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JENNIE SHAFFER V. SAMUEL S. VINCENT.

FILED JANUARY 19, 1898. No. 7675.

1. **Bill of Exceptions:** AUTHENTICATION. A bill of exceptions, to be available in the supreme court, must be authenticated by the clerk of the district court.
2. ———: ———. A certificate by the clerk of that court merely stating that the original bill was filed in his office on a certain date, is insufficient to identify a document contained in the transcript as being either such original bill or a copy thereof.

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

R. L. Keester, for plaintiff in error.

John Everson, contra.

NORVAL, J.

This was an action by Samuel S. Vincent against Jennie Shaffer and others to obtain the cancellation of a deed to certain real estate in Harlan county, on the ground that the same was procured by misrepresentation and fraud. A decree was entered for Vincent as prayed. A motion for a new trial was filed by Jennie Shaffer, which was overruled by the court, and she alone has brought the record here for review.

The assignments of error call in question the sufficiency of the evidence to sustain the findings and decree, the decisions of the court below upon the admission of testimony, and the ruling upon the motion for a new trial. These assignments are not available, because the document attached to the transcript is not authenticated by the certificate of the clerk of the trial court as being either the original bill of exceptions in the cause or a copy thereof. The district clerk merely certifies that the original bill of exceptions was filed in his office on a certain date, which is insufficient for the purpose of au-

thentication. As none of the questions argued can be considered without the aid of a bill of exceptions, the decree must be

AFFIRMED.

LAURA F. FUNK, APPELLEE, V. KANSAS MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED JANUARY 19, 1898. No. 7701.

1. **Judgments: EQUITABLE RELIEF: NEGLIGENCE.** A court of equity will not afford relief against a judgment or decree obtained against a party through the negligence of his attorney.
2. ———: ———: **EVIDENCE.** Evidence *held* insufficient to support the decision of the trial court vacating a former decree in another action between the same parties.

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

Ricketts & Wilson, for appellants.

Doty & Haggard, contra.

NORVAL, J.

The Kansas Manufacturing Company recovered several money judgments against Ancil L. Funk, on which executions were issued, which were returned by the sheriff of Lancaster county *nulla bona*. Alias executions were thereupon issued on said judgments, and levies were made thereunder upon certain real estate as the property of Funk, which prior thereto he had conveyed to his brother-in-law T. W. Thornburg, who likewise conveyed it to Laura F. Funk, the wife of said judgment debtor. Subsequently, and after the levy of said executions, the Kansas Manufacturing Company commenced a suit in the court below, in the nature of a creditor's bill, against Ancil L. Funk, Laura F. Funk, and T. W. Thornburg, to

set aside the deeds to said real estate, and to subject the property to the payment of said judgments. On May 11, 1893, Laura F. Funk filed an answer and cross-petition therein, which not only denied many of the material averments of the creditor's bill, but pleaded matters upon which she asked affirmative relief. On June 19, 1894, the plaintiff therein replied to said answer and cross-petition and filed a supplemental petition setting up the recovery by it on that day of another judgment against said Ancil L. Funk. On June 20, which was a day in the April term, 1894, of the district court of Lancaster county, the cause was tried in the absence of Mrs. Funk, and in nine days later a decree was entered cancelling the conveyances, and awarding the plaintiff therein a lien upon the real estate. An order of sale was issued thereon, and the property was advertised for sale, but prior to the day fixed for the sale, and on August 28, 1894, Mrs. Funk instituted this action against the sheriff, Fred A. Miller, and the Kansas Manufacturing Company to enjoin the sale and to vacate and set aside the decree of June 29. From the decree awarding Mrs. Funk the full measure of relief demanded in her petition the defendants prosecute this appeal.

