crime to be of the date of the blow and governed by the law then in force. The chief justice, in the course of his opinion, observed: "The blow was given before, but the death ensued after, the passage of the last statute. The death must be made to relate back to the unlawful act which occasioned it, and as the party died in consequence of wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged."

Complaint is made of the giving of the twelfth instruction, which reads as follows:

"12. You would in this case be warranted in convicting the defendant of murder in the first degree, and it would be your duty to do so, if you find the following facts from the evidence and beyond a reasonable doubt: First—That Catherine Debney is dead, and that she died in the county of Platte and state of Nebraska on the 9th day of July, A. D. 1893, or at some time prior to the 21st day of No-

vember, 1893, which is the date of filing the information in this case. Second—That said Catherine Debney died from the effects of wounds and injuries inflicted on her by the defendant in the manner and by the means specified in the information. Third—That the defendant inflicted said wounds and injuries upon the said Catherine Debney unlawfully and with the purpose and intent to thereby kill her; and that the said wounds and injuries were so inflicted by the defendant of his deliberate and premeditated malice. Fourth—that the said wounds and injuries were so inflicted by the defendant upon the said Catherine Debney in the county of Nance and state of Nebraska on the 4th day of July, A. D. 1893, or at some time prior to her death."

The criticism, and the only one, suggested upon the foregoing instruction,—that it assumes the death occurred within a year and a day from the time the mortal blow was inflicted,—is without merit. It is firmly settled by our own decisions that the court has no right in its instructions to assume that any essential element of a crime has been established. It is for the jury alone to pass upon the facts and the credibility of the witnesses. (*Heldt v. State*, 20 Neb., 492; *Long v. State*, 23 Neb., 33.) But the rule stated above has not been violated or infringed by the instruction already quoted. It does not assume that the death occurred within a year and a day after the injury was received, but it was left for the jury to determine from the evidence whether or not, beyond a reasonable doubt, Mrs. Debney died after the wounds were given, and before the filing of the indictment.

Exception was taken to the eighth paragraph of the court's charge, as follows:

"8. 'Deliberation' means the act of deliberating or weighing and considering the reasons for and against a choice or measure. In the sense which the word is here used, an act is done deliberately, or with deliberation, when

it is done in cool blood and not under the influence of violent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of its accomplishment, does it deliberately."

The foregoing definition of "deliberation" is substantially within the rule announced in *Craft v. State*, 3 Kan., 450. It is true this court in *Simmerman v. State*, 14 Neb., 570, criticised the definition given in the Kansas case in so far as it held it was necessary for the accused to have considered the different means for the accomplishment of the killing, and in the case at bar the instruction informed the jury that the weighing of the mode and means of the accomplishment of the act was essential to deliberation. Whether this was correct or not it is unnecessary to determine, for if it was erroneous, it was more favorable to the accused than he was entitled. Error cannot be predicated upon the giving of an instruction where it could not have prejudiced the complaining party. (*Converse v. Meyer*, 14 Neb., 190; *O'Hara v. Wells*, 14 Neb., 403; *Labaree v. Klosterman*, 33 Neb., 150; *Roggenkamp v. Hargreaves*, 39 Neb., 544; *Hurlbut v. Hall*, 39 Neb., 890; *Jolly v. State*, 43 Neb., 857.)

The twenty-fourth instruction given by the court on its own motion reads thus:

"24. While it is a general rule of law that voluntary intoxication is no excuse for the commission of crime, still, in cases of this kind, drunkenness, if proved, may be considered by the jury for the purpose of determining whether the accused at the time of the alleged killing was capable of forming a willful, deliberate and premeditated purpose to take life; and if in this case, although you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evi-

dence that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a design, deliberately and premeditatedly, to do the killing, then such killing would only be murder in the second degree. If, however, the defendant took intoxicants to steady his nerves for the commission of the crime with which he is charged, then his intoxication would neither excuse the crime, nor reduce it from murder in the first degree to the second degree."

The criticism directed against the foregoing is twofold: First, that it imposes the burden of proving intoxication upon the defendant; and second, that the last clause of the instruction is not based upon the evidence. As to the first objection, we remark that counsel for the prisoner are correct when they say that the law does not cast the burden of proving intoxication upon the defense, but that it was sufficient if the jury from the evidence entertained a reasonable doubt upon that point. It must be borne in mind that intoxication is not a justification or an excuse for crime, but evidence of intoxication is admissible in some cases for the purpose of showing no crime has been committed, or to show the degree or grade of the offense, where the crime charged—*e. g.*, murder—consists of different degrees. In a prosecution for murder it is competent for the jury to consider evidence of intoxication as tending to show that the act was not premeditated, and that there was not such deliberation as was necessary to constitute murder in the first degree. (*Smith v. State*, 4 Neb., 278.) By at least four instructions the jury were informed that the accused should be acquitted, unless from the evidence they found that every element of the crime was established beyond a reasonable doubt. The fifteenth paragraph of the charge is in this language:

"15. By the law of the land, every person is presumed to be innocent of crime, and the defendant in this case is entitled to the benefit of this presumption as evidence in

his favor, and in order to convict him of the crime alleged in the information, every fact necessary to constitute such crime must be established by the evidence beyond a reasonable doubt. If, after a full and fair consideration of all the evidence in the case, you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime of murder in the first degree, it is your duty to give him the benefit of such doubt and acquit him of that crime; and if upon a like consideration of the evidence you entertain a reasonable doubt as to the existence of any single fact or element necessary to constitute the crime of murder in the second degree, you should give him the benefit of such doubt, and also acquit him of that charge. You should likewise acquit him of the charge of manslaughter, if upon a full and fair consideration of the evidence you entertain a reasonable doubt of the existence of any fact necessary to constitute that offense."

The foregoing was a full and clear statement of the law upon the question, and put, and properly, the burden upon the state to make out its case, at every point, beyond a reasonable doubt, although it would have been more appropriate to have used the word "degree" instead of "crime." To convict of murder in the first degree it was necessary that the act be done with deliberation and premeditation, and if the evidence left any reasonable doubt upon the minds of the jury as to whether there was any deliberation or premeditation, they knew from the charge that they could not convict him of the highest degree of murder, and they knew, too, that it was not incumbent upon the accused to prove his intoxication at the time the mortal wounds were given, since they were told that the state was required to establish every fact or element necessary to constitute the crime by the evidence beyond a reasonable doubt. This is not a case of conflicting instructions, nor does the instruction criticised undertake to impose the burden of showing intoxication upon the defendant, but the rule upon that point was cov-

ered by the general instructions upon the burden of proof. The doctrine is well settled that instructions must be construed together, and if, when so considered, the law is properly stated, it is sufficient. (*St. Louis v. State*, 8 Neb., 406; *Murphy v. State*, 15 Neb., 383; *City of Lincoln v. Smith*, 28 Neb., 762.) There was sufficient evidence before the jury upon which to base the latter portion of the twenty-fourth instruction. The evidence discloses that the defendant often drank liquors to excess; that when under the influence of intoxicants, he is cross and rough; that after he first saw his wife on the morning of the tragedy and before its occurrence, he drank liquors. The defendant testified that on the day of the shooting he took the priest to Genoa. "I was drinking outside. It was carried out in pails. I got twenty-five cents worth of beer and twenty-five cents worth of rum." The inference could properly be drawn from the testimony that defendant drank "intoxicants to steady his nerves for the commission of the crime." The instruction was applicable to the evidence.

It is also urged that the evidence is insufficient to sustain the verdict. The evidence is uncontradicted that the defendant purchased a revolver a short time before the homicide, and that he inflicted the wounds from which his wife died. The accused relies upon the defense of insanity. After a second reading of the record we are fully satisfied that the defendant at the time fully comprehended what he was doing; that his mind was clear, and that with deliberation and premeditation he committed one of the most atrocious murders that has come under our observation. The evidence bearing upon the defense of insanity was fairly submitted to the jury under proper instructions, and the verdict has settled that point against the defendant. The assignment that the verdict is unsupported by the evidence must be overruled.

Finally, it is insisted that the defendant did not have a fair and impartial trial on account of alleged misconduct

of the audience in attendance upon the trial. It appears that at the close of the argument of the county attorney to the jury the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. The record fails to disclose what was said by the prosecutor in his closing address, nor does it appear from the showing made that the applause was in approval of the sentiments expressed by the county attorney. The incident complained of occurred in the presence and hearing of the trial judge, and he is better enabled than we to determine the effect, if any, the applause had upon the jury. By overruling the motion for a new trial, containing an assignment relating thereto, submitted upon the affidavits both on behalf of the accused and the state, the trial court must have been of the opinion that the demonstration was not of such a character as to influence the verdict, and no prejudice being shown, its determination will not be interfered with. (*Edney v. Baum*, 44 Neb., 294; *State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461.) The accused has been accorded a fair trial, and no prejudicial error appearing in the record, the judgment is

AFFIRMED.

January 10, 1896, fixed for the execution of the sentence imposed by the trial court.

JAMES D. HAWTHORNE V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6065.

1. **Pleading:** DEMURRER. A demurrer searches the entire record, and judgment should go against the party whose pleading was first defective in substance. *Hower v. Aultman*, 27 Neb., 251, and *Oakley v. Valley County*, 40 Neb., 900, followed.
2. **Contempt Proceedings:** AFFIDAVITS: JURISDICTION. In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction.
3. ——: WILLFUL DISOBEDIENCE OF ORDER. Unless the disobedience of an order of court is willful there is no contempt.
4. **Order to Pay Money on Judgment:** DISOBEDIENCE: CONTEMPT. A defendant in a civil action who has failed to comply with an order of court directing the payment by him of a certain sum of money to apply on a judgment recovered therein against him is not liable to punishment as for a contempt in refusing to comply with such order where such disobedience was not willful, but was solely on account of his being insolvent and wholly unable to pay the amount in the order required.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Calkins & Pratt, contra.

NORVAL, C. J.

This was a proceeding for contempt of court instituted in the county court of Buffalo county, resulting in the conviction and sentence of the plaintiff in error. The district court, on a review of the proceedings, affirmed the judgment, and the cause was removed to this court by petition in error.

The affidavit of Warren Pratt, as the basis of the pro-

ceeding, alleges that on the 19th day of November, 1890, in an action pending in the county court of Buffalo county, wherein the Rockford Silver Plate Company was plaintiff and the said James D. Hawthorne was defendant, the said county court entered the following order: "Now on this day, in open court, the parties present by their respective attorneys, upon mature consideration of all the evidence, and being fully advised in the premises, it is ordered, considered, and adjudged by me that the said J. D. Hawthorne apply so much of the money shown by his examination as in his possession as may be necessary to the satisfaction of the judgment heretofore obtained in the county court of Buffalo county, Nebraska, by the Rockford Silver Plate Company against said J. D. Hawthorne in the sum of $108.11, with interest at seven per cent from May 15, 1889, which said judgment was duly transcripted and is now on file in the office of the clerk of the district court of said county; and that he pay the costs of this proceeding, taxed at ——. Sheriff's fees, 85 cents; stenographer's fees, $10; and court fees, ——." The affidavit further alleges, in effect, that the said Hawthorne prosecuted error from this order to the district court, where the same was affirmed, and the clerk of said last named court, in accordance with said judgment of affirmance, certified the decision to the county court that its order might be enforced; that a certified copy of the order of the county court and the affirmance thereof by the district court were duly served upon said Hawthorne, yet he has disregarded the order of said court by refusing to comply therewith, and still refuses to pay said money into said court as required thereby. To the affidavit or information, the plaintiff in error filed the following answer, to-wit: "That he admits all the allegations and orders set forth in the said information, but asserts his utter inability to comply with the order of the court with reference to the payment of the sum of money named in said information; that at the time

his testimony was taken, upon which the said order was made, he was wholly mistaken as to the amount of money in his hands, or belonging to him; that in truth and in fact the amount which he stated at that time to be within his control, to-wit, from $180 to $200, was not in money, but was in outstanding bills due to him for labor done at his bench, but which he expected would be paid as money on demand; that had such payments been made he would have been able to comply with the said order of court, but they were not made, and are still outstanding and many of them not collectible; that there has been no time since the entry of said order in which he has been able to comply therewith; that he is the head of a family, residing with the same in said county, and has no means of supporting himself and family, except by his own personal labor, and that it now takes, and has taken since said order was entered, all his earnings to support himself and family; that he disclaims all intention on his part either to disregard or disobey the order of this court, and has not complied with said order for the reason that he is wholly unable to do so. He therefore asks to be discharged from the alleged contempt of court in not complying with said order. The state filed a general demurrer to the answer, which the county court sustained, and entered an order adjudging the plaintiff in error guilty of contempt of court as charged, and that he stand committed to the jail of the county until he comply with the order of the court which he had disobeyed. The demurrer is predicated upon the single ground that the facts set up in the answer are insufficient to excuse him from complying with the order of the county court. It is a familiar rule of pleading that on demurrer the court must consider the entire record, and judgment must go against the party whose pleading was first defective in substance. (*Bennet v. Hargus*, 1 Neb., 424; *Hower v. Aultman*, 27 Neb., 251; *Oakley v. Valley County*, 40 Neb., 900.)

The first question, therefore, presented for consideration is, does the information, or affidavit, state sufficient facts to constitute a contempt over which the county court had jurisdiction? It is a firmly established doctrine that in, a proceeding to punish for an alleged contempt not committed in the presence of the court, the affidavit on which the proceeding is based is jurisdictional, and all the facts showing that the case is one over which the court has jurisdiction must be affirmatively disclosed by the affidavit. (*Gandy v. State*, 13 Neb., 445; *Ludden v. State*, 31 Neb., 437.) As was said by Wallace, J., in *Batchelder v. Moore*, 42 Cal., 412: "The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to a fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support."

It is urged in the brief filed by the state that the order requiring the plaintiff in error to pay the money into court to apply upon the judgment recovered against him was made in proceedings in aid of execution, instituted under sections 533 and 534 of the Code of Civil Procedure. If this contention is well founded, the record before us fails to disclose the fact. We may surmise, however, that the order was obtained in aid of execution, and if so regarded, how stands the case? By section 533 it is provided that when an execution sued out upon a judgment is returned unsatisfied in whole or in part, a county judge or judge of the district court of the county to which the execution was issued is authorized to issue an order requiring the judgment debtor to appear and answer concerning his property, before such judge or referee appointed by him, at a time and

place to be specified in such order. The next section reads as follows:

"Sec. 534. After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor or otherwise, to the satisfaction of the district court, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by order, require the judgment creditor to appear at a time and place in said county to answer concerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are prescribed in this chapter."

It will be observed that the affidavit of Mr. Pratt, which is the foundation of the contempt proceeding, does not allege, nor does the record before us disclose, that any execution was ever issued upon the judgment in the case of the Rockford Silver Plate Company against James D. Hawthorne, or if one was issued that it was ever returned unsatisfied. Furthermore, the affidavit does not aver that it is in the power of the plaintiff in error to comply with the order of the court, nor does it allege that proof by affidavit or otherwise was made to the county judge that Mr. Hawthorne "has property which he unjustly refuses to apply toward the satisfaction of the judgment rendered against him." It therefore follows that the affidavit in this case is fatally defective, and the order of the county judge, to which the plaintiff in error refuses to yield obedience, is void, because such judge had no jurisdiction to make the same. Again, the answer of the plaintiff in error shows that his disobedience of the order was not willful or contumacious, but was occasioned by his not having the property or money wherewith to satisfy the judgment, and for this reason he was entitled to be discharged. A rule for

contempt for failure to pay a sum of money into court will be discharged when it is made clearly to appear that at the time the proceedings in contempt were commenced and ever since it was not within his power to make the payment, unless it is disclosed that the party has disabled himself from paying. (*Adams v. Haskell*, 6 Cal., 316; *Cochran v. Ingersoll*, 13 Hun [N. Y.], 368; *Ockershausen v. Ockershausen*, 59 Hun [N. Y.], 200; *Pain v. Pain*, 80 N. Car., 322; *Martin v. Burgwyn*, 13 S. E. Rep. [Ga.], 958; *Hogue v. Hayes*, 53 Ia., 377; *O'Callaghan v. O'Callaghan*, 69 Ill., 552.) The Iowa case cited above is on all fours with the one at bar. In a proceeding in aid of execution Hogue, the judgment debtor, was ordered by Hayes, as judge of the district court, to pay over to the sheriff $100 and deposit with the clerk of the court certain notes to apply on a judgment. Having failed to comply with this order, on application of the judgment creditor an attachment was issued against Hogue to show cause why he should not be punished for contempt of court. He filed an answer denying all contempt of court, and showing that prior to the making of the order to pay the money he had paid out the same, and that the notes had been negotiated and had not been in his control and that it was impossible for him to comply with the order of court by producing and depositing them. A demurrer was interposed to the answer, which was sustained, and Hogue was adjudged guilty of contempt of court. Upon a review of the proceedings, Adams, C. J., in delivering the opinion of the court, uses the following apposite language: "The answer shows that the money was paid out before the order was made, and the notes are not within the plaintiff's control. Such being the fact, it was of course impossible to obey the order, and it follows that in failing to obey it there was no actual contempt. The defendant insists, however, that it is immaterial whether the thing ordered to be done was impossible or not, or whether there was any actual contempt or not, that if

the order was impossible to be performed it should have been superseded by an appeal, and as that was not done the plaintiff should be imprisoned as for a contempt. The argument is, that plaintiff cannot be heard to set up the impossibility of obeying the order without impeaching, incidentally at least, the correctness of the order, and that that cannot be done in this way. The argument has the merit of being plausible, but we are unable to conclude it is sound. It would result that a person is liable to be imprisoned for life for failing to do an impossible thing, and merely upon the ground that he is estopped from showing that it is impossible. In our opinion the conclusiveness of the correctness of the order does not reach so far as to preclude the plaintiff, upon a proceeding for an alleged contempt, from showing that there was no contempt in fact. The maintenance of the dignity of the court does not require the punishment of a person as for a contempt which had no existence in fact, nor are the rights of the creditor subserved in such case. We think that the judgment of the district court cannot be sustained, and that the order of commitment should be set aside." The cases cited above are equally in point with the one from which the foregoing excerpt was taken. Construing the answer of Hawthorne to the rule to show cause in the light of these decisions, there is no room for doubt that the order committing the plaintiff in error to jail should be vacated and set aside, since it is manifest that he is entirely unable to comply with the order of the county court for the payment of money. Courts will not require of a party an impossibility. There has been no willful disobedience of a lawful order, hence no contempt of court has been committed. The judgment of the district court is reversed and the order of commitment set aside.

REVERSED.

GREEN S. GRAVELY V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. NO. 7486.

1. **Criminal Law: JURORS: ORDER OF MAKING PEREMPTORY CHALLENGES.** Inasmuch as the statute does not prescribe the order in which peremptory challenges to jurors shall be taken by the accused and state respectively, the order in which the right to challenge shall be exercised is left to the sound discretion of the trial court, and its decision upon that point will not be disturbed, unless it clearly appears that there has been an abuse of discretion prejudicial to the party complaining. Rule applied.
2. ———: **INSTRUCTIONS: EXCEPTIONS: REVIEW.** Instructions, given or refused, will not be reviewed where no exception is taken in the trial.
3. **Murder: MOTIVES OF ACCUSED: EVIDENCE.** In a trial for murder it is competent for the state to adduce evidence against the defendant tending to show a motive for the homicide.
4. **Homicide: EVIDENCE.** *Held*, That the evidence sustains a verdict for manslaughter.

ERROR to the district court for Lancaster county. Tried below before STRODE, J.

Cobb & Harvey and *W. B. Price*, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

NORVAL, C. J.

The plaintiff in error was charged with murder in the first degree in the district court of Lancaster county. He was convicted of the crime of murder in the second degree, which judgment was reversed by this court at the January, 1894, term, the opinion in the case being reported in 38 Neb., 871. On the second trial the plaintiff in error was found guilty of manslaughter, and sentenced to a term of nine years in the penitentiary. This last judgment he seeks to reverse by this proceeding. Four grounds are re-

lied upon by the counsel for the prisoner for a new trial, which we will consider in the order presented in the briefs.

The first objection is predicated upon the ruling of the trial court to the effect that by the accused waiving his eleventh peremptory challenge he thereby waived his remaining challenges. The record before us discloses that the court below, as well as the county attorney and the counsel for the defendant, at the commencement of the selection of the jury in this case entertained the erroneous opinion that the statute gave to the state eight peremptory challenges instead of six. The challenging of the jurors was commenced upon the theory that the defense had sixteen peremptory challenges and the state eight, and under this misapprehension as to the law the state was required to, and did, exercise one peremptory challenge, followed by two challenges for the defense, and then the state one and the defense two. In this mode five challenges were exhausted by the state, and by the accused ten, when it was discovered that the statute only allowed the state six peremptory challenges. Thereupon the trial court directed the defendant to avail himself of the six remaining challenges, if he so desired, giving to the state the last challenge. The defendant then waived his eleventh challenge, and the court held, and so informed counsel in advance, that by so doing he waived his other five challenges. It is for this decision and ruling that a reversal of the judgment is asked.

By section 467 of the Criminal Code, on the trial of a person for a crime punishable with death, the accused is authorized to peremptorily challenge but sixteen jurors, and the prosecuting attorney six. While the statute prescribes the number of challenges, it contains no provision as to the order in which the right shall be exercised by the state or by the prisoner. This being true, it is clear that the course of proceeding in regard to peremptory challenges is left to the sound discretion of the trial court, and its deci-

sion in that regard is no cause for disturbing the verdict, unless it is clearly made to appear that there has been an abuse of discretion. Upon this point the authorities are harmonious, and fully sustain our conclusion. (1 Thompson, Trials, sec. 94; *Commonwealth v. Piper*, 120 Mass., 185; *Turpin v. State*, 2 Crim. Law Mag. [Md.], 532; *State v. Pike*, 49 N. H., 399; *State v. Pierce*, 8 Ia., 231; *Schufflin v. State*, 20 O. St., 233.) While the statute fails to prescribe the order in which challenges to jurors shall be made, manifestly the legislature never contemplated that the state should exhaust all its peremptory challenges before the defense is called upon to challenge, or that the accused should first take all his peremptory challenges. The more fair and equitable rule is the one adopted in this case. The waiver by the plaintiff in error of his eleventh challenge was a waiver of his remaining five challenges, and counts against him as though he had actually made them.

The second ground argued for a reversal is based upon the refusal of the trial court to give the defendant's sixteenth instruction, which reads as follows:

"16. The character of the defendant is not an issue in this case, but you are instructed that the law presumes that he has a good character until he himself puts it in issue, and then, and only then, can the state offer evidence of his bad character; therefore you are instructed that you are to presume that the defendant has a good character, as he has not put it in issue."

We cannot review the foregoing request to charge, for more than one reason. In the first place, no exception in the trial court was taken to the refusal to give this instruction. By a long line of decisions it has been held that such exception is indispensable to review the action of the trial court upon the giving or refusing of instructions. (*Heldt v. State*, 20 Neb., 499; *Carleton v. State*, 43 Neb., 373; *Warrick v. Rounds*, 17 Neb., 415; *Nyce v. Shaffer*, 20

Neb., 509; *Levi v. Fred*, 38 Neb., 564; *City of Chadron v. Glover*, 43 Neb., 732; *Bloedel v. Zimmerman*, 41 Neb., 695; *Barr v. City of Omaha*, 42 Neb., 341.) Again, the assignment of error as to the refusing of this instruction is insufficient. The accused requested sixteen instructions, numbered from 1 to 16 inclusive, all of which the court below declined to give to the jury, and such refusal is assigned as error, the assignment in the petition in error, as well as in a motion for a new trial, being that the court erred in not giving the entire sixteen instructions asked. That such an assignment is bad, unless each of the instructions in the group was proper and should have been given, is no longer an open question in this court. (*Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 269; *Jenkins v. Mitchell*, 40 Neb., 664; *Murphy v. Gould*, 40 Neb., 728; *Armann v. Buel*, 40 Neb., 803; *Berneker v. State*, 40 Neb., 810; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Havens v. Grand Island Light & Fuel Co.*, 41 Neb., 157; *Rea v. Bishop*, 41 Neb., 202; *City of Chadron v. Glover*, 43 Neb., 732; *Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 110; *Mullen v. Morris*, 43 Neb., 611; *Funk v. Latta*, 43 Neb., 741.) An examination of the several instructions requested by the prisoner discloses that the most of them were fully covered by the charge of the court, and, therefore, it was not reversible error to repeat them. It follows that the assignment relating to the refusal of the instructions must be overruled. The result would be the same, even though we should brush aside the technical objections already mentioned to the consideration of instruction copied above. Conceding that said request to charge was faultless as an abstract proposition of law, yet it was properly refused, for the reason it was not applicable to the case made by the proofs. True, no evidence was given or offered as to whether the general reputation of the accused for being a peaceable and quiet man was good or bad, nevertheless, as is suggested by the attorney general, the witnesses

for the state, in detailing the circumstances of the crime, and of the causes which led up to its commission, incidentally disclosed the character of the prisoner to be unenviable, and that he had boasted of "having served a term in the penitentiary for killing a nigger." From a careful examination of the record we are convinced that the court below did not err in refusing the request to charge.

Objection is made to the testimony of Clara Thomas, the wife of the deceased, as to what transpired at her home on the afternoon of the day preceding the killing. She testified that the accused came to her house with Will Jamison and Bud Mills at the time stated and Gravely said "he wanted to shoot dice, and then Will Jamison lost a twenty-five cent piece and threw the dice away, and I told him to buy some dice. I told Mr. Gravely to buy some dice, and he said he had enough money out of those niggers, and then I ordered him out of the house, and then he pulled a gun and said he just got out of the pen for killing one nigger, and I'll just kill another. I just as soon go back for you." This conversation and threat were communicated by Mrs. Thomas to her husband the evening after the occurrence thereof. The theory of the defendant below was, and is, that the killing was in self-defense. From the evidence adduced on the trial it is fully established, without contradiction, that the quarrel with Mrs. Thomas was the sole foundation of the difficulty between the plaintiff in error and Mr. Thomas, which terminated in the taking of the life of the latter. Evidence of the quarrel had with the wife of the deceased was admissible as tending to show a motive for the homicide and to disprove the claim of self-defense. The rule is that "when it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, facts tending to show a motive, although remote, are admissible in evidence." (*Dill v. State*, 1 Tex. Ct. App., 278; *Baalam v. State*, 17 Ala., 451; *Coward v. State*, 6 Tex.

Ct. App., 59; *People v. Walters*, 98 Cal., 138.) The testimony objected to, standing alone, would be entitled to but slight weight, but we cannot say, when considered in connection with the other evidence in the case and the circumstances surrounding the killing, that the court erred in permitting it to go to the jury. The general rule undoubtedly is as stated in *Carr v. State*, 23 Neb., 749, that threats made by the accused prior to the homicide, to kill or injure some other person than the deceased, are inadmissible against him, but an exception to the rule is that threats against, or quarrels with, members of the family of the deceased may be received as tending to establish a motive, where connection is shown between such threats or quarrels and the offense charged.

The remaining point argued is that the evidence is insufficient to warrant a conviction. The killing of Thomas by the plaintiff in error is undisputed, but the latter claims that the deceased was the aggressor and that his life was taken by Gravely in defense of his person. We have with great care perused and given due consideration to the evidence contained in the bill of exceptions, and find that the testimony was ample to sustain the verdict, if the witnesses for the state were credible. The question of the credibility of the witnesses was properly submitted to the jury by the instructions, and, so far as we are able to determine from the record, the plaintiff in error has had a fair and impartial trial and has been convicted upon sufficient legal testimony. There being no error in the record the judgment is affirmed.

JUDGMENT AFFIRMED.

PAXTON & HERSHEY IRRIGATING CANAL & LAND COMPANY, APPELLANT, V. FARMERS & MERCHANTS IRRIGATION & LAND COMPANY, APPELLEE.

FILED OCTOBER 1, 1895. No. 7724.

1. **Constitutional Law:** TITLES OF BILLS. The provision of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," is intended to prevent surreptitious legislation and not to prohibit comprehensive titles.
2. **Irrigation:** EMINENT DOMAIN: STATUTES: CONSTITUTIONAL LAW. The term "irrigation," as employed in the title of the act of March 27, 1889, viz., "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," etc., is used in its popular sense and implies the means of conducting water to the land to be supplied. The provision therein for the acquiring by irrigating companies of the right of way for canals and ditches accordingly *held* to be within said title and not to conflict with section 11, article 3, of the constitution.
3. **Eminent Domain:** CONSTITUTIONAL LAW: LEGISLATIVE AUTHORITY: COURTS. To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property, the limit of judicial interference being the duty to declare void acts clearly in conflict with the constitution.
4. ———: ———: ———. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the element of public utility. Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and not to a particular individual.
5. ———: RAYNER IRRIGATION LAW. The use of water for the purpose of irrigating contemplated by the act of March 27, 1889, known as the "Rayner Irrigation Law," is a public use within meaning of the constitution.
6. **Irrigation:** RIGHT OF WAY: CONDEMNATION. Section 8 of article 2, of the "Rayner Irrigation Law" confers upon irrigating companies organized under the laws of this state power to

acquire the right of way for necessary canals, reservoirs, etc., by condemnation.

7. ———: CONSTRUCTION OF ACT. The word "if" in the first line of the section last above mentioned is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act.

8. ———: ———: LANDS OF CORPORATIONS. The provision of section 3, article 1, of the irrigation law of 1889, viz., "No tract of land shall be crossed by more than one ditch," etc., *held* to include lands owned by corporations as well as natural persons.

9. **Statutes:** PROVISO: CONSTRUCTION. A proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception.

10. **Irrigating Companies:** CONNECTION OF DITCHES. The irrigation law of 1889 does not confer upon one irrigating company any right to connect with the ditches of another or take water therefrom without the consent of the proprietor.

11. ———: CONSTRUCTION OF STATUTE: DITCHES. What is meant by the exception contained in section 3, article 1, of the act above mentioned is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may as constructed be made to supply the lands within reach of both.

APPEAL from the district court of Lincoln county. Heard below before SINCLAIR, J.

The opinion contains a statement of the case.

Frank T. Ransom and *T. Fulton Gantt*, for appellant:

The irrigation law of 1889 is unconstitutional in so far as it attempts to confer authority to condemn lands for right of way for canals. The act contains more than one subject. Article 2 treats upon a subject foreign to that mentioned in the title of the act, and is, therefore, in contravention of section 11, article 3, of the state constitution

which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." (*City of Tecumseh v. Phillips*, 5 Neb., 305; *Messenger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817.)

The act is unconstitutional because it attempts to authorize the taking of private property for private use. (State Bill of Rights, sec. 21; *Welton v. Dickson*, 38 Neb., 767; *Jenal v. Green Island Draining Co.*, 12 Neb., 163; *Witham v. Osburn*, 4 Ore., 318; *Lorenz v. Jacob*, 63 Cal., 73; Randolph, Eminent Domain, 37.)

Statutes permitting drainage canals to be placed on land for the benefit of an individual proprietor have uniformly been held to be invalid as being for private purposes, unless there was some provision in the state constitution permitting such statutes. (*Fleming v. Hull*, 73 Ia., 598; *McQuillen v. Hatton*, 42 O. St., 202; *Reeves v. Wood County*, 8 O. St., 333.)

The canals already constructed may be made to answer the purpose for which the defendant's proposed canal is desired and intended, and defendant should be enjoined from crossing the land of plaintiff with an irrigating ditch. (Compiled Statutes, sec. 3, ch. 93*a*; *San Luis Land, Canal & Improvement Co. v. Kenilworth Canal Co.*, 32 Pac. Rep. [Col.], 860.)

Thomas C. Patterson and *Grimes & Wilcox, contra:*

So far as the act of 1889 declares irrigation to be a public use, and provides for the condemnation of land for right of way for canals that are projected and built for the purpose of supplying water to the public for irrigation, it clearly comes within the constitutional power of the legislature to legislate for the public welfare. (*In re Bonds, Madera Irrigation District*, 28 Pac. Rep. [Cal.], 272; *Cumming v. Peters*, 56 Cal., 593; *Lux v. Haggin*, 69 Cal., 255;

Lindsay Irrigation Co. v. Mehrtens, 97 Cal., 677; *Talbot v. Hudson*, 16 Gray [Mass.], 425; *Oury v. Goodwin*, 26 Pac. Rep. [Ariz.], 376; *Barbier v. Connolly*, 113 U. S., 31; *Head v. Amoskeag Mfg. Co.*, 113 U. S., 16; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Bankhead v. Brown*, 25 Ia., 540; *Pocantico Water-Works Co. v. Bird*, 29 N. E. Rep. [N. Y.], 246; *Omsted v. Proprietors of the Morris Aqueduct*, 46 N. J. Law, 495; *St. Helena Water Co. v. Forbes*, 62 Cal., 182; *Matter of New Rochelle Water Co.*, 46 Hun [N. Y.], 525; *Stamford Water Co. v. Stanley*, 39 Hun [N. Y.], 424; 6 Am. & Eng. Ency. Law, 524; Cooley, Constitutional Limitations [4th ed.], 672.)

The following cases were also cited to sustain the decision of the lower court: *Downing v. Moore*, 20 Pac. Rep. [Col.], 766; *Thomas v. Guiraud*, 6 Col., 530; *Dick v. Caldwell*, 14 Nev., 167; *Simpson v. Williams*, 18 Nev., 432; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 32 Pac. Rep. [Col.], 724; *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 21 Pac. Rep. [Col.], 1028; *Clifford v. Larrien*, 11 Pac. Rep. [Ariz.], 397; *Wyatt v. Larimer & Weld Irrigation Co.*, 33 Pac. Rep. [Col.], 144; *Cole v. Logan*, 33 Pac. [Ore.], 568; *Knoblauch v. City of Minneapolis*, 57 N. W. Rep. [Minn.], 929; *Barrett v. Kemp*, 59 N. W. Rep. [Ia.], 77; *Cherry v. Matthews*, 36 Pac. Rep. [Ore.], 529; *City of Santa Ana v. Harlin*, 34 Pac. Rep. [Cal.], 225; *Waterloo Water Co. v. Hoxie*, 56 N. W. Rep. [Ia.], 499; *Western Maryland R. Co. v. Patterson*, 37 Md., 125; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St., 103; *Eidemiller Ice Co. v. Guthrie*, 42 Neb., 238; *Tigard v. Moffitt*, 13 Neb., 565; *Gause v. Perkins*, 3 Jones Eq. [N. Car.], 177.

POST, J.

This is an appeal from a decree of the district court for Lincoln county dismissing the action of the plaintiff company, whereby it seeks to prevent the appropriation by the

defendant of a right of way through its lands for an irrigating canal. In the petition it is, in substance, alleged that the plaintiff company is the owner of 10,000 acres of land, bounded by the North Platte river, in Lincoln county, and also of an irrigating canal known as the "Paxton & Hershey ditch," situated on its said lands and on the lands of other adjoining proprietors; that upon its said land, and nearly parallel with the ditch above mentioned, is an irrigating canal known as the "North Platte Irrigating & Land Company's ditch," and herein referred to as the "North Platte ditch," and that in the vicinity of the plaintiff's lands sought to be watered by the defendant's proposed canal is an irrigating canal known as the "Cody & Dillon ditch." The plaintiff, it is alleged, has constructed a large number of laterals from its said canal, which it is proposed by the defendant company to cross, thus necessitating the construction and maintaining of many bridges, flumes, and conduits, and otherwise needlessly harassing it in the use and enjoyment of its said property. The defendant company, which is organized for the purpose of building and maintaining ditches, canals, aqueducts, and reservoirs for the storage and conveyance of water and of selling water to consumers for irrigating, power, and other useful purposes, prior to the commencement of this action, entered upon the plaintiff's said land, and located and staked out a ditch thereon four and one-half miles in length, and is taking steps to condemn a right of way therefor, but that the three ditches above described afford ample facilities for the irrigation of all of the land sought to be supplied by the defendant company, and that water sufficient to supply the defendant's wants can be furnished from the ditches already constructed, should connection be made therewith, at less expense than by the construction and maintaining of the proposed ditch through the plaintiff's land to the source of supply, the North Platte river. The answer, so far as it is deemed necessary to notice it, consists of an allegation

that the defendant is engaged in the construction of an irrigating canal some twenty miles in length for the purpose of supplying with water from the North Platte river certain territory not within the reach of either of the canals already constructed, a denial that the plaintiff's canal is capable of supplying the lands which the defendant proposes to water, and an allegation that the water supplied by said canal is barely sufficient for the irrigation of the plaintiff's own land. Accompanying the pleadings is a map showing the location of the proposed ditch, as well as those already completed, and which is essential to a perfect understanding of the question at issue. (See page 890.)

The district court, upon entering the decree complained of, submitted the following findings of fact and conclusions of law:

"1. The plaintiff is a corporation organized and existing under and by virtue of the laws of this state for the following purposes: To construct, own, operate, and maintain a canal or canals, ditch or ditches, for irrigation purposes, to purchase, acquire, own, sell, and convey all real estate that may be necessary for such purposes, and to acquire, own, sell, and convey real estate in connection with carrying on an irrigating business, and to acquire, own, sell, and convey real estate for other purposes deemed advisable or advantageous to the corporation and its interest, and to cultivate and improve such lands as shall be owned by the corporation; to furnish, sell or rent water for irrigation of lands which shall be owned by said corporation and within its area and other lands within reach of any canal or canals which shall be owned, operated, or controlled by the corporation owning live stock and raising the same in connection with the land held or controlled by this corporation.