The evidence adduced tended to prove that Mrs. Funk had a meritorious defense against the creditor's bill. Therefore we are limited in our investigation to the question whether sufficient cause existed for setting aside and vacating the decree which canceled the conveyances to the real estate in controversy. Relief was asked upon two grounds: First—That her attorneys failed to properly look after her interest in the action or to notify her of the time when the cause would be reached for trial; and second—that she was misled as to the time of the trial by an agreement made with the Kansas Manufacturing Company that the cause should not be heard during the April term, 1894, of the district court. Assuming, without deciding the point, or intimating that the facts warrant such an inference, that Mrs. Funk's at-

torneys were negligent, such fact constituted no justification for vacating the decree. It is well settled that equity will not relieve a party against a judgment on account of his own negligence or that of his attorney. The fault or negligence of an attorney is in law regarded the neglect of the client. (Weeks, Attorneys [2d ed.] sec. 294; 1 Black, Judgments secs. 500-503; *Jones v. Leech*, 46 Ia. 186; *Drinkard v. Ingram*, 21 Tex. 650; *Lee v. Green*, 28 Atl. Rep. [N. J.], 904; *Yates v. Monroe*, 13 Ill. 213; *Kern v. Strausberger*, 71 Ill. 413; *Clark v. Ewing*, 93 Ill. 572; *Barrow v. Jones*, 1 J. J. Marsh. [Ky.] 470; *Ganzer v. Schiffbauer*, 40 Neb. 633; *Scott v. Wright*, 50 Neb. 849; *Losey v. Neidig*, 52 Neb. 167.)

Plaintiff and her husband on and prior to April 10, 1894, resided in the city of Lincoln and on that date they moved to Alcovia, Wyoming. There were then pending two suits in the district court of Lancaster county in favor of the Kansas Manufacturing Company, one against Ancil L. Funk for the recovery of a money judgment, and the other was the creditor's bill already mentioned. Ancil L. Funk testified that about a week prior to the removal of himself and wife to Wyoming he interviewed H. H. Wilson, one of the attorneys for the plaintiff in the last named suit, as regards the trial thereof, and his version of the conversation which then took place is here reproduced in his own language: "I met Mr. Wilson near the corner of Eleventh and O and told him that I was going to Wyoming before long, and would necessarily be some distance from the railroad, and I would like to be sure that this case was put off until fall. He said that he was not particular about the equity case, but the law case he should press—he had put that off and would not put it off again—but the equity case he was not particular about, and would not take any undue advantage of my absence, or my wife's." Mr. Funk further testified that had it not been for this conversation and the reliance placed thereon, he and his wife would have attended the trial. H. H. Wilson testi-

fied positively that no conversation of the import narrated by Mr. Funk was ever had, and Mr. Wilson is corroborated by other testimony appearing in the record. Moreover, if the conversation occurred as testified to by Mr. Funk it is insufficient to sustain the allegation in the petition that there was a definite agreement that the cause should not be tried during the term of the district court at which it was heard. At most it cannot be claimed that Mr. Wilson agreed to anything more than that no undue advantage should be taken of the absence of Mr. Funk or his wife. The record fails to disclose that any undue advantage was taken of the absence, since the Funks, by letters received from their attorney, were advised that the equity case was on the call for the April term and urged upon them the necessity of their being present at the trial. In no reply to these letters was it suggested that there was an agreement that the cause should not be tried at that term of court. Counsel for Mrs. Funk consented to the setting of the case down for trial, and when it was reached asked for no postponement of the hearing, and made the very best defense possible without the assistance of either client or witness. It is manifest that no sufficient cause was shown for vacating the decree of June 29, 1894. The decree of the court below herein is reversed, and the action dismissed.

REVERSED AND DISMISSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED JANUARY 19, 1898. No. 8419.

1. **Municipal Corporations: ANNEXATION OF TERRITORY.** Ordinance No. 226 of Nebraska City was ineffectual of itself to annex adjacent territory to said city or to extend the territorial limits of the municipality.

2. ———: TAXATION. A city cannot levy a tax on property where its situs is not within the corporate limits.

3. **Taxation:** INJUNCTION. A court of equity will enjoin the collection of a tax which is absolutely void.

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

C. W. Seymour, for appellants.

John C. Watson, J. W. Deweese, and *F. E. Bishop, contra.*

NORVAL, J.

Action was instituted by the Chicago, Burlington & Quincy Railroad Company to enjoin the collection of a city tax assessed in 1893 by the authorities of Nebraska City upon the west half of plaintiff's bridge spanning the Missouri river at or near said city. From a decree awarding the company a peremptory injunction the defendants appeal.

The tax in question is claimed by the plaintiff to be invalid upon two grounds: First—The bridge