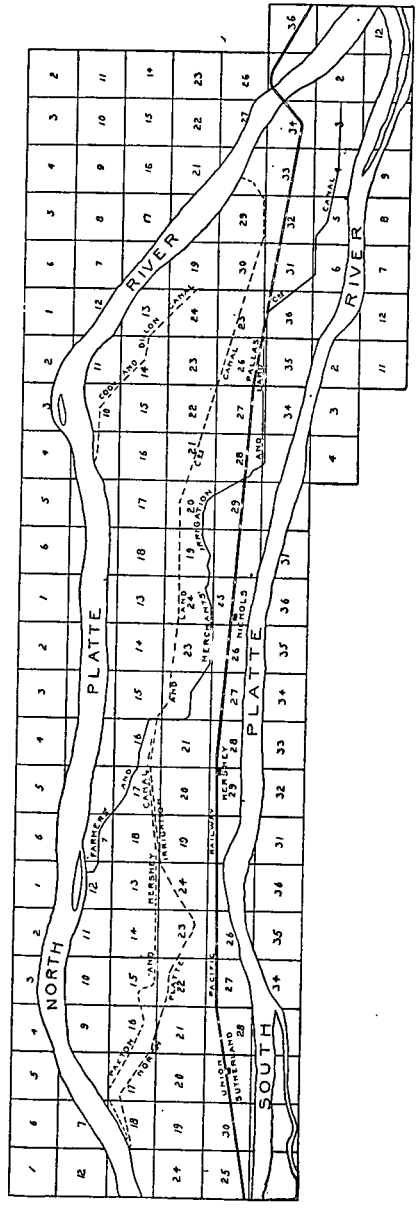
"2. The plaintiff is the owner of about 7,000 acres of land located on and adjacent to the banks of the North Platte river, in Lincoln county, Nebraska, as alleged in its

SURVEY SHOWING THE LOCATION

OF THE

FARMERS & MERCHANTS IRRIGATION AND LAND COMPANY'S CANAL,

LINCOLN COUNTY, NEB.



petition, and is the owner of an irrigating canal running across its said lands, and the lands of others, for a distance of about ten miles, which canal is finished and constructed for the purposes of irrigating the land under the said ditch, and for the purposes set forth in the articles of incorporation of the plaintiff.

"3. The defendant is a corporation organized under the laws of this state for the following purposes, among others: The building and maintaining of canals, ditches, and aqueducts and reservoirs for the storage and conveyance of water, and the selling of such water to consumers for irrigation, agricultural, power, and other useful purposes.

"4. The plaintiff is the owner of the tract of land proposed to be crossed by the proposed canal of the defendant and which lies under the plaintiff's ditch and which is proposed to be crossed by defendant's ditch for a distance of four miles and a half.

"5. All of the land of the plaintiff across which the defendant proposes to construct its canal, for a distance of four and a half miles, can be irrigated from and by plaintiff's canal, and it is not proposed by the defendant to water or irrigate any of plaintiff's said land within said four miles and a half.

"6. That the defendant corporation is the owner of no land to be watered by its proposed ditch, but that the object of said corporation is for the purpose of constructing and operating a canal or ditch for irrigation purposes for the lands lying contiguous under said ditch for other parties to hire.

"7. That at the points where it is alleged that the defendant's ditch crosses the lands of the plaintiff it is necessary for the defendant to run said ditch across said lands in order to get its water out of the North Platte river, with necessary fall in accordance with the surveyed route of its ditch; that in the territory covered by the ditch of the plaintiff's it is not the object nor the purpose of the

defendant's ditch to irrigate said land, but lands lying below and beyond the territory of the plaintiff's ditch.

"8. There are about 40,000 acres of land between the North and South Platte rivers, and in this territory the evidence shows that the North Platte Ditch Company has a ditch about twenty miles long running through the middle portion of the peninsula formed by the two rivers. The plaintiff's ditch is also constructed in this peninsula and is in length about ten miles. The Cody & Dillon ditch is also in this peninsula and is about six miles in length. A great amount of evidence has been taken to show the capacity of these several ditches for watering the land in the peninsula, including the land proposed to be watered by the defendant's ditch. The location of these several ditches in the peninsula, their dimensions and their capacity, appears from the evidence and the maps introduced in the evidence, but the court does not find nor pass upon the evidence relating to the question as to whether or not this water could be supplied by the defendant's constructing their ditch up and to the plaintiff's ditch and receiving water therefrom, for the reason there is no provision in the act contemplating it is obligatory upon the defendant to so do.

"9. The court further finds that the defendant's proposed ditch will cross the lands of the plaintiff through which plaintiff's ditch has already been built which lands are also irrigated from plaintiff's ditch.

"10. The court further finds that the plaintiff has not given its written consent to cross the lands owned by it proposed to be cro-sed by the defendant with its said proposed canal and objects to its appropriation of its lands for the purpose of constructing the defendant's said ditch over the same.

"CONCLUSIONS OF LAW.

"First—That section 2034 [sec. 3, art. 1, irrigation law of 1889] is not applicable to the facts in this case, for the reason that the defendant's contemplated ditch is not being

constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under the plaintiff's ditch, but for the purpose of irrigating lands beyond and below the plaintiff's ditch.

"Second—That the defendant is entitled to cross the lands of the plaintiff for the purpose of constructing its said ditch on complying with the necessary requirements of law for said purpose."

It will be observed from the foregoing statement and opinion that the defendant's claim to a right of way for its canal through the plaintiff's land is founded upon the provisions of the act of March 27, 1889, known as the "Rayner Irrigation Law," entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal sections one hundred and fifty-eight (158) and one hundred and fifty-nine (159) of chapter 16 of the Compiled Statutes of 1887, entitled 'Corporations.'"

The first contention on this appeal is that the provision for the acquiring by corporations of the right of way for irrigating ditches in the exercise of the power of eminent domain is foreign to the title of the act mentioned, and accordingly violative of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The object of the foregoing provision has been declared not to prohibit comprehensive titles, but to prevent surreptitious legislation, by advising representatives of the nature and purpose of the measures they are called upon to support or oppose. (*Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *In re White*, 33 Neb., 813; *Trumble v. Trumble*, 37 Neb., 340; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) It is said in White's case, *supra*, that the legislature has the right to choose the title to any act passed by it, and although that chosen may not be the most appropriate the act will not be held void unless clearly in conflict

with the constitution. When tested by that rule we cannot doubt that the provision assailed is germane to the title of the act, and within the evident purpose thereof, viz., the utilizing of the public waters in the further development of the agricultural resources of the state. The word "irrigation," as employed in the title of the act under consideration, is apparently used in its popular sense, and denotes the application of water to land for the production of crops. (*Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Col., 525.) The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied, and any plan such as contemplated by the act of 1889 which omits provision for the enforced access by the public to the source of supply is necessarily partial and ineffective.

2. The act, in so far as it makes provision for the acquiring of the right of way for irrigating canals by condemnation, is also vigorously assailed on the ground that it contemplates the taking of property for private use only, and therefore in conflict with section 21 of the Bill of Rights, viz., "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision has been held to prohibit, by implication, the taking of private property for private use of any character whatever without the consent of the owner. (*Jenal v. Green Island Draining Co.*, 12 Neb., 163; *Welton v. Dickson*, 38 Neb., 767.) In the last mentioned case it was held, following *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, that the want of power in the legislature to transfer to one person the property of another does not necessarily depend upon constitutional restrictions, but upon the fact that such authority is in no sense an incident to the powers conferred upon the law-making branch of the government. We are thus for the first time confronted with the question whether the use contemplated by the statute is a public one in a constitutional sense, or whether it is a mere

private use and accordingly within the prohibition mentioned. In this connection it should be observed that to the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of property for public uses, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. It has been said by an eminent jurist: "The public use required, need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals or estates." (See Chancellor Zabriskie in *Coster v. Tide Water Co., supra.*) Again, it has been said that "the use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large." (Kinney, Irrigation, sec. 94. See, also, Black's Pomeroy, Water Rights, 174; *Lux v. Haggin*, 69 Cal., 304; *Oury v. Goodwin*, 26 Pac. Rep. [Ariz.], 376; *Umatilla Irrigation Co. v. Barnhart*, 30 Pac. Rep. [Ore.], 37; *Foster v. Park Commissioners*, 133 Mass., 321; *Hagar v. Reclamation District*, 111 U. S., 701; *Wurts v. Hoagland*, 114 U. S., 606; *Pocantico Water-Works Co. v. Bird*, 130 N. Y., 249.) In the last mentioned case we observe the following pertinent language: "The term 'public use,' as used in connection with the right of eminent domain, is not easily defined. * * * It is doubtless true that in order to make the use public a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies 'the use of many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual." It has been said that if by any

reasonable construction a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court (*Blankhead v. Brown*, 25 Ia., 540; *In re Bonds, Madera Irrigation District*, 92 Cal., 309; *Coster v. Tide Water Co., supra*), which, however, is but the application of a fundamental principle of our system, viz., the independence of each department of the government within its own domain. It should be remembered, too, that the essential features of the "Rayner Irrigation Law" appear in the legislation of the several Pacific states, notably of California, whose constitutional provisions on the subject do not differ substantially from ours, and where it had, long previous to its adoption by us, received a definite construction adverse to the contention of the plaintiff herein. (See *Lux v. Haggin, supra.*) The legislature must, therefore, have intended to adopt not the statute alone, but the construction placed upon it in the state of California. Such is the well established rule. (*Bohanan v. State*, 18 Neb., 57.) But any examination of this subject is necessarily incomplete which omits mention of the recent case of *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948, holding that assessments under the provisions of the district irrigation law of that state contemplate the taking of property for mere private purposes and accordingly within the prohibition of the United States constitution. It is unnecessary, however, at this time to examine the reasoning upon which that case rests, since it is therein declared inapplicable to the ordinary use of water for irrigating purposes in the arid region of California, and therefore in harmony with *Lux v. Haggin* and later cases in which the same doctrine is asserted by that court. The varying conditions of society are constantly presenting new subjects of public utility, which is but another name for public necessity, hence the force of Chancellor Vroom's remark in *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq., 694, that what shall be deemed a

public use depends somewhat on the situation and wants of the community for the time being. Nor were the conditions surrounding the people of the Pacific states, when the foundation was laid for the body of their laws upon the subject, materially different from those which to-day confront the western half of our own state. We behold what was but yesterday the public domain, occupied to the western limit of the rain belt, so called, and settlers eagerly seeking for homes in the semi-arid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers, practically worthless under existing conditions for the purpose of agriculture, but which by application of the waters of those streams may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding largely to the wealth and material prosperity of the state. That an undertaking so important can be successfully prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government. And the exercise of the reserve power of the state in the promotion of an enterprise so beneficial is not even in a technical sense violative of the restrictive features of the constitution.

3. It is next argued that authority to appropriate land for right of way purposes is by the law of 1889 conferred upon property owners only, and it being admitted that the defendant company is not the owner of any of the lands lying under its ditch, is not within the provisions of the act. The purpose of sections 1, 2, 3, and 4 of article 2, to which we are referred in support of that contention, was apparently, to confer upon individuals and corporations the right of way in certain cases through the premises of adjoining proprietors. It is, however, unnecessary to examine the provisions mentioned, since the plaintiff's argument is based upon an apparent misconception of the defendant's claim,

which is under the provisions of sections 8 and 9 of article 2, viz.:

"Sec. 8. If any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water power purposes, or both, may acquire a right of way over or upon any land for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canals, in the same manner as provided for persons and companies in this act, and such persons, canal companies, and corporations shall have the same power to occupy state lands with their said canals as is given to railroad corporations by section 105, chapter 16, of the Compiled Statutes of 1887; and such corporations shall also have power to borrow money and to mortgage all their property and franchises in the same manner and for the same purposes as railroad companies. * * *

"Sec. 9. Canals constructed for irrigating or water power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canals."

The first word of section 8, as it appears above, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act. (*Stone v. Yeovil*, 1 C. P. Div. [Eng.], 701; *United States v. Stern*, 5 Blatch. [U. S.], 512; *State v. Beasley*, 5 Mo., 91; *State v. Acuff*, 6 Mo., 55.) A careful reading of the two sections last named with the word "if" eliminated from section 8 leaves no room to doubt that the defendant company is within the terms of the act, and that the plaintiff's claim to the contrary is without merit.

4. It is by the plaintiff further argued that it is within the exception contained in section 3, article 1, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement

of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The evidence relating to this branch of the case is quite voluminous, although the district court, as appears from its findings and conclusions of law, held the foregoing exception not applicable to the facts without determining the question of the capacity of the ditch as already constructed. On behalf of the defendant it is contended, in effect, that the exception of the statute applies to owners and proprietors other than irrigating companies, which corporations, it is argued are not in terms or by implication included therein. The case of *San Luis Land, Canal & Improvement Co. v. Kenilworth Canal Co.*, 32 Pac. Rep. [Col. App.], 860, it is conceded, tends to sustain that contention. Referring to the Colorado statute which provides that no tract or parcel of improved or occupied land shall be burdened with two or more ditches, etc., it is said in the case cited: "We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly, and in unmistakable language, apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act." We are, however, unable to accept that case as an authoritative interpretation of our statute. The term "no tract of land," as employed, without qualifications, must be held to include the property of corporations as well as natural persons; and such would have been the construction had the statute read, "the land of no person shall be crossed," etc. (*Wales v. City of Muscatine*, 4 Ia., 302; *Ricker v. American Loan & Trust Co.*, 140 Mass., 346; *Norris v. State*, 25 O. St., 217.) But we reach the same conclusion as the district court—presumably by the same course of reasoning—by which the sections are transposed, section 8 of article 2 being regarded

as the enacting clause and section 3 of article 1 as a proviso exempting the exceptional cases therein contemplated from the operation of the act. According to settled rules of construction a proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception. (Endlich, Interpretation of Statutes, sec. 186; *United States v. Dickson*, 15 Pet. [U. S.], 141; *Roberts v. Yarboro*, 41 Tex., 449; *Epps v. Epps*, 17 Ill. App., 196.) Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of land owners rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions and apparently not within the contemplation of the legislature. It is in the second place noticeable that the act is silent respecting the terms and conditions upon which one irrigating company may make use of the canal or ditch of another. Nor is the proprietor of such a ditch in terms required to supply water upon any terms to a rival corporation. It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies as *quasi*-public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may by the courts be compelled to enter into particular agreements or assume particular relations, however just and equitable, toward each other. That subject has recently engaged the attention of the supreme court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative rather than judicial in character, notwithstanding the provisions of the interstate commerce act. (*Atchison, T. & S. F. R. Co. v.*

Denver & N. O. R. Co., 110 U. S., 667; *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587; *Express Cases*, 117 U. S., 1; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep., 559. See, also, Beach, Private Corporations, 839; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep., 567; *Shelbyville R. Co. v. Louisville & N. R. Co.*, 82 Ky., 541.) The precise limits within which courts of equity will interfere in such cases, in order to regulate or enforce the reciprocal obligations of corporations, is a question foreign to the present controversy, although the authorities cited serve to illustrate the difficulties attending the interpretation placed upon the statute by counsel for plaintiff. We are, after a careful analysis of the language of the exception, unable to say that it contemplates the connecting of different canals or that it imposes upon one irrigating company any duty to supply water for use by the patrons of another. What the statute implies is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may, as constructed, be made to supply the lands within reach of both. That the purpose of the defendant is to water lands which cannot be accommodated by the plaintiff, but which, in the language of the district court, "lie below and beyond its ditch," as now constructed, is clearly established by the proofs and apparent from an inspection of the foregoing map. Nor can the fact that the plaintiff concedes the defendant's right to connect with its ditch and offers to supply the latter with water on terms confessedly reasonable be regarded as material, since, as we have seen, the law imposes upon the plaintiff no such duty. It follows, without further elaboration, that the decree of the district court is right and must be

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4. Sec. 1, ch. 37, Comp. Stats., permitting a settlement to be made in a bastardy proceeding, does not violate sec. 11, art. 3, of the constitution, providing that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. *Stoppert v. Nierle*.....107, 117
5. Ch. 10, Session Laws, 1895, amending sec. 145 of the act of 1887, incorporating cities of the metropolitan class (ch. 10, Session Laws, 1887), is not inimical to sec. 11, art. 3, of the constitution, relating to amendment of laws. *State v. Bemis*..... 724
6. Ch. 13, Session Laws, 1891, repealing secs. 136 and 139, ch. 16, Comp. Stats., is not unconstitutional on the ground that the provision of sec. 4 making the repealing statute applicable to pending suits is not expressed in the title of the act. *Kleckner v. Turk* 177
7. The legislature has power to enact a statute to operate as a general saving clause to continue rights and remedies unless repealing statutes express the intention that such rights and remedies shall not be continued. *Id.*

Constitutional Law—*concluded.*

8. The provision of the charter of the city of Omaha, for a board of fire and police commissioners composed of three members, "at least one from each of the two political parties casting the largest number of votes at the last preceding general election," is not unconstitutional as prescribing party affiliation as a qualification for office. *State v. Bemis* 725

9. The provision of the irrigation law of 1889, and the amendment thereof in 1893, abolishing riparian rights in all streams over twenty feet in width, is an invasion of private property and is therefore unconstitutional. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co* 799

Construction. See STATUTES.

Contempt. See CONTINUANCE, 4.

1. It is a contempt to publish, concerning a pending action, statements tending to prejudice the minds of the public with respect to the merits of the case. *Percival v. State* ... 741

2. In a contempt proceeding an answer alleging that defendant did not intend by a publication to reflect upon the integrity or honesty of a judge, or to embarrass or impede the administration of justice, is conclusive, where the publication is not libelous *per se*. *Id.*

3. In proceedings in aid of execution a third person cannot be imprisoned for contempt for failing to comply with an order to turn over property to be applied on a judgment. *In re Havlik* 747

4. The affidavit in proceedings for a contempt not committed in presence of the court must disclose sufficient facts to show that the court has jurisdiction. *Hawthorne v. State* ... 871

5. Unless the disobedience of an order of court is willful there is no contempt. *Id.*

6. A defendant who cannot on account of insolvency comply with an order to pay money on a judgment is not punishable for a contempt. *Id.*

Continuance. See NEW TRIAL, 1.

1. An application for a continuance is addressed to the discretion of the trial court. *Stoppert v. Nierle* 106
Stratton v. Dole 472

2. Case where the action of plaintiff's counsel in forcing a trial in the absence of the attorney for defendant amounted to such misconduct as to justify a new trial. *Chicago, St. P., M. & O. R. Co. v. Deaver* 307

Continuance—*concluded.*

3. It is proper to refuse an application to withdraw a juror and continue the case for the purpose of enabling a party to procure a witness, when the adverse party admits the only fact to be proved, except what is cumulative. *Smith v. First Nat. Bank of Chadron* 444

4. A continuance should not be granted to enable a party, by proceedings for contempt in the courts of another state, to compel a witness to testify by deposition, there being no presumption that he would be guilty of contempt for refusing to answer questions. *Stratton v. Dole* 472

Contracts. See BREACH OF CONTRACT TO MARRY. CARRIERS, 1-3. DAMAGES, 5. GUARANTY. INTEREST. NEGOTIABLE INSTRUMENTS, 6. PARTNERSHIP, 1. PLEADING, 16. SALES, 11. SCHOOLS AND SCHOOL DISTRICTS, 6. SUBSCRIPTION. USURY.

1. Where a contractor partially erected a building and received payments as the work progressed, owners who agreed to keep the building insured to the extent of their interest are not, after a loss by fire, released from that agreement on the ground they could not procure a responsible company to write insurance to the extent of their interest. *Gallagher v. St. Patrick's Church*..... 535

2. In such a case the failure of the owners to insure the property to the extent of their interest is a complete defense for the sureties on the contractor's bond. *Id.*

3. Where owners of a building in course of construction permit their contractor to continue his work after the date fixed for completion, they waive their right to terminate the contract and complete the building, and are bound by the terms of their agreement. *Id.*

4. One who accepts a conveyance of land upon express condition that he will convey it to another and fails to do so is liable to the latter for such damages as result from expenses of necessary litigation or from the loss of an opportunity to sell at a good price while the conveyance is wrongfully withheld. *McMurtry v. Blake.* 213

5. It is competent for parties in making contracts for accident insurance to agree that the company shall not be liable where injury results under circumstances enumerated in the policy. *Travelers Ins. Co. v. Snowden*..... 249

6. An action for breach of contract was not prematurely begun May 13, where defendant violated an agreement to furnish plaintiff a herd of cattle May 1, to be cared for

Contracts—*concluded.*

and herded by the latter during the ensuing season at a fixed sum per head. *Hamilton v. Goff* 339

7. An action to recover wages under a contract for personal services can only be sustained by proof that the services were performed. *Culbertson Irrigating & Water Power Co. v. Wildman* 663

Conversion. See CARRIERS, 3. PRINCIPAL AND AGENT, 2. TORTS. TROVER AND CONVERSION.

Conveyances. See CONTRACTS, 4. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. MORTGAGES.

Corporations. See FRAUDULENT CONVEYANCES, 5. PLEADING, 1.

1. Sec. 139, ch. 11, Gen. Stats., 1873, making stockholders individually liable for corporate debts where there has been a failure to give notice and other requisites of organization, is penal. *Kleckner v. Turk* 176

2. Sec. 136, ch. 11, Gen. Stats., 1873, repealed April 6, 1891, providing for publication of notice of corporate debts, and for liability of stockholders, was penal. *Id.*

3. One who contracted with a corporation, and thus recognized its corporate capacity, cannot attack the validity of the incorporation in order to make the stockholders individually liable, where the articles of incorporation were adopted and filed in substantial compliance with law, though the incorporation might be declared illegal in an action by the state. *Id.*

4. A president of a loan company, who allowed trust-deed securities to be made to himself as trustee, thereby gained no right to use such designation to the injury of the company, the beneficiary contemplated in the deeds. *Tulleys v. Keller* 220

5. Case involving the right of a loan company to make use of the name of its president as trustee in enforcing its rights under trust deeds. *Id.*

6. Actions against a domestic corporation may be brought in any county where it maintains a place of business and has an agent to conduct such business, though its principal office and chief officer are in another county. *Fremont Butter & Egg Co. v. Peters* 356

7. Dividends belong to the persons in whose names the shares of stock are registered, but may be made the subject of a valid contract the same as other personal property. *Cook v. Monroe* 349

Corporations—*concluded.*

8. Evidence *held* sufficient to justify the court in directing a verdict for plaintiff in an action to recover dividends received by defendant after he transferred the stock upon which they were declared. *Id.*
9. A creditor who has not reduced his claim against a corporation to judgment cannot maintain an action against the stockholders to enforce the statutory liability for a failure to publish the annual notice of indebtedness as required by law. *Ball v. Wicks*..... 367
10. Directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Tillson v. Downing*..... 549
11. Directors of an insolvent corporation cannot prefer debts to third persons for which they are obligated as sureties. *Id.*
12. Solvent corporations have the same dominion over their own property as individuals. *Id.*

Costs. See ATTORNEYS' FEES.

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See TOWNSHIP BONDS.

County Courts. See BASTARDY, 1. BILL OF EXCEPTIONS, 4–6.

Courts. See CONTEMPT. EQUITY, 1, 2. JUSTICE OF THE PEACE. OFFICE AND OFFICERS, 2, 3. RES ADJUDICATA, 1.

Covenants.

A covenant against incumbrances is a personal obligation and does not run with the land where it is broken at the time it is made. *Campbell v. McClure*..... 608

Criminal Law. See CONTEMPT. HABEAS CORPUS. HOMICIDE. INSTRUCTIONS, 5, 6. JURY. WITNESSES, 6.

1. All presumptions exist in favor of the regularity of judgments of courts of general jurisdiction. *Wright v. State*... 44
2. An allegation of error based on the ground that a particular charge of the information was not included in the original complaint will be ignored where such complaint has been omitted from the record. *Id.*
3. Affidavits used as evidence below will not be considered on review unless preserved by a bill of exceptions. *Id.*
4. A sentence pronounced by the trial court will not be re-

Criminal Law—*continued.*

versed as being excessive unless there has been a clear abuse of discretion. *Id.*

5. Prejudicial error will not be found in the rulings of the trial court during the *voir dire* examination of a veniremen unless an abuse of discretion is shown. *Basye v. State* 261

6. The finding of the trial court in deciding a challenge to a juror for cause will not be set aside by the supreme court unless it is clearly wrong. *Id.* 262

7. Where the surname and initials of the Christian name of a witness appear upon the information it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Id.*

8. The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal where no abuse of discretion is shown. *Id.*

9. It is permissible on cross-examination of a witness testifying in reference to character or reputation, to ascertain the extent of his information, the foundation for his opinion or the data from which he draws his conclusion. *Id.*

10. Upon cross-examination a witness may be asked, with a view to lessen the effect of his testimony as to general reputation, but not for the purpose of establishing the fact to be proved, whether he has not heard certain enumerated reports which tend to contradict the purport and effect of his testimony given on direct examination. *Id.*

11. A person who is unlawfully attacked in such a manner as to excite in him a reasonable belief that he is in danger of losing his life at the hands of the assailant, or receiving great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary. *Barr v. State* 459

12. A person unlawfully attacked is, in defending himself, justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they actually exist. *Id.* 458

13. Upon change of venue the clerk must transmit a transcript of the proceedings, with the original indictment or information, to the clerk of the district court of the county where the cause is to be tried. *Id.*

Criminal Law—*concluded.*

14. Where a charge considered as a whole correctly states the law, it is sufficient. *Debney v. State*..... 856
15. An erroneous instruction is not ground for reversal where it was not prejudicial to defendant. *Id.*
16. Where instructions were not excepted to at the trial, they will not be reviewed. *Gravely v. State*..... 878

Cross-Bills. See JUDGMENTS, 5. PLEADING, 6–8.

Damages. See ATTORNEYS' FEES. CARRIERS, 9. CLERK OF DISTRICT COURT, 2. CONTRACTS, 4. DEATH BY WRONGFUL ACT. EMINENT DOMAIN. LIBEL AND SLANDER. MASTER AND SERVANT, 9. MUNICIPAL CORPORATIONS, 6, 12, 13, 18, 19. OFFICE AND OFFICERS, 8. RAILROAD COMPANIES, 3. REPLEVIN, 7. RIPARIAN RIGHTS, 2. SALES, 9. WASTE. WATER AND WATER-COURSES.

1. A city may be liable for damages for negligently making street improvements which cause surface water to flow upon the premises of a private owner. *City of Beatrice v. Leary*..... 149
2. The owner of a vacant lot upon which a pond is situated is not liable for the death of a boy who went upon the premises for amusement without invitation, and was drowned. *Richards v. Connell*..... 467
3. Evidence *held* sufficient to sustain a judgment for plaintiff in an action by her to recover from defendant damages for breach of a contract to marry. *Stratton v. Dole*..... 474
4. Right of owners of a building to recover damages for failure of the builder to complete it at the time fixed by the building contract. *Gallagher v. St. Patrick's Church*..... 535
5. One who was induced by a third person to part with property in exchange for notes which the latter promised to buy may recover from the promisor the damages resulting from a violation of the promise. *Stratton v. Meredith*..... 622
6. Plaintiff cannot recover damages for breach of a contract to employ him under a petition to recover wages earned. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 663
7. Where the wages fixed by a contract of employment are sixty dollars per month in cash and forty dollars per month in water rights, the employe's measure of damages is one hundred dollars per month in an action for breach of the contract. *Id.*..... 664
8. A verdict for plaintiffs for five thousand dollars *held* to be

Damages—*concluded.*
sustained by the evidence in an action by a widow and her children on a saloon-keeper's bond, where the death of the husband resulted from intoxication. *Gran v. Houston*..... 815

Death by Wrongful Act. See INTOXICATING LIQUORS, 3.
In a suit by a widow as administratrix to recover from a corporation damages for negligently causing the death of her husband, a petition alleging that deceased left seven minor children who were wholly dependent upon him for support and maintenance, is not open to the objection that it fails to aver facts showing the wife and next of kin sustained pecuniary injuries within the meaning of ch. 21, Comp. Stats. *Kearney Electric Co. v. Laughlin*..... 390

Deceit. See DAMAGES, 5.

Decrees. See JUDGMENTS.

Deeds. See COVENANTS. MORTGAGES, 4, 15, 16. TAXATION, 5.

Deficiency Judgments. See APPEAL BONDS, 5, 6. MORTGAGES, 2, 14.

Delivery Bonds. See ATTACHMENT, 2–4.

Depositions.
Provisions for taking testimony in one state to be used in another, and to enforce attendance of witnesses for that purpose, are, in the absence of express statutory provision to the contrary, extrajudicial as to courts of the state where such evidence is sought. *Stratton v. Dole*..... 472

Disability. See LIMITATION OF ACTIONS, 1.

Dismissal. See REVIEW, 2.

Disorderly Houses.
Evidence *held* sufficient to sustain a conviction for violating sec. 210, Criminal Code. *Wright v. State*..... 44

Dividends. See CORPORATIONS, 7, 8.

Docket Entries. See JUSTICE OF THE PEACE, 3.

Domicile.
1. The words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile." *Wood v. Roeder*..... 311
2. The residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. *Id.*
3. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning. *Id.*

Domicile—*concluded.*

4. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. *Id.*

5. The mere residing at a different place, though evidence of intention, does not *per se* constitute a change of domicile. *Id.*

Drainage. See MUNICIPAL CORPORATIONS, 1, 5, 6.

Duress.

A mortgage to secure a debt, executed without threats or promises, will not be set aside on the ground it was given to obtain the dismissal of criminal proceedings, where the creditor previously stated to the debtor that the promise of such a dismissal could not be made. *Hargreaves v. Menken*..... 668

Ejectment. See PLEADING, 16.

Election of Remedies.

1. A grantee who received a conveyance and agreed to pay a debt of the grantor cannot defend a suit by the latter's creditor on the ground that plaintiff previously sued the grantor for the debt and attached the property conveyed as belonging to him. *Davis v. Nat. Bank of Commerce*..... 589

2. Where two causes of action in a petition are identical, error does not result from a failure to require plaintiff to elect as to the cause upon which he will proceed to trial. *Pollock v. Whipple* 844

Elections. See TOWNSHIP BONDS.

Electric Lighting Systems. See MUNICIPAL CORPORATIONS, 7–10.

Eminent Domain. See RIPARIAN RIGHTS, 2.

1. Correctness of an instruction as to damages resulting to property by taking land for railroad purposes. *Atchison & N. R. Co. v. Boerner* 453

2. Where several contiguous town lots are treated by the owner as one piece of property, the injury to the whole by the construction of a railroad should be considered, though but a portion is taken and it alone is described in the petition for appraisement. *Id.*

3. A judgment of the district court on appeal from an award of damages is conclusive upon the parties as to all matters necessarily in issue. *Id.*

4. The power to determine when the exigencies of the public demand the taking of private property has been commit-

Eminent Domain—*concluded.*

ted to the legislature and not to the courts. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*.... 884

5. "Public use" may be confined to the inhabitants of a restricted locality, but the use must be common, and not to a particular individual. *Id.*

6. The use of water for irrigating purposes under the Rayner irrigation law is a public use. *Id.*

7. Under the Rayner irrigation law, irrigating companies may acquire by condemnation the right of way for canals and reservoirs. *Id.*

Equity. See INJUNCTION. JUDGMENTS, 6–9. SUBROGATION. TAXATION, 1. TRUSTS.

1. When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes. *Disher v. Disher*..... 100
Flentham v. Steward..... 641

2. There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization. *Powers v. Budy*..... 208

3. One who asked a court of equity to enforce his claim to the right to use his name as trustee to the disadvantage of the beneficiary cannot complain because the court, having taken jurisdiction of the subject-matter for such purpose, administered complete relief as between all parties to the litigation. *Tulleys v. Keller*..... 220

4. Where a purchaser obtains merchandise on credit through fraud and disposes of it for money and other property, equity may award the seller any particular property or a lien thereon, which can be identified as having been bought with the goods fraudulently acquired from the seller. *Farwell v. Kloman*..... 425

5. Where a purchaser obtains merchandise on credit through fraud, disposes of it for property which he mingles with that already in his possession and makes a voluntary assignment, a court of equity should not decree the entire estate in the hands of the assignee a trust fund, and give the defrauded vendor, as beneficiary, a lien thereon. *Id.*

Error. See REVIEW.

Estates. See TAXATION, 3.

Estoppel. See CORPORATIONS, 3. ELECTION OF REMEDIES, 1. INTOXICATING LIQUORS, 6.

1. A property owner by petitioning a city to grade a street

Estoppel—*concluded.*

does not thereby estop himself from claiming damages resulting from the negligent omission of the city to provide suitable outlets for surface water. *City of Beatrice v. Leary*, 151

2. Corporators will not be heard to allege failure to become a *de jure* corporation in order to escape individual liability for neglecting to comply with statutory requirements. *Kleckner v. Turk*..... 177

3. The facts constituting an estoppel *in pais* must be pleaded. *Scroggin v. Johnston*..... 714

4. A seller is estopped from asserting that his representations were not warranties where he knows they were regarded as such by the purchaser and relied upon. *Erskine v. Swanson*..... 767

Estrepement. See WASTE.

Evidence. See BASTARDY, 3, 5, 7. BREACH OF CONTRACT TO MARRY. CARRIERS, 8, 9. CONTEMPT, 2. CRIMINAL LAW, 9, 10. DEPOSITIONS. FORGERY. FRAUDULENT CONVEYANCES, 2. HOMICIDE. INTOXICATING LIQUORS, 1, 7, 8. JURY, 1. MASTER AND SERVANT, 5, 7. MECHANICS' LIENS. MORTGAGES, 2-4, 19. MUNICIPAL CORPORATIONS, 3, 4. NEGLIGENCE, 3. NOVATION. PLEADING, 2. PRINCIPAL AND AGENT, 5. REPLEVIN, 2, 8. SALES, 6, 11, 12. WITNESSES.

1. As between the original parties to the blank indorsement of a note by the payee to the purchaser, parol evidence is admissible to show the actual contract. *True v. Ballard*... 410

2. Parol evidence is inadmissible to vary or contradict the terms of a written contract. *Quinn v. Moss*..... 614

3. Expert testimony as to alteration of a note. *Davis v. Snyder*..... 417

4. Where the value of a stock of dry goods is in issue it is not competent to inquire of a witness not shown to have seen, or to know anything in regard to, the stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months. *Smith v. First Nat. Bank of Chadron*..... 444

5. The existence of a record must be proved by its production or by an authenticated copy. *Id.*

6. The non-existence of a record may be proved by the oath of any one who has made a search therefor. *Id.*

7. Courts take notice without proof that the Republican river is unnavigable. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co*..... 798

Evidence—*concluded.*

8. A coroner who is a physician and surgeon may state his opinion as to the manner of a death where no one was present when it occurred. *Gran v. Houston* 816
9. Evidence *held* sufficient to justify a conviction for murder in the first degree. *Debney v. State* 856
10. Sufficiency of evidence to sustain a verdict for manslaughter. *Gravely v. State* 878

Exceptions. See BILL OF EXCEPTIONS.

Executions. See APPEAL BONDS, 6. JUDICIAL SALES. REPLEVIN, 5.

1. The test of the validity of a levy upon personal property is whether or not the acts of the officer have been such as would make him liable as a trespasser but for the protection of his writ. *Grand Island Banking Co. v. Costello* 119
2. Chattels garnished in the hands of a mortgagee are in custody of the law and not subject to seizure on execution. *Id.*
3. After property has been sold under execution the appraisement can only be attacked for fraud. *Kearney Land & Investment Co. v. Aspinwall* 601
4. Objections to the appraised value of property for sale under execution should be made and filed before sale in the court where the case is pending, with a motion to set aside the appraisement. *Id.*
5. It is the duty of an officer holding an execution for the sale of real estate to cause it to be appraised immediately and deposit a copy of the appraisement with the clerk who issued the order for the sale. *Id.*
6. A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien. *Hargreaves v. Menken* 668
7. In proceedings in aid of execution, a third person who has in his hands non-exempt property of a judgment debtor may be ordered to apply it in payment of the judgment, and the order may be enforced by legal methods. *In re Havlik* 747
8. Necessary allegations of an affidavit to punish defendant for a contempt in failing to comply with an order in aid of execution directing him to pay money on a judgment. *Hawthorne v. State* 871

Executors and Administrators.

1. An order authorizing an administrator to sell mortgaged

Executors and Administrators—*concluded.*
land to pay debts, will not be reversed where the proofs fail to show that the order was improper. *Waldow v. Beemer* 626

2. The regularity of the appointment of an administrator cannot be inquired into in resisting his application for license to sell property to pay debts. *Id.*

Exemptions. See HOMESTEAD.
Lands acquired under the federal homestead law are exempt from liability for the debts of the patentee created before the issuing of the patent, though the patentee conveyed the land and subsequently re-acquired the title. *Brandhoefer v. Bain* 781

Fees. See OFFICE AND OFFICERS, 8.

Fellow-Servants. See MASTER AND SERVANT, 8.

Final Order. See JUDGMENTS, 1, 2.

Findings. See TRIAL, 1, 2.

Fire and Police Commissioners. See MUNICIPAL CORPORATIONS, 20.

Foreign Judgments. See JUDGMENTS, 4.

Forgery.
1. Evidence that a person unlawfully disposed of mortgaged chattels is not competent to prove that he committed a forgery. *Stratton v. Nye* 621
2. The insolvency of a person cannot be shown to establish that he committed a forgery. *Id.*
3. In a suit on a note, evidence that a defendant stated he could imitate the signature of any person, was *held* incompetent, in the case stated in opinion, to show that the signature of another defendant was a forgery. *Id.* 622

Forum of Jurisdiction. See VENUE.

Fraud. See EQUITY, 4, 5. FRAUDULENT CONVEYANCES.

Fraudulent Conveyances. See CORPORATIONS, 10, 11. ELECTION OF REMEDIES, 1. WITNESSES, 2.
1. The fact that a chattel mortgage covers property in value largely in excess of the debt secured does not raise a conclusive presumption of fraud. *Kilpatrick-Koch Dry Goods Co. v. Strauss* 793
2. Excessive chattel mortgage security is merely evidence of fraud to be considered in connection with other facts. *Id.*
3. The disproportion between the value of mortgaged chattels

Fraudulent Conveyances—*concluded.*

and the amount secured affords no basis for a presumption of law, but is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact. *Grand Island Banking Co. v. Costello* 119

4. The validity of a mortgagee's right to chattels may be attacked by a garnishing creditor by alleging and proving fraud or by an actual levy on the mortgaged chattels. *Id.*

5. Sufficiency of evidence to justify a finding of fraud as to creditors of an insolvent corporation, where the latter, before closing business, transferred to a stockholder a sufficient amount of bills receivable to secure his claims. *Wortendyke v. Salladin* 755

Gambling.

A place kept for gambling purposes is a public nuisance. *Hill v. Pierson* 503

Garnishment. See EXECUTIONS, 2. MORTGAGES, 21.

An order of garnishment cannot be issued to a county other than that in which the principal action is brought. *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank* 29

Governor. See OFFICE AND OFFICERS, 1–5.

Guaranty. See NEGOTIABLE INSTRUMENTS, 9. PRINCIPAL AND SURETY, 3. SALES, 12, 13.

A guarantor is not released from a written guaranty to pay for cigars sold to a third person, on the ground that by a subsequent agreement between the buyer and seller the cigars of a particular brand were exchanged for an equal number of a different brand of the same value and not less salable. *Quinn v. Moss* 614

Habeas Corpus.

1. Mere irregularities and errors in the proceedings in a criminal case under which a person is imprisoned cannot be reviewed on *habeas corpus*. *In re Havlik* 747

2. Where the law does not authorize contempt proceedings under which a person is imprisoned, he may be discharged on *habeas corpus*. *Id.*

Harmless Error. See INSTRUCTIONS, 2. TRIAL, 8.

Homestead. See EXEMPTIONS.

A mortgagor whose property was sold under a decree of foreclosure may claim the surplus proceeds in lieu of his homestead exemption any time before the final distribution of such surplus. *Hooper v. Casletter* 69

Homicide.

1. Sufficiency of foundation for admitting in evidence a confession of defendant's guilt. *Basye v. State* 262
2. In a prosecution for murder it is competent for the state to prove the description and location of the wounds inflicted by the defendant upon the deceased, as tending to establish whether or not death resulted therefrom. *Id.*
3. Dying declarations, in order to be admissible, must have been made under a sense of impending death, and it is competent for the party offering them to prove the physical condition of the deceased at the time they were made. *Id.*
4. On a trial for murder, evidence tending to show the defendant's general reputation as a peaceable and quiet man in the community in which he resided prior to the offense charged is competent, but his reputation for honesty and integrity is not admissible. *Id.*
5. In a prosecution for murder, where the circumstances tend to establish self-defense, evidence of the quarrelsome and irritable disposition of the deceased, and of threats recently made by him against the accused, which were communicated to the latter prior to the killing, is admissible. *Id.*
6. One charged with murder should be tried under the laws in force when the fatal wound was inflicted, though death did not occur until a subsequent date. *Debney v. State*.... 856
7. An instruction defining the word "deliberation" was *held* not prejudicial to defendant in a prosecution for murder. *Id.*
8. The charge of the court upon the subject of intoxication was *held* applicable to the evidence in a prosecution for murder. *Id.*
9. The applause of by-standers at the time the county attorney closes his remarks in a trial for murder is not always prejudicial to defendant where it is immediately suppressed and the offenders rebuked. *Id.*
10. Sufficiency of evidence to sustain a conviction for murder in the first degree. *Id.*
11. In a trial for murder the state may adduce evidence tending to show a motive for the homicide. *Gravely v. State*... 878
12. Sufficiency of evidence to sustain a verdict for manslaughter. *Id.*

Hospital for Insane. See OFFICE AND OFFICERS.

Houses of Prostitution. See DISORDERLY HOUSES.

Husband and Wife. See CONFLICT OF LAWS. LIBEL AND SLANDER. MUNICIPAL CORPORATIONS, 13. WITNESSES, 2–5.

Impaneling Jury. See JURY.

Indemnity. See PRINCIPAL AND SURETY, 1.

Indictment and Information. See CRIMINAL LAW, 13.

Where the surname and initials of the Christian name of a witness appear upon the information, it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Basye v. State* 262

Indorsements. See NEGOTIABLE INSTRUMENTS, 4–7.

Informations. See INDICTMENT AND INFORMATIONS.

Informers. See RAILROAD COMPANIES, 1, 2.

Injunction. See ATTORNEYS' FEES. EQUITY, 3. REGISTRATION, 2.

1. Whenever waste threatened would amount to a manifest injury to an estate and a wanton abuse of the rights of a tenant for life, he may be restrained by injunction on petition of the reversioner. *Disher v. Disher* 100
2. A public nuisance, criminal in its nature, will only be enjoined at the instance of a private person upon a showing of special injury. *Hill v. Pierson* 503
3. A plaintiff who by his laches made it impossible to prevent the completion or use of public works without great injury to defendant, or inconvenience to the public, is not entitled to the preventive remedy of injunction. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co* 799

Insanity. See LIMITATION OF ACTIONS, 1.

Insolvency. See CONTEMPT, 6. CORPORATIONS, 10, 11. EQUITY, 5.

Instructions. See HOMICIDE, 7, 8. MASTER AND SERVANT, 3, 4. NEW TRIAL, 3. REVIEW, 19.

1. Instructions in a case should be few in number, and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. *City of Beatrice v. Leary* 151
2. The refusal to give a correct instruction relating solely to the measure of damages is not prejudicial error, where the jury by a verdict for the defendant has shown that it was

Instructions—*concluded.*

not brought to a consideration of the damages. *Montgomery v. Willis* 434

3. In an action to recover damages for personal injuries it is not, in general, erroneous to refuse instructions directing the attention of the jury to special facts as demanding greater care than usual, where the court gave correct instructions as to negligence and contributory negligence. *Chicago, B. & Q. R. Co. v. Putnam* 440

4. An assignment of error as to instructions *en masse* will be overruled when one of them is found to be correct. *Smith v. First Nat. Bank of Chadron* 448
Ripp v. Hale 567
Wortendyke v. Salladin 755
Pollock v. Whipple 844

5. In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do. *Barr v. State* 458

6. Where the law is incorrectly stated in one instruction, the error is not cured by another instruction which correctly propounds the law upon the same subject. *Id.*

7. It is error for the court to refuse an instruction requested where it is pertinent and applicable to one branch of the case not covered by the charge. *Case v. Case* 493

8. In the absence of exceptions to rulings in giving or refusing instructions, assignments of error relating to such rulings will be overruled. *Sigler v. McConnell* 598

9. An instruction is erroneous which requires a jury to base its verdict on a matter which forms only a portion of the evidence bearing on the principal issue and disregards the determination of that issue itself, and such error is not cured by other instructions stating the issue correctly. *Burlingim v. Baders* 673

10. In charging a jury the repetition of a proposition in proper connection with different facts is not ground of error. *Gran v. Houston* 813

11. A party who did not request a proper instruction cannot complain because the one given should have contained a more extended statement. *Id.* 815

Instruments. See ALTERATION OF INSTRUMENTS.

Insurance. See SUBROGATION, 6.

1. Validity of clauses in accident insurance contracts except-

Insurance—*concluded.*

ing the company from liability where injury results under circumstances enumerated in the policy. *Travelers Ins. Co. v. Snowden* 249

2. Where an insurer, either before suit or by answer in an action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment. *Home Fire Ins. Co. v. Fallon* 554
3. Sufficiency of evidence to show that the person to whom an application for insurance was made was the agent of the company issuing the policy, and that the company denied liability before suit was brought. *Id.*
4. Misstatements written in an application for insurance by the insurer's agent, to whom the insured correctly stated the facts, do not invalidate the policy where the latter did not consent to or know of such misstatements. *Id.*

Interest.

1. Where a note bears lawful interest before maturity and a higher and lawful rate thereafter, the rate it draws to date of maturity is the contract rate for that time, and the rate it draws after maturity is the contract rate from that date, within the meaning of sec. 3, ch. 44, Comp. Stats. *Havemeyer v. Paul* 374
2. Under sec. 3, ch. 44, Comp. Stats., a judgment based upon a contract for the payment of money draws the contract rate of interest where the rate is lawful and exceeds seven per cent. *Id.*
3. Under sec. 3, ch. 44, Comp. Stats., where the parties to a contract for the payment of money have not agreed upon a rate of interest, or agreed upon a rate less than seven per cent, a judgment based on the contract bears seven per cent interest. *Id.*

Interpleader.

Where a stranger to a contract of bailment claims property in possession of the bailee, the latter has a remedy by bill of interpleader requiring the claimants to the property to litigate the question of title between themselves. *Shellenberg v. Fremont, E. & M. V. R. Co.* 487

Intoxicating Liquors.

1. A saloon-keeper's bond is not invalid merely because it makes reference to incurring liability under the liquor law as ch. 61, Gen. Stats., 1887, instead of ch. 61, Session

Intoxicating Liquors—*concluded.*

Laws of 1881, and it should not be excluded from evidence on that ground. *Plucknett v. Tippey*..... 342

2. The liability of the sureties to the extent of the penalty is the same as that of the principal in an action on the bond of a saloon-keeper who sold liquor to plaintiff's decedent. *Gran v. Houston*..... 814
3. The action on a saloon-keeper's bond, authorized by ch. 50, Comp. Stats., is not an action for death caused by intoxication, but for loss of means of support resulting from death. *Id.*
4. Elements of damage in a suit under ch. 50, Comp. Stats., by a widow and children against a saloon-keeper and the sureties on his bond, where death resulted from the use of liquor sold to the husband and father. *Id.*
5. It was *held* that defendants, by their answer in an action on a saloon-keeper's bond, admitted the execution of the bond, and that the instructions in the case were not erroneous. *Id.*..... 815
6. The fact that a wife consented to sales of liquor to her husband is no defense to an action by her and her children against the saloon-keeper for loss of support through disability of the husband resulting from intoxication. *Id.*
7. Proof that a husband's earnings were the source of the support of the wife and children is admissible in an action for damages resulting from the death of the husband by intoxication. *Id.*
8. Evidence that the saloon-keeper instructed his servants not to sell liquor to the deceased is inadmissible in an action on the saloon-keeper's bond for loss of support. *Id.*

Irrigation. See CONSTITUTIONAL LAW, 9.

1. The provision of sec. 3, art. 1, of the Rayner irrigation law, that no tract of land shall be crossed by more than one ditch, includes land owned by corporations as well as that owned by natural persons. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*..... 885
2. The Rayner irrigation law does not confer upon one irrigating company any right to connect with the ditches of another or take water therefrom without the consent of the proprietor. *Id.*
3. Under the exception in sec. 3, art. 1, of the Rayner irrigation law, no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. *Id.*

Judgments. See APPEAL BONDS, 7. INTEREST, 3. JUSTICE OF THE PEACE, 2-4. MORTGAGES, 2, 14. REPLEVIN, 5. RES ADJUDICATA.

1. An order refusing to require the clerk of the district court to approve a supersedeas bond is a final order. *State v. Baker*..... 39
2. Where plaintiff in his petition prays for partition of land, or for a sale thereof in case it cannot be divided, a record showing that a demurrer to the answer was sustained, and merely reciting "judgment of partition as prayed for in the petition," does not disclose a final judgment. *Atwood v. Atwood*..... 201
3. The lien of a judgment on mortgaged land is subject to mortgagor's homestead rights. *Hooper v. Castetter*..... 69
4. An action on a foreign judgment cannot be defeated on the ground that it was obtained by the fraudulent conduct of an attorney who acted for both parties, where the defendant with knowledge of the facts failed to object to such conduct. *Cox v. Barnes*..... 172
5. In an action *in rem* a decree based upon the cross-bill of a defendant filed after answer day, his co-defendant not appearing, is irregular, but not void for want of jurisdiction. *Patten v. Lane*..... 333
6. Where land intended to be included in a mortgage is omitted by mistake, and a transcript of judgment against the mortgagor is subsequently filed in the district court, the lien thereof is subject to the equity of the mortgage. *Chadron Building & Loan Association v. Hamilton*..... 370
7. The lien does not exceed the actual interest the debtor had in the land at the time a transcript of judgment from a justice of the peace was filed in the district court, and is subject to all equities then existing against such debtor. *Id*..... 369
8. In a suit to foreclose a mortgage the owner of the equity who answered the petition is not concluded by a decree conforming to the prayer of a supplemental petition filed by plaintiff after answer day without notice. *Havemeyer v. Paul*..... 373
9. Where the failure to file a motion to set aside a judgment results from the laches of counsel, it will not be set aside in equity, after the term expires, on the ground that the clerk did not make the journal entry immediately. *Slater v. Skirving*..... 594
10. Right of certain defendants to have a judgment against

Judgments—*concluded.*

them set aside on the ground that a co-defendant was made a party for the sole purpose of obtaining service on them in a different county. *Id.* 597

11. A judgment in a proceeding under an unconstitutional statute is not void where jurisdiction of the action exists independently of the statute. *Brandhoefer v. Bain* 781

Judicial Notice. See EVIDENCE, 7.

Judicial Sales. See EXECUTIONS.

1. An officer conducting a judicial sale has no authority to sell on credit or accept in payment of a bid anything but money, unless authority to do so is given by the decree or the law governing the sale. *Hooper v. Castetter* 67
2. An officer can make a judicial sale only on such terms as are provided by the decree and the law governing sales. *Id.*
3. An officer who states in his return that he sold the property to a designated bidder, is conclusively presumed to have made the sale for cash, less the amount of the purchaser's lien, if any, unless authorized by the decree to extend credit. *Id.*
4. A purchaser at a foreclosure sale of mortgaged premises will not be relieved from completing his bid on the ground of prior incumbrances, where the true condition of the title is set out in the record of the proceedings. *Id.*
5. Grounds for setting aside a judicial sale will not be considered on review unless they were presented below. *Id.*
6. After confirmation a purchaser at judical sale under mortgage foreclosure who accepts the sheriff's deed and applies for, and obtains, a writ of possession thereby waives all errors in the sale and all objections to the order of confirmation. *Id.* 68
7. Where the conclusion of the trial judge in confirming a mortgage foreclosure sale is sustained by the record and evidence, the order of confirmation will be affirmed. *Johnson v. Thorpe* 347
   Johnson v. Hubbard 348

Jurisdiction. See APPEAL BONDS, 7. BASTARDY, 1. CONTEMPT, 4. DOMICILE. EQUITY, 1, 3. HABEAS CORPUS, 2. JUDGMENTS, 5. JUSTICE OF THE PEACE, 1. OFFICE AND OFFICERS, 2, 3. RECEIVERS, 3. REVIEW, 26.

Jury. See NEW TRIAL, 4, 5.

1. The appearance and general demeanor of a juror while

Jury—*concluded.*

being examined may be taken into consideration in determining his competency to serve. *Basye v. State* 261

2. During the impaneling of a jury the defendant in a prosecution for murder may ask a juror who read newspaper accounts of the homicide, whether or not he has formed any opinion or conclusion as to defendant's guilt, or as to whether or not the crime of murder has been committed. *Id.*

3. It is proper to ask a venire-man whether the fact defendant is charged with a crime would have any weight with the former, and whether he could give the same credit to the testimony of the accused that he could give to the testimony of any other witness, under the same circumstances. *Id.*

4. On *voir dire* examination of a juror the parties have a right to put pertinent questions for the purpose of ascertaining whether or not there exists sufficient grounds for a challenge for cause, and also to enable them to properly exercise the statutory right of peremptory challenge. *Id.*

5. An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. *Id.* 262

6. An opinion founded solely on rumor and newspaper reports will not disqualify a juror where it is shown that the opinion will not interfere with his rendering a fair and impartial verdict upon the evidence under the instructions. *Id.*

7. The order of exercising peremptory challenges in a criminal case is left to the sound discretion of the trial court. *Gravely v. State* 878

Jury Trial. See EQUITY, 1.

A party who does not demand a jury or object to a trial to the court may thereby waive his right to a trial by jury. *Davis v. Snyder* 415

Justice of the Peace. See APPEAL BONDS, 3, 4. BILL OF EXCEPTIONS, 4.

1. A covenantee who paid taxes to discharge a lien existing when he received a deed containing a covenant against incumbrances may recover the amount of the lien from the covenantor in an action before a justice of the peace, as such an action does not relate to the title to the land. *Campbell v. McClure* 608

2. In an action before a justice of the peace, where defendant

Justice of the Peace—*concluded.*

does not appear, the record must show legal service of summons. *Muller v. Plue*..... 701

3. A justice of the peace must enter upon his docket the day and hour fixed in the summons for the time of trial, and the omission to do so is fatal, where there is no appearance of the defendant. *Id.*

4. Where defendant fails to appear, the record must disclose that the plaintiff appeared within one hour of the time named in the summons for appearance, or jurisdiction is lost. *Id.*

Laches. See INJUNCTION, 3. JUDGMENTS, 9.

Landlord and Tenant. See WASTE.

1. The rule that where a tenant for a year remains in possession over his term, and is recognized as a tenant by the landlord, and no new contract is shown, he becomes a tenant from year to year, is only a rule of presumption, which may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *Montgomery v. Willis*, 434

2. Where, before the expiration of a lease for a year, the tenant gives notice that he will not remain for another year, but for a short period and pay rent for any time he may remain, and the landlord acquiesces and receives the rent, a tenancy for another year is not created. *Id.*

3. A tenant who remains over his term with the understanding that he is to occupy the premises for a short time and pay rent while he remains is not required to give notice of an intention to quit. *Id.*

4. Where an action is brought for rent, and the answer does not admit facts sufficient to raise a presumption of a lease entitling the landlord to the rent demanded, the burden of proof is upon the landlord to establish such a lease. *Id.*

Law of the Case. See RES ADJUDICATA, 2.

Levy. See EXECUTIONS, 1.

Libel. See CONTEMPT, 1, 2.

Libel and Slander.

The alienation of the affections of a husband or wife resulting from the circulation of slanderous reports is a proper element of damage in an action for slander. *Case v. Case*... 493

Liens. See EQUITY, 5. JUDGMENTS. MORTGAGES.

Lighting Systems. See MUNICIPAL CORPORATIONS, 7–10.

Limitation of Actions. See MUNICIPAL CORPORATIONS, 18.

1. The disability of plaintiff during a portion of the time allowed for the performance of conditions precedent to suit does not extend the period, where a reasonable time remains after disability ceases. *City of Hastings v. Foxworthy*..... 677
2. Limitation as a defense must be pleaded in the answer, where it is not apparent from the petition that the action is barred. *Hanna v. Emerson*..... 709

Loan Companies. See CORPORATIONS, 4, 5.

Mandamus.

1. A writ of *mandamus* will issue only when the right to require the performance of the desired act is clear. *State v. Bowman*..... 752
2. Where an official bond, sufficient in form and substance, is rejected, the remedy of the officer presenting it is *mandamus* to compel the proper officer to approve it. *McMillin v. Richards*..... 787

Marriage. See BREACH OF PROMISE TO MARRY.

Married Women. See CONFLICT OF LAWS.

Master and Servant. See PRINCIPAL AND AGENT, 6.

1. A servant who incurs the risk of appliances which, though dangerous, he may safely use by the exercise of reasonable skill and caution, does not, as a matter of law, assume the risk of injury from an accident resulting from the master's negligence. *Lee v. Smart*..... 318
2. A master who relies on the defense that a servant assumed the risk of employment must show that the tools or appliance furnished were reasonably safe, or if unsafe, that the danger was obvious. *Kearney Electric Co. v. Laughlin*, 391
3. The following instruction was approved: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not with ordinary care and prudence have discovered it, he would not be deemed to have consented to incur such unusual risk." *Id*..... 392
4. It is error to instruct the jury if they find from the evidence that the servant was exposed to unusual or extraordinary danger it would be negligence on part of the master. *Id.*
5. Evidence set out in opinion *held* sufficient to support a finding that the negligence of the employer was the proximate cause of the death of the employe. *Id*..... 391

Master and Servant—*concluded.*

6. The master is not liable for an injury to a brakeman resulting solely from the negligence of another brakeman while they are working together on the same railroad train. *Chicago, B. & Q. R. Co. v. Howard* 570
7. The happening of an accident through the displacement of a coupler of a certain design is not sufficient proof that the design of appliance is defective where the displacement was caused by a negligent and reckless act. *Id.*
8. Two brakemen employed on the same railroad train are fellow-servants. *Id.*
9. Where services of a surgeon possessing ordinary knowledge and skill in his profession are voluntarily procured for an injured employe by his employer, the latter is not liable for the negligence or malpractice of the surgeon in absence of a reason to suspect that either would result. *Id.*

Maxims.

1. "Where one of two innocent persons must suffer loss by the fraud or misconduct of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." *Union P. R. Co. v. Johnson* 66
   Scroggin v. Johnston 723
2. "*Falsus in uno, falsus in omnibus.*" *Stoppert v. Nierle* 107

Mechanics' Liens.

Sufficiency of evidence to show that the owner of realty, through a person in the employ of claimants for a lien, contracted with the latter for work subsequently performed by them. *Blazer v. Rogner* 588

Metropolitan Cities. See MUNICIPAL CORPORATIONS.

Misconduct of Attorney. See CONTINUANCE, 2.

Misjoinder. See PARTIES.

Mistake. See JUDGMENTS, 6. SUBROGATION, 4.

Mortgages. See APPEAL BONDS, 5, 6. BANKS AND BANKING. CHATTEL MORTGAGES. CORPORATIONS, 4. EXECUTIONS, 3–5. JUDGMENTS, 6. JUDICIAL SALES. RECEIVERS, 1.

1. Where the purchaser of mortgaged land assumes and agrees to pay the mortgage debt, he is personally liable and such liability may be enforced by the mortgagee or his assigns. *Hare v. Murphy* 809
2. The proofs required to establish a deficiency judgment

Mortgages—*continued.*

against the purchaser of mortgaged premises must be such as would enable the mortgagee to maintain against the former an action for the amount of the mortgage debt. *Green v. Hall* 89

3. Where a deed conveying mortgaged land merely recites the existence of the mortgage and that it is part of the purchase price, assumption by the grantee of the mortgage debt cannot be established by proof of a subsequent oral promise without consideration to pay it. *Id.*

4. Recitals in a deed conveying mortgaged land that the deed is subject to the mortgage and that the mortgage is part of the purchase price do not establish the grantee's assumption of the mortgage debt. *Id.*

5. The fact that a junior mortgagee, after obtaining a decree of foreclosure, purchased, before judicial sale, the first mortgage, does not, as against the mortgagor, entitle the former to apply the surplus proceeds of the judicial sale on the first mortgage. *Hooper v. Castetter* 68

6. A decree rendered in a foreclosure suit is not a bar to mortgagor's right to have the surplus proceeds of the sale paid to him in lieu of his homestead. *Id.* 69

7. Effect of failure to register a mortgage. *Grand Island Banking Co. v. Costello* 138

8. Judgment for plaintiff on a supplemental petition to recover money paid to insure the mortgaged property after bringing a foreclosure suit, *held* to be unsupported by the evidence. *Havemeyer v. Paul* 373

9. The mortgagor has no ground to complain because a decree of foreclosure draws seven per cent interest, where the mortgage provides for payment of six per cent before maturity and ten per cent thereafter. *Id.* 374

10. When a first mortgage is satisfied the second mortgage becomes the first lien on the land. *Rice v. Winters* 518

11. An intending purchaser or mortgagee of land must take notice of the mortgage records, and when he relies upon recitals of an abstract of title he does so at his peril. *Id.*

12. One relying upon the record entry of a release not made by the mortgagee is bound at his peril to know that the person who released the mortgage had authority to do so. *Id.*

13. A waiver of the right to foreclose a mortgage upon default in payment of interest is not binding, where the only consideration to support it is the payment of another install-

Mortgages—*concluded.*

ment of interest past due. *Baldwin Investment Co. v. Bailey* 580

14. Upon return of the sheriff's report of a sale under mortgage foreclosure, personal judgment and execution for any deficiency may be awarded by the court. *Flentham v. Steward* 640

15. A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, though the parties may have agreed that upon default of payment the deed should become absolute. *State Bank of O'Neill v. Mathews* 659

16. Where one takes an absolute deed to land as security for a note, assigns the note, and to secure payment thereof gives the assignee a mortgage on the land, the mortgage will be treated as an assignment of the security acquired by the assignor under his deed. *Id.*

17. In the absence of a stipulation to the contrary, different holders of the notes secured by a mortgage are entitled to share *pro rata* in the distribution of the fund realized from foreclosure. *Id.*

18. An assignment of one of several notes secured by a mortgage is an assignment *pro tanto* of the mortgage. *Id.*

19. Where several notes are secured by a mortgage, the fact that those first to mature were transferred before the remaining notes were assigned does not imply an agreement that those first transferred should have preference. *Id.*

20. Where a judgment at law has been rendered for the debt secured by a mortgage, a suit to foreclose cannot be brought until an execution on the judgment has been returned unsatisfied, the return of an attachment pending the action not being sufficient. *Hargreaves v. Menken* 668

21. The pendency of proceedings against garnishees upon a judgment for the debt stays foreclosure. *Id.*

22. To prevent foreclosure it is not necessary that proceedings at law should have been instituted upon the notes secured by the mortgage, proceedings to recover the same debt being sufficient. *Id.*

23. Evidence as to release and payment. *Burlingim v. Baders*, 673

Municipal Corporations. See OFFICE AND OFFICERS, 5. STATUTES, 3.

1. A city may be liable for injuries to private property resulting from an overflow of water during a heavy rain,

Municipal Corporations—*continued.*

where it graded a street, filled up a natural drain and was negligent in failing to provide suitable outlets. *City of Beatrice v. Leary*..... 149

2. Building dikes and making ditches in the streets of a city were *held* to be ministerial acts. *Id.*..... 151
3. The question as to the negligence of a city in constructing drainage ditches in the streets was *held* to be for the jury in an action for damages by a citizen whose property had been inundated, *Id.*
4. Sufficiency of evidence to sustain a verdict for plaintiff in a suit for damages resulting from the failure of a city to provide suitable outlets for water where a natural drain had been closed in improving a street. *Id.*
5. Negligence may be imputed to a municipal corporation and it may be liable for resulting damages, where the mayor and council adopt an insufficient or defective plan of drainage. *Id.*
6. A municipal corporation is not charged with the duty of providing drainage for private property within its limits to prevent an inundation caused by one who obstructs a water-course by filling his own lot to conform to the established grade of a street. *City of Beatrice v. Knight*..... 546
7. The power conferred upon cities of the second class having over five thousand inhabitants, to provide for and regulate the lighting of streets, implies the power to erect and maintain an electric lighting system for that purpose. *Christensen v. City of Fremont*..... 160
8. From the power of a city to provide for and regulate the lighting of streets no power can be implied to erect or maintain a lighting system for the purpose of supplying light for private buildings. *Id.*
9. The power to erect and maintain a lighting system for the purpose of supplying light to private buildings is conferred upon cities of the second class having over five thousand inhabitants by ch. 19, Session Laws, 1889. *Id.*
10. A city may use for the purpose of erecting a lighting system unappropriated general funds on hands, though the law authorizing such a system provides for the levy of a tax and the issuing of bonds for that purpose. *Id.*
11. A city of the second class having more than five thousand inhabitants may, with the sanction of a majority of the electors, make a special appropriation by an ordinance other than the annual appropriation bill. *Id.*..... 161

Municipal Corporations—*concluded.*

12. In order to recover damages against a city on account of the change of grade of streets, the plaintiff must have either a legal or equitable estate in the property injured. *City of Nebraska City v. Northcutt* 456

13. A husband who has erected improvements on the land of his wife, and is in possession thereof, is not entitled to recover in his own name for damages sustained to said property by a change of grade. *Id.*

14. A municipal corporation has no power to issue bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. *Brinkworth v. Grable*..... 647

15. A city in issuing bonds has no authority to issue and deliver interest coupons maturing before a tax for payment can be lawfully levied and collected, and such coupons are void even in the hands of an innocent purchaser. *Id.*

16. Where it is the duty of the auditor of public accounts to register municipal bonds having attached thereto interest coupons maturing before a tax for payment can be lawfully levied and collected, he should detach such coupons when the bonds are registered. *Id.*

17. Evidence examined, and *held* to sustain a judgment annexing certain adjacent lots to a city of the second class. *City of Wahoo v. Tharp* 563

18. One injured as a result of negligence of a city of the second class having more than five thousand inhabitants cannot maintain an action against it for damages where he failed to file a statement in the office of the city clerk within six months from the date of injury. *City of Hastings v. Foxworthy*..... 676

19. The time allowed for filing with the city clerk a claim for injuries resulting from negligence of the city is not extended by plaintiff's disability during a portion of the period, where a reasonable time remains after disability ceases. *Id.*..... 677

20. The provision of ch. 10, Session Laws, 1895, for the appointment of fire and police commissioners for the city of Omaha within thirty days from the passage of the act refers to the time when the act took effect, three calendar months after the adjournment of the legislature. *State v. Bemis*..... 725

Murder. See HOMICIDE. JURY, 2.

Names. See CRIMINAL LAW, 7.

Navigable Waters.

Navigable waters include those waters only which afford a channel for useful commerce, whether the beds thereof are public or private property, and without regard to the influence of the ocean tide. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co*..... 798

Negligence. See CARRIERS, 4. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1, 3, 18, 19.

1. In an action to recover damages for personal injuries resulting from negligence, plaintiff need not plead the precautions he took to avoid injury. *Chicago, B. & Q. R. Co. v. Putnam*..... 440
2. Where a lot contains a pond or dangerous excavation the owner is not required to fence or guard it for the protection of strangers who may go upon the premises, without invitation, for amusement or curiosity. *Richards v. Connell*..... 467
3. A verdict for negligence may be supported by inference when the inference is the logical, probable, and reasonable deduction from proved or conceded facts. *Kearney Canal & Water Supply Co. v. Akeyson*..... 635

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. CONFLICT OF LAWS. DAMAGES, 5. FORGERY, 3. INTEREST. MORTGAGES, 16-19. USURY.

1. An accommodation maker is one who executes commercial paper without consideration in order to enable the payee or holder to thereby obtain credit. *Peoria Mfg. Co. v. Huff*..... 7
2. One who executes a promissory note as surety for another is not an accommodation maker. *Id.*
3. Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. *First Nat. Bank of Omaha v. Chilson*..... 257
4. A blank indorsement, as between the original parties, may be modified by parol. *True v. Bullard*..... 410
5. Where judgment has been rendered on a note against the payee who indorsed it in blank, he cannot maintain an action against a subsequent indorser before paying at least a part of the judgment. *Id.*
6. The contract created by law on part of one who purchases a note indorsed to him in blank by the payee is that the former will present the note to the maker for payment at

Negotiable Instruments—*concluded.*

maturity and notify the indorser within a reasonable time in case of default. *Id.*

7. A payee of a note who indorses it in blank before maturity and delivers it to the purchaser becomes liable to the latter for payment, in absence of an agreement to the contrary, in case the note is not paid by the maker when presented at maturity. *Id.*

8. Where usury is the defense to a note the burden is upon the plaintiff to show that he is a *bona fide* purchaser. *Vail v. Van Doren* 451

9. One who before maturity absolutely guaranties payment of a note becomes liable upon default of the maker, and the neglect of the holder of the note to bring suit does not discharge the guarantor, though the maker meanwhile becomes insolvent. *Fleatham v. Steward* 641

10. Where a defendant under a general denial urged but one ground for the avoidance of the effect of his indorsement, he should not urge non-liability on a different ground in an error proceeding. *Graves v. Norfolk Nat. Bank* 840

11. Evidence discussed in opinion *held* insufficient to show that the holder of a note extended the time of payment without the consent of the indorser. *Benton v. German-American Nat. Bank* 850

New Trial. See REVIEW, 32, 35, 42.

1. Refusal to grant a new trial was sustained in the appellate court in a case where the party aggrieved failed to object to certain testimony, alleged surprise, and did not move for a continuance. *McMurtry v. Blake* 219

2. "Misconduct," as used in the provision (Code, sec. 314) for new trials in civil actions, does not necessarily imply an evil or corrupt motive on the part of the jury or prevailing party. *Chicago, St. P., M. & O. R. Co. v. Deaver* ... 307

3. Exceptions to rulings in giving and refusing instructions are unavailing on review unless specifically assigned in the motion for a new trial. *Hamilton v. Goff* 339

4. A verdict cannot be impeached by affidavits of the jurors. *Gran v. Houston* 815

5. The statements of an affidavit in relation to the misconduct of a juror *held* insufficient. *Id.* 871

6. A motion for a new trial will not be sustained on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict. *Id.*

Notice. See APPEAL BONDS, 7. LANDLORD AND TENANT, 3. PLEADING, 4–8. SUMMONS.

Novation. See ELECTION OF REMEDIES, 1. MORTGAGES, 1. SUBSCRIPTION, 1.

Where the purchaser of the business of one who employed a servant for a definite time at a fixed rate retains the servant for several months and pays him the wages he formerly received, this is such evidence of novation as to charge the purchaser with the obligations of the contract of employment. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 663

Nuisance. See DISORDERLY HOUSES.

An injunction to restrain defendants from operating a gambling house was properly denied where plaintiff was a private individual and failed to prove special injury on account of the nuisance. *Hill v. Pierson*..... 503

Objections. See EXECUTIONS, 4. TRIAL, 12, 14.

Office and Officers. See CONSTITUTIONAL LAW, 8. MUNICIPAL CORPORATIONS, 5.

1. The provision of sec. 7, art. 7, ch. 83, Comp. Stats., for the hearing by the board of public lands and buildings of charges against certain officers did not repeal the provision authorizing the governor to remove for cause the superintendent of the hospital for the insane at Lincoln. *State v. Hay*..... 321
2. The governor in removing officers for cause exercises administrative functions, and his orders in the exercise of such power are not reviewable by the courts. *Id.*..... 322
3. The limit of judicial interference in such cases is to protect public officers, removable for cause only, in their right to a hearing upon specific charges. *Id.*
4. Findings set out in opinion *held* to sustain an order of the governor removing the superintendent of the hospital for the insane at Lincoln. *Id.*
5. In the absence of a statutory provision to the contrary, the presence of all members of a public board is not essential to the transaction of business. *State v. Bemis*..... 725
6. An officer *de jure* is one clothed with the full legal right and title to an office. *McMillin v. Richards*..... 787
7. One claiming to be county treasurer is not a *de jure* officer where the county board rejected his bond and refused to approve it. *Id.*..... 786
8. In a suit for fees against a *de facto* officer plaintiff, in order to recover, must allege and prove that he is the *de jure* officer. *Id.*

Official Bonds. See CLERK OF DISTRICT COURT.

Overruled Cases. See TABLE, *ante*, p. xlvii.

Parties. See JUDGMENTS, 10. PARTNERSHIP, 3. PLEADING, 7. QUI TAM ACTIONS. SUMMONS, 2, 4.

A purchaser who, by novation, became liable upon the vendor's contract to employ a servant for a definite time at a fixed rate cannot complain because judgment was also rendered against the vendor in an action by the servant for wages; nor can misjoinder in such a case be raised by demurrer or objection to evidence. *Culbertson Irrigating & Water Power Co. v. Wildman* 663

Partition. See JUDGMENTS, 2.

Partnership. See FRAUDULENT CONVEYANCES, 5.

1. Where a partner, during the existence of the partnership, enters into a contract within the scope of the partnership business, the firm will be bound thereby. *Farmers & Merchants Ins. Co. v. Malone* 302
2. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue another partner at law for a share of money received by the latter who kept the books and failed to charge himself with the receipt of such money. *McAuley v. Cooley*... 582
3. Where a summons runs against defendants individually, their firm relation being stated in the petition and summons as *descriptio personæ*, the suit is not one against the partnership but against the individual members. *Hanna v. Emerson*..... 708

Payment. See PRINCIPAL AND AGENT, 2. SUBROGATION.

Insufficiency of evidence to show payment of a note. *First Nat. Bank of Omaha v. Chilson*..... 257

Penalties. See STATUTES, 5.

An informer cannot maintain an action in his own name to recover a penalty unless authorized to do so by statute. *Omaha & R. V. R. Co. v. Hale*..... 418

Personal Injuries. See INSTRUCTIONS, 3. MASTER AND SERVANT, 1, 9.

Physicians and Surgeons.

1. Evidence of employment. *Mitchell v. Jones*..... 55
2. A surgeon is required in the exercise of his profession to employ only that degree of knowledge and skill ordinarily possessed by other surgeons. *Chicago, B. & Q. R. Co. v. Howard*..... 570

Pleading. See DEATH BY WRONGFUL ACT. LANDLORD AND TENANT, 4. LIMITATION OF ACTIONS, 2. NEGLIGENCE, 1. OFFICE AND OFFICERS, 8. QUIETING TITLE.

1. Under sec. 120 of the Code the attorney at law for a corporation may verify its pleadings. *Beatrice Rapid Transit & Power Co. v. German Nat. Bank* 147
2. Where suit is brought upon a note by the pledgee thereof, evidence that plaintiff took other security and agreed to release the note is inadmissible under an answer that the debt for which the note was pledged had been paid. *First Nat. Bank of Omaha v. Chilson* 257
3. Objection that a pleading does not state a cause of action or defense should be made in the trial court and assigned in the petition in error. *Pearce v. McKay* 296
4. Notice of a cross-bill of a defendant in an action *in rem* is a proceeding in the cause and interlocutory in character. *Patten v. Lane* 333
5. Where part of the defendants in a foreclosure suit file pleadings after answer day asserting liens, they should notify the adverse parties in interest. *Havemeyer v. Paul*, 373
6. A defendant, upon whom service has been made, is only chargeable with notice of such answers as his co-defendants file within the statutory time. *Id.* 374
7. In a suit to foreclose a mortgage the owner of the equity, after answering the petition, is not charged with notice of an answer filed after answer day by co-defendants who claim liens on the property. *Id.* 373
8. In a suit to foreclose a mortgage it is error to permit plaintiff to file after answer day, without notice to defendant, a supplemental petition to recover money paid for insurance. *Id.*
9. Where defendant files an answer, he is bound to take notice of the reply thereto. *Id.*
10. The want of a material allegation in a petition may be waived by a failure to challenge attention to it in the trial court. *O'Donohoe v. Polk* 510
11. In a suit for wages under a special contract, an averment that plaintiff has performed all the conditions thereof so far as defendant permitted is a sufficient averment of performance unless attacked by motion. *Culbertson Irrigating & Water Power Co. v. Wildman* 664
12. On demurrer, judgment should go against the party whose pleading was first defcetive in substance. *Hawthorne v. State* 871

Pleading—*concluded.*

13. An order allowing an amendment will not be interfered with on review, except for an abuse of discretion on part of the lower court. *Kleckner v. Turk* 177
14. The court may, during a trial, grant leave to amend the petition where the nature of plaintiff's claim will not be changed thereby. *Stratton v. Wood*..... 629
15. Allowing a petition to be amended so as to change the form of the action is permissible where the identity of the cause of action is preserved. *Scroggin v. Johnston*..... 714
16. In an action of ejectment, where defendant pleads a contract of purchase and demands affirmative relief, plaintiff may be permitted to amend his petition so as to change the form of action to foreclosure of the contract. *Id.*
17. The court may permit a pleading to be amended to conform to the proof. *Id.*
18. Leave to amend a pleading may be properly refused where the motion does not disclose the nature of the proposed amendment. *Camp v. Pollock*..... 772
19. Where two causes of action in a petition are identical, the defendant may have a remedy by motion to strike out one of them as surplusage. *Pollock v. Whipple*..... 844
20. New matter constituting a defense cannot be introduced under a general denial. *Gran v. Houston*..... 815

Pledges. See PLEADING, 2.

Powers. See MUNICIPAL CORPORATIONS, 7-11.

Practice. See APPEAL BONDS, 5. ATTORNEY AND CLIENT, 3. BASTARDY, 2. EQUITY, 1. INSTRUCTIONS, 1. PARTIES. PLEADING, 5, 18. RECEIVERS, 2. REMITTITUR. RES ADJUDICATA. REVIEW.

Presumption of Law. See FRAUDULENT CONVEYANCES, 3.

Principal and Agent. See INSURANCE, 3. MORTGAGES, 12. SALES, 3. SCHOOLS AND SCHOOL DISTRICTS, 5-7. TORTS.

1. A banker who receives money from the payer of a note becomes the agent of the latter and not of the payee where the note is payable at the bank but has not been left there and is not produced. *First Nat. Bank of Omaha v. Chilson*, 257
2. An agent who receives money for his principal and fails to pay it over is not liable to the payer in an action for conversion. *Mathews v. O'Shea*..... 299
3. Citation of conflicting authorities as to whether an agent

Principal and Agent—*concluded.*
who receives money for his principal is liable as principal to the payer. *Id.* 301
4. Form of action against an agent to recover money paid to him for his principal where the question of fraud is not involved. *Id.* 302
5. Agency cannot be proved by the acts or declarations of the alleged agent not brought home to the principal. *Richardson & Boynton Co. v. School District* 777
6. A master is not bound by the acts or declarations of his servant beyond the scope, or apparent scope, of the latter's employment. *Id.*

Principal and Surety. See APPEAL BONDS, 1–4, 7. CLERK OF DISTRICT COURT, 1. CORPORATIONS, 11. INTOXICATING LIQUORS, 1, 2. NEGOTIABLE INSTRUMENTS, 2, 5, 11.
1. Where a surety for the payment of a debt receives security as indemnity, the principal creditor is in equity entitled to the benefit of that security. *South Omaha Nat. Bank v. Wright* 23
2. In a suit to recover money paid by plaintiffs as work progressed on a church building destroyed by fire before completion, the sureties on the contractor's bond are not liable, where the owners of the building violated a provision of the contract requiring them to keep the property insured to the extent of their interest. *Gallagher v. St. Patrick's Church* 535
3. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue the sureties on the bond of another partner with the latter who kept the books and failed to charge himself with the receipt of certain sums of money collected. *McAuley v. Cooley* 582

Priorities. See REVIEW, 2.

Privileged Communications. See WITNESSES, 7, 8.

Property. See NEGLIGENCE, 2.

Public Officers. See OFFICE AND OFFICERS.

Quieting Title. See ADVERSE POSSESSION.
Where a land-owner in his petition does not offer to pay to the purchaser at a tax sale the amount of the purchase price or to refund payments made for subsequent legal taxes, an invalid tax deed will not be canceled as a cloud on the former's title. *Weston v. Meyers* 95

Qui Tam Actions.

An informer cannot maintain an action in his own name to recover a penalty unless authorized to do so by statute. *Omaha & R. V. R. Co. v. Hale* 418

Quorum. See OFFICE AND OFFICERS, 5.

Quo Warranto. See CORPORATIONS, 3.

1. Judgment of ouster against the superintendent of the hospital for the insane at Lincoln who was removed for cause by the governor. *State v. Hay* 322
2. Decision in relation to title of rival claimants to the offices of fire and police commissioners of the city of Omaha. *State v. Bemis* 731

Railroad Companies. See CARRIERS. MASTER AND SERVANT, 6, 7. MUNICIPAL CORPORATIONS, 14-16.

1. Where a railroad company, in violation of law, fails to ring a bell or blow a whistle at public crossings it forfeits to the state and not to the informer the penalty provided by sec. 104, ch. 16, Comp. Stats. *Omaha & R. V. R. Co. v. Hale* 418
2. One who informs against a railroad company for violating sec. 104, ch. 16, Comp. Stats., by failing to ring a bell or blow a whistle, cannot maintain an action in his own name for the penalty or control the action when brought. *Id.*
3. Plaintiff was injured in a collision at a railroad crossing and a verdict in his favor against the company for two hundred dollars for damages was *held* to be sustained by the evidence. *Chicago, B. & Q. R. Co. v. Putnam* 441

Receivers.

1. Applications for the appointment of receivers in cases brought in the district court should be presented there whether made before or after appeal. *Eastman v. Cain* ... 48
2. Unless sufficient reasons exist the supreme court will not entertain an original application for the appointment of a receiver. *Id.*
3. The fact that a receiver has been sued without leave of court is a matter of defense for him in the action and does not render invalid the process of the court served on him nor prevent jurisdiction from attaching. *Flentham v. Steward* 641
4. A receiver who voluntarily enters his appearance and asks for and obtains affirmative relief thereby waives the defense of being sued without leave of court. *Id.*

Records. See EVIDENCE, 5, 6. JUSTICE OF THE PEACE, 2-4. MORTGAGES, 11.

Registration.

1. Effect of failure to register a mortgage. *Grand Island Banking Co. v. Costello*..... 138
2. It was *held* as a matter of law that municipal bonds were registered when presented to the auditor of public accounts, though the registration was in fact delayed for several months by injunction. *Brinkworth v. Grable*..... 647

Religious Societies.

1. Courts having no ecclesiastical jurisdiction will neither review nor revise the proceedings or judgments of church tribunals where questions of church discipline are alone involved. *Powers v. Budy*..... 208
2. A church organization has power to provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen or the jurisdiction of the state. *Id.*

Remittitur.

When a verdict is too large and the amount of excess appears from the record, the party who recovered the verdict, in absence of other error, may be permitted to remit the excess and have the judgment for the balance affirmed. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 667

Repeal. See STATUTES.

Replevin. See SALES, 1, 6.

1. Plaintiff's right to recover cannot be predicated upon the failure of defendant to establish a superior right. *Johannson v. Miller*..... 53
2. Where the rights of plaintiff are based solely on written leases to parties from whom he claims to have derived rights of possession superior to defendant's, the failure to offer in evidence the leases or copies will defeat the action. *Id.*
3. Where, by a special finding on sufficient evidence, there was fixed the value of replevied property upon which the mortgage of plaintiff was operative, a judgment rendered on a general verdict limited to the same amount will not be disturbed. *Citizens Nat. Bank of Grand Island v. Wedgwood*..... 143
4. In an action by the indorsee of a note secured by a chattel mortgage to recover the chattels the evidence was *held* sufficient to sustain the defense that the note was materially altered without the knowledge or consent of the defendant. *Davis v. Snyder*..... 415
5. Where defendant claims to hold the property by virtue

Replevin—*concluded.*

of the levy of an execution regular on its face, the writ and levy thereunder will confer upon the officer no right to hold the property as against the owner, if the execution was issued upon a void judgment. *Muller v. Plue* 701

6. One claiming under a chattel mortgage must plead the facts creating his interest and right of possession. *Camp v. Pollock* 771
7. Where there is no conflict as to the amount of damages, the court may direct as to the precise amount and not leave it to the assessment of the jury. *Id.* 772
8. There is no presumption that a mortgagee of chattels before condition broken has any right to possession as against the mortgagor. *Id.*
9. A mortgagee of chattels cannot maintain replevin against a stranger unless as between the parties to the mortgage plaintiff has the right of possession. *Id.*
10. As a rule the rights of parties to an action of replevin must be determined by the facts as they existed when suit was instituted. *Kilpatrick-Koch Dry Goods Co. v. Strauss,* 793

Res Adjudicata. See MORTGAGES, 6.

1. In a judicial district having two judges an order by one judge directing a verdict for defendant on the pleadings and evidence is not necessarily erroneous as reversing the decision of the other judge, who overruled a demurrer to the petition in the same case. *Kleckner v. Turk* 177
2. Where a judgment has been reversed on appeal and the case remanded generally and the same questions are presented on retrial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy* 676

Rescission. See SALES, 1, 2.

Residence. See DOMICILE.

Review. See APPEAL BONDS. BILL OF EXCEPTIONS. CRIMINAL LAW. HABEAS CORPUS, 1. INSTRUCTIONS, 2, 4. JUDGMENTS, 2. JUDICIAL SALES, 7. RELIGIOUS SOCIETIES, 1. TRIAL, 1, 2, 5, 11. VENUE, 1.

1. An order refusing to require the clerk of the district court to approve a supersedeas bond may be reviewed by petition in error. *State v. Baker* 39
2. Where plaintiff dismissed his appeal, leaving a controversy solely between defendants as to priorities of chattel mortgage liens, the defendants having stipulated that a mort-

Review—*continued.*

gage to a co-defendant was first recorded, and that other mortgages were subject thereto, *held*, in the absence of facts pleaded and corresponding relief prayed entitling the junior lienors to other relief, the supreme court should not reverse the judgment below confirming the priority as stipulated. *Gilmore v. Silver*..... 632

3. Where a case has been remanded generally and the same questions are presented on re-trial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy*..... 676

4. Error not conducing to a wrong final decision is not ground for reversal. *Stratton v. Dole*..... 473

5. A ruling on a motion for a continuance will not be reversed except for an abuse of discretion. *Id.*

6. Permitting reported decisions to be read to the jury is not reversible error in absence of an abuse of discretion on part of the trial court. *Id.*

7. Where a case has been submitted without brief and oral argument the judgment may be affirmed. *Gaines v. Bonnell*..... 260
Betz v. Martin..... 341
Denney v. Denslow..... 613

8. An objection that a statute was not enacted in the constitutional mode cannot be raised for the first time in the supreme court. *Clearwater Bank v. Kurkonski*..... 1

9. Grounds for sustaining a motion will not be considered on review unless they were presented below. *Hooper v. Castetter*..... 67

10. A defendant cannot in the supreme court urge a defense not raised below. *Graves v. Norfolk Nat. Bank*..... 840

11. The supreme court will not ordinarily consider the objection that a pleading fails to state a cause of action or defense where that question was not raised below or assigned in the petition in error. *Pearce v. McKay*..... 296

12. A judgment will not be reversed on account of error in admitting evidence not prejudicial. *Peoria Mfg. Co. v. Huff*... 7

13. On appeal from a decree in an equity case it will be presumed that incompetent testimony given below was not considered by the trial court. *Buckingham v. Roar*..... 244

14. Admission of incompetent testimony in a case tried to the court is not reversible error. *Pearce v. McKay*..... 296
Tolerton v. McClure..... 368
Scroggin v. Johnston..... 714

Review—*continued.*

15. Where the bill of exceptions has not been properly authenticated, questions of fact will not be examined. *Griggs v. Harmon*..... 21
16. A verdict will not be disturbed as being contrary to the evidence where important testimony has been omitted from the bill of exceptions. *Conger v. Dodd*..... 36
17. Where papers are filed with a motion and are necessary to a determination thereof, the ruling on the motion will not be reviewed where the papers are not preserved by a bill of exceptions. *Fremont Butter & Egg Co. v. Peters*..... 356
18. Questions of fact will not be considered where the bill of exceptions was settled without authority by the clerk of the district court. *Mattis v. Connolly*..... 628
19. Where part of the charge has been omitted from the transcript for review, an assignment that a certain instruction is misleading for want of modification will not be examined. *Conger v. Dodd*..... 36
20. Assignments of error based on an order sustaining a demurrer will not be considered where the demurrer has been omitted from the transcript. *Ball v. Nelson*..... 205
21. An order of the district court refusing to strike out the pleadings because presenting issues not made before a justice from whom the case was appealed cannot be reviewed unless the record discloses the issues presented before the justice. *First Nat. Bank of Omaha v. Chilson*..... 257
22. Appellee may withdraw from the supreme court a transcript which he filed with a motion to quash the supersedeas bond before appellant's appeal had been docketed. *Kountze v. Erck*..... 295
23. The transcript is the sole evidence of the proceedings below. *Davis v. Snyder*..... 415
24. An assignment that the trial court erred in overruling a motion to strike from the files a certain paper cannot be considered upon review where neither such motion, nor the grounds thereof, appear in the record. *Barr v. State*..... 458
25. Where the record does not show a demand for a jury trial or an objection to a trial to the court, it will be presumed that a jury was waived. *Davis v. Snyder*..... 415
26. Error of a county judge in excluding testimony during the examination of complainant in a bastardy case will not affect the jurisdiction of the district court. *Stoppert v. Nierle*..... 106

Review—*continued.*

27. An assignment of error as to giving or refusing a group of instructions is insufficient. *Id.* 107

28. Exceptions to the rulings in giving and refusing instructions will be disregarded unless specifically assigned in the motion for a new trial. *Hamilton v. Goff.* 340

29. A judgment will not be reversed for the giving of an erroneous instruction where the verdict is the only one which could have been rendered upon the issues. *Stratton v. Dole* 473

30. In charging a jury the repetition of a proposition of law is not reversible error where it does not perplex or mislead the jury. *Gran v. Houston* 813

31. The giving of an instruction assuming the existence of a fact established by undisputed evidence is not a ground for reversal. *Id.* 814

32. Assignments in a petition in error relating to errors occuring at the trial and in the rendition of judgment will not be considered where the record fails to show a ruling on a motion for a new trial. *Leach v. Renwald* 207

33. Allegations that there were errors in the trial below will not be considered in absence of a motion for a new trial. *Carnes v. Heimrod* 364

34. Where a motion for a new trial is based on several different grounds, an assignment that it was erroneously overruled is too general for consideration. *Moore v. Hubbard*.... 612

35. An objection that the findings and judgment are not supported by sufficient evidence is unavailing in an error proceeding where the record fails to show that a motion for a new trial was filed and ruled on below. *Losure v. Miller*... 465
Losure v. Thompson 466

36. A judgment sustained by the proofs will be affirmed where only questions of fact are involved on appeal. *Citizens State Bank of Chadron v. Bellangee* 203

37. Findings below supported by sufficient evidence will not be disturbed in error proceedings upon the assignment that the judgment is against the weight of the evidence. *Tolerton v. McClure* 368

38. Where the record fails to present a question of law the judgment will be affirmed if supported by the evidence. *State Bank of Crawford v. Owens* 534

39. Findings by court or jury on conflicting evidence will

Review—*concluded.*

not be disturbed on review unless clearly wrong. *Mitchell v. Jones* 55
Hooper v. Castetter 68
Thompson v. Field 146
Pearce v. McKay 296
Farmers & Merchants Ins. Co. v. Malone 302
O'Donohoe v. Polk 510
Carstens v. Eller 515
Thompson v. Luke 561
Baldwin Investment Co. v. Bailey 580
B'Nai Israel v. Garneau 592
Moore v. Hubbard 612
Scroggin v. Johnston 714

40. A joint assignment not good as to all plaintiffs in error who joined therein will be overruled as to all. *Small v. Sandall* 306
Harold v. Moline, Milburn & Stoddard Co 618

41. Error in admitting and rejecting testimony is not available on review unless the rulings complained of are definitely pointed out in the petition in error. *Stoppert v. Nierle* 107
Scroggin v. Johnston 714

42. An assignment that the court erred in overruling the motion for a new trial is too indefinite where several grounds are stated in the motion. *Conger v. Dodd* 39
Pearce v. McKay 296
Sigler v. McConnell 598

43. An assignment that the court erred in admitting or rejecting evidence presents nothing for review. *Kearney Electric Co. v. Laughlin* 392

44. The assignment, "Errors of law occurring at the trial and duly excepted to," is insufficient in a petition in error. *Moore v. Hubbard* 612

45. An assignment of error is insufficient where it fails to point out the particular error objected to. *Quinn v. Moss*, 614

46. An assignment that the district court erred in admitting the evidence of a witness will be overruled if any of his evidence was proper. *Kearney Electric Co. v. Laughlin* 392
Sigler v. McConnell 598

Riparian Rights.

1. Except as abrogated or modified by statute, the common law doctrine with respect to the rights of private riparian

Riparian Rights—*concluded.*
proprietors prevails. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.* 799

2. The right of a riparian proprietor is property, and when vested can be impaired or destroyed only in the interest of the general public, upon full compensation. *Id.*

Sales. See CORPORATIONS, 7. EQUITY, 4, 5. GUARANTY. JUDICIAL SALES. MUNICIPAL CORPORATIONS, 15. NOVATION.

1. A merchant who was induced to sell goods on credit through fraud of the purchaser may rescind the contract within a reasonable time and replevy the goods. *Farwell v. Kloman* 425

2. The vendor of goods, in order to rescind a sale on the ground of fraud, must exercise his election to rescind within a reasonable time after the discovery of the fraud. *Smith v. First Nat. Bank of Chadron* 444

3. The relation existing between a wholesale merchant and one who buys goods on credit through fraud is that of debtor and creditor,—not that of principal and agent. *Farwell v. Kloman* 424

4. A purchaser may decline to receive a consignment where the wholesale merchant fails to deliver the quality and quantity of goods ordered, within a reasonable time. *Graves v. Morse* 604

5. The question whether a consignee accepted goods and became liable for payment is for the jury to determine from all the facts and circumstances in the case, where the goods were not shipped within a reasonable time, but were subsequently delivered. *Id.*

6. Where goods not shipped within a reasonable time are received by a clerk of the consignee and stored in the warehouse of the latter without his knowledge, and in violation of his wishes, the evidence will sustain a verdict for the consignor in an action of replevin by him to recover the goods from one who purchased, without an inventory, the entire retail stock of the consignee. *Id.*

7. A shipment of goods consigned to the seller who makes a draft for the price and attaches the bill of lading thereto is a tender of delivery at the place to which the goods are shipped, and not at the place of shipment. *Van Valkenburgh v. Gregg* 654

8. The fact that a buyer received a portion of the goods consigned to the seller at a place designated was a waiver

Sales—*concluded.*

only of the terms of delivery as to the goods so received, and not as to those not shipped. *Id.*

9. A seller of goods cannot recover damages on account of the refusal of the purchaser to accept, unless he tenders delivery of the goods in accordance with the contract. *Id.*

10. Where a written contract specifies a place of delivery, delivery must be tendered at that place. *Id.*

11. Construction of, and evidence of compliance with, a contract of sale for delivery of goods at either of two places, the seller to ship from either place to the buyer at a place designated by the latter. *Id.*

12. Whether statements made by a seller as to the condition of property offered for sale were intended to be warranties, is a question of fact for a jury. *Erskine v. Swanson*..... 767

13. A seller may become a warrantor by using language amounting to an assertion that the property is as represented, though he does not use the word "warrant." *Id.*

14. A person who buys personal property from a conditional vendee thereof, with knowledge of the conditions, is not an innocent purchaser. *Pollock v. Whipple*..... 844

Satisfaction. See CHATTEL MORTGAGES, 1-3.

Schools and School Districts.

1. Secs. 32, 33, 34, and 35, ch. 9, Comp. Stats., providing for issuance of bonds, do not empower a school district to issue its bonds to parties in compromise, or to take the place, of an indebtedness evidenced by school district warrants or orders. *State v. Moore*..... 13

2. The electors of a school district alone have power to direct the building of a school house. *Mizera v. Auten*..... 239

3. A district board has no power to appropriate the funds of a school district to the erection of a school house unless authorized to do so by a vote of the electors. *Id.*

4. Where a school district has raised sufficient money to build a school house, has the funds in its treasury and owns a site, it may, at any regular annual meeting, or at a special meeting called for the purpose, direct the building of a school house on such site, and that payment therefor be made from the funds on hand. *Id.*

5. The electors of a school district may designate the school board as the agent of the district to superintend the construction of a school house. *Id.*

Schools and School Districts—*concluded.*

6. The school board has authority to make contracts for, and superintend the erection of, a school house ordered to be built, where the electors of the district failed to designate an agent for that purpose. *Id.*

7. The electors of a school district may select to superintend the construction of a school building such person or persons as will best subserve the interests of the school district. *Id.*

Seals. See TAXATION, 5.

Self-Defense. See CRIMINAL LAW, 11, 12. HOMICIDE, 5.

Sentence. See CRIMINAL LAW, 4.

Set-Off and Counter-Claim.

Sufficiency of evidence to sustain a finding against a tenant for life who pleaded a counter-claim for payments on mortgages in a case where she was sued by the reversioner for damages for waste. *Disher v. Disher*..... 100

Sheriffs and Constables. See JUDICIAL SALES. REPLEVIN, 5.

Slander. See LIBEL AND SLANDER.

Special Findings. See TRIAL, 1, 2.

Stare Decisis. See RES ADJUDICATA, 2.

State and State Officers. See OFFICE AND OFFICERS.

Statute of Frauds. See TRUSTS.

Statutes. See CONSTITUTIONAL LAW. JUDGMENTS, 11. TABLE, *ante*, p. li.

1. In construing statutes the purpose should be to ascertain the intention of the legislature. *State v. Moore*..... 12

2. Where a law is plain and free from ambiguity no interpretation is necessary. *Id.*..... 13

3. Where, from an analysis of a whole act providing for the issuance of bonds by minor political subdivisions of the state, the meaning and intent is doubtful, the doubt should be resolved in favor of the taxpayers. *Id.*

4. Where the words of a statute are plain, direct, and unambiguous, an interpretation is unnecessary. *Stoppert v. Nierle*..... 106

5. A statute is penal where it creates a liability for violating its provisions not measured or limited by the damage caused by performing or omitting a requirement of the act. *Kleckner v. Turk*..... 176

Statutes—*continued.*

6. A right of action which accrued under a statute and did not otherwise exist is destroyed by the repeal of the statute in absence of a saving clause. *Id.* 177
7. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of the statute. *Id.*
8. A statute treating of a subject in general terms, and not expressly contradicting positive provisions of a prior act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted. *State v. Hay* 321
9. Though the action created by ch. 21, Comp. Stats., is purely a creature of the statute, the courts will not give the statute a technical or narrow construction. *Kearney Electric Co. v. Laughlin* 391
10. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to ring bells or blow whistles at public crossings is penal. *Omaha & R. V. R. Co. v. Hale* 418
11. The word "repealed" in sec. 11, art. 3, of the constitution, relating to amendment of laws, is used therein in the sense in which it was understood when the constitution was adopted. *State v. Bemis* 724
12. Before the adoption of the constitution it was settled as a rule of construction that the simultaneous repeal and reenactment of a statute in terms, or in substance, is a mere re-affirmance of the original act, and not a "repeal" in the strict or constitutional sense of the term. *Id.*
13. It is only required by sec. 11, art. 3, of the constitution, in relation to amending laws, that the amendatory act shall be definite and certain as to the law amended, and germane to the original act. *Id.*
14. An act embracing the entire subject-matter of a prior act and also additional provisions will be construed as a repeal of the latter by implication. *Id.* 725
15. A provision in a statute without an emergency clause, for the appointment of certain officers within thirty days from the passage of the act, was *held* to refer to the time the law went into effect, three calendar months after the adjournment of the legislature. *Id.*
16. All presumptions are in favor of legislative acts. *Id.* 731
17. An act will not be declared invalid unless plainly and irreconcilably in conflict with the constitution. *Id.*
18. A court in construing a statute should consider its policy

Statutes—*concluded.*

and the mischief to be remedied, and give the interpretation best calculated to advance the design of the legislature. *Gran v. Houston* 814

19. A proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co* 885

20. The power conferred by the Rayner irrigation law of 1889 upon irrigating companies for acquiring the right of way for canals and ditches is within the title of the act, and is not in conflict with sec. 11, art. 3, of the constitution relating to titles of bills. *Id.* 884

Stock. See CORPORATIONS, 7, 8.

Stockholders. See CORPORATIONS, 1-3.

Subrogation. See TAXATION 1.

1. The right of subrogation not resting on contract, but being a mere equitable right, whether the doctrine should be applied depends upon the circumstances of each case. *South Omaha Nat. Bank v. Wright* 23
Rice v. Winters 517

2. One cannot be subrogated to the rights of a third person until he has paid a debt due the latter. *Rice v. Winters*... 517

3. The right of subrogation is never accorded to one who is a mere volunteer in paying a debt of one person to another. *Id.*

4. A third mortgagee who loaned the mortgagor the money with which the first mortgage was paid and satisfied, believing that a marginal release on the record of the second mortgage was valid, when in fact it was not, should not be subrogated to the rights of first lienor. *Id.*

5. Courts of equity will not apply the doctrine of subrogation where it will deprive a party of a legal right. *Id.*..... 518

6. Sureties on a contractor's bond, after a building in course of construction has been destroyed by fire, may be subrogated to the rights of the owner in the insurance on the property, where they were compelled to pay him the sums he advanced under a building contract requiring him to carry insurance to the extent of his interest in the property. *Gallagher v. St. Patrick's Church* 535

Subscription.

1. Where a subscription paper, payable to a certain person,

Subscription—*concluded.*

is assigned by him to one of the subscribers, the latter may recover directly from another subscriber who is delinquent. *Ripp v. Hale*..... 567

2. A page of a deed record in such a case was *held* to have been properly excluded from the evidence, as not affecting the liability of defendant upon the subscription. *Id.*

3. The evidence in such a case was *held* sufficient to sustain a verdict for plaintiff where the defense was alteration of the instrument. *Id.*

Summons. See APPEARANCE, 4. JUDGMENTS, 5, 10. JUSTICE OF THE PEACE, 2–4. PLEADING, 5–7.

1. Sufficiency of evidence to establish the place of leaving a summons as that of the usual place of residence of defendant who was absent from the state with the intention of returning. *Wood v. Roeder*..... 311

2. Where a transitory action is properly brought in a county, summons may issue to any other county to bring in other parties defendant. *Hanna v. Emerson*..... 708

3. Service of summons in an action against individual members of a firm is governed by sec. 69 of the Code, authorizing service to be made by delivering a copy to a defendant or by leaving it at his usual place of residence. *Id.*

4. In a personal action, service upon a nominal defendant in the county where suit is brought does not confer authority for bringing a real defendant from another county by a summons directed to that county and served there. *Id.*

5. To entitle a party to the issuance of an alias summons, it is not essential that he should refile the petition or file a new one. *Id.*..... 709

Supersedeas Bonds. See APPEAL BONDS.

Suretyship. See PRINCIPAL AND SURETY.

Surface Water.

A land-owner may defend his premises against surface water by dike or embankment, but is liable for damages where he negligently or unnecessarily constructs an embankment and overflows the land of an adjoining proprietor. *City of Beatrice v. Leary*..... 149

Taxation. See MUNICIPAL CORPORATIONS, 11, 15, 16.

1. A purchaser at an invalid tax sale has a lien on the realty for the taxes paid and is subrogated to the rights of the public. *Weston v. Meyers*..... 95

Taxation—*concluded.*

2. A public tax levied on real estate becomes a lien until paid or barred. *Id.* 96

3. As between a tenant for life and the reversioner the former should pay taxes assessed against the estate. *Disher v. Disher* 100

4. One who sells land after April 1, in any year is, under sec. 44, ch. 77, Comp. Stats., liable for the taxes on such real estate for that year. *Campbell v. McClure* 609

5. Valid tax deeds cannot be executed because the law does not provide for an official seal for county treasurers. *Dickey v. Paterson* 848

Tender. See SALES, 7, 9, 10.

Torts. See CARRIERS, 2.

A person who interferes with personal property not his own, at the instance of another, who is not the owner, is liable to the owner for the wrongful act. *Cook v. Monroe* 349

Towns. See VILLAGES.

Township Bonds.

County commissioners have no jurisdiction to order an election for the purpose of voting on a proposition to issue township bonds for internal improvement until a petition signed by at least fifty freeholders of the township has been presented. *Hoxie v. Scott* 199

Transcripts. See BILL OF EXCEPTIONS, 4. CRIMINAL LAW, 2. REVIEW, 19-23.

Transitory Actions. See SUMMONS, 2.

Trial. See ATTORNEY AND CLIENT, 3. CONTINUANCE, 3. CRIMINAL LAW. EQUITY, 1. HOMICIDE, 9. INSTRUCTIONS. JURY. RES ADJUDICATA, 1. REVIEW, 10, 13. WITNESSES.

1. A special finding will not be assumed to be in conflict with the general verdict of the jury. *Citizens Nat. Bank of Grand Island v. Wedgwood* 143

2. A special finding, though clearly unsustained by the evidence, must be disregarded when the fact established by it is clearly irrelevant to the issues. *Id.*

3. The admission of incompetent or irrelevant testimony in a trial without a jury is not reversible error. *Pearce v. McKay* 296
Tolerton v. McClure 368
Scroggin v. Johnston 714

Trial—*concluded.*

4. Error cannot be predicated upon the exclusion of certain testimony where the same was subsequently admitted. *Farmers & Merchants Ins. Co. v. Malone*..... 302
5. The admission of evidence which, though not competent, is immaterial affords no grounds for the reversal of a decree in equity. *Blazer v. Rogner*..... 588
6. Where a jury returns an incomplete or defective verdict, it is proper for the court to send it back under proper instructions for its completion or correction. *Smith v. First Nat. Bank of Chadron*..... 444
7. Permitting reported decisions to be read to the jury is a subject within the discretion of the trial court. *Stratton v. Dole*..... 473
8. Argument of counsel based on facts not in evidence is not reversible error if made in reply to similar argument of the adverse party. *Id.*..... 474
9. Where defendant's attorney in his opening statement, with permission of the court and against plaintiff's objections, rehearses matters foreign to the issues and which tend to excite the prejudice of the jury, a judgment for defendant may be reversed. *Stratton v. Nye*..... 619
10. Where the district court abuses its discretion in conducting the routine business of a trial the judgment may be reversed. *Id.*
11. The refusal of the court to permit a witness to answer a question cannot be made a ground of error in absence of an offer of the proof an answer would elicit. *Alter v. Covey*... 508
12. Where a responsive answer is received without objection, it is discretionary with the court to sustain or overrule a motion to strike out the answer as incompetent. *Gran v. Houston*..... 816
13. A party desiring to review proceedings in relation to the misconduct of an attorney should at the time object to the conduct and obtain a ruling on the objection. *Id.*
14. To make error available in the admission of evidence there must be an objection to its admission and an exception to the ruling on the objection. *Id.*

Trover and Conversion. See PRINCIPAL AND AGENT, 2.

The refusal of a common carrier to surrender goods in its possession to the rightful owner amounts to conversion, for which the latter may recover if entitled to possession at the time of the demand therefor. *Shellenberg v. Fremont, E. & M. V. R. Co*..... 487

Trust Funds. See EQUITY, 5.

Trusts. See CORPORATIONS, 4, 5. FRAUDULENT CONVEYANCES, 5.

Where several persons furnish money, buy land, and have it conveyed to one of their number in trust for all, one who contributed to the fund may enforce the trust in equity in an action against the trustee. *Leader v. Tierney*..... 753

Ultra Vires. See BANKS AND BANKING.

Usury.

1. Where a note bearing the highest lawful rate of interest is antedated as a device to cover usury, and the money is not set aside by the lender for the use of the borrower during the time between the date of the note and the payment of the money, the transaction is usurious. *Vail v. Van Doren*..... 450
2. A transaction providing for a loan at ten per cent, where a seven per cent note is given, and an advance payment of interest deducted from the loan, which with the interest on the note does not exceed ten per cent, is not usurious. *Guthrie v. Hamilton Loan & Trust Co*..... 766

Variance. See CRIMINAL LAW, 2.

Vendor and Vendee. See CONTRACTS, 4. MORTGAGES, 1, 11. PARTIES. PLEADING, 16. TAXATION, 4. TRUSTS.

A deed unrecorded at the time of the rendition of a judgment, if recorded before execution sale thereunder, is superior to the sheriff's deed. *Hargreaves v. Menken*..... 668

Venue. See CORPORATIONS, 6. CRIMINAL LAW, 13. GARNISHMENT.

1. A ruling on a motion for a change of venue will not be disturbed in the supreme court except for an abuse of discretion of the trial court. *Stoppert v. Nierle*..... 106
2. An action on an account against two or more persons may be brought in the county in which any one of the defendants at the time resides or may be summoned. *Hanna v. Emerson*..... 708
3. Where an action on an account against two or more persons is not instituted in a county where a defendant resides, it must be brought in the county where he then is, and summons must be served upon him there. *Id.*

Verdict. See TRIAL, 6.

Verification. See PLEADING, 1.

Villages.

The boundaries of a village may, under sec. 99, ch. 14, Comp. Stats., be extended so as to include adjacent lands in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. *City of Wahoo v. Tharp*..... 563

Voluntary Assignments. See EQUITY, 5.

Waiver. See CONTRACTS, 3. MORTGAGES, 13. PLEADING, 10. REVIEW, 25. SALES, 8.

Warranty. See GUARANTY. SALES, 12, 13.

Waste.

1. A life tenant who does not damage or diminish the value of the inheritance may remove timber so as to fit the land for pasture or cultivation. *Disher v. Disher*..... 100
2. The reversioner in an action to stay threatened waste by a tenant for life may recover for waste previously committed where there is some connection between the injury done and the acts threatened. *Id.*
3. Sufficiency of evidence to sustain the allegation of waste by a reversioner against a tenant for life. *Id.*

Water and Water-Courses. See NAVIGABLE WATERS. SURFACE WATER.

In a suit against a canal company for damages to crops by the overflow of a canal resulting from the negligence of defendant in maintaining its embankments the evidence was *held* sufficient to justify a verdict for plaintiff. *Kearney Canal & Water Supply Co. v. Akeyson*..... 635

Witnesses. See CRIMINAL LAW, 9, 10. EVIDENCE, 4. INDICTMENT AND INFORMATION. REVIEW, 46.

1. Instruction as to credibility of a witness *held* properly refused, for the reason that it misstated the maxim, "*Falsus in uno, falsus in omnibus.*" *Stoppert v. Nierle*..... 107
2. Where a husband is a nominal defendant, having no interest adverse to that of his wife, in an action by her to cancel a fraudulent conveyance executed by both to a third person the wife is a competent witness in her own behalf. *Buckingham v. Roar*..... 244
3. In such a case neither the husband nor the wife should testify as to any conversation which occurred between them with reference to the subject-matter of the suit. *Id.*
4. In such a case testimony of the husband tending to sustain the conveyance is incompetent as being adverse to the interest of the wife. *Id.*

Witnesses—*concluded.*

5. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication made while the marriage subsisted. *Id.*
6. Where defendant in a criminal prosecution becomes a witness in his own behalf, his interest in the result of the trial may be shown for the purpose of affecting his credibility. *Basye v. State* 261
7. A communication from a party to an attorney is not privileged where the relation of attorney and client did not exist between them. *Id* 262
8. Where a client makes statements to his counsel in the presence and hearing of a third person who stands in no relation of confidence to either, such person may testify to the statement. *Id.* 263
9. Statements made by a witness out of court in conflict with his testimony at the trial may be shown in cross-examination. *Fremont Butter & Egg Co. v. Peters.* 356
10. Evidence set out in opinion *held* admissible for the purpose of impeachment. *Stratton v. Dole* 473
11. Case where a witness was permitted to testify after disobeying an order excluding witnesses from the court room. *Gran v. Houston* 816

Words and Phrases.

1. "Deliberation." *Debney v. State* 866
2. "Misconduct." *Chicago, St. P., M. & O. R. Co. v. Deaver* ... 307
3. "Navigable waters." *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co* 798
4. "Pecuniary injuries." *Kearney Electric Co. v. Laughlin* ... 391
5. "Repeal." *State v. Bemis* 724
6. "Wholly dependent." *Kearney Electric Co. v. Laughlin* ... 391

Writs. See EXECUTIONS. SUMMONS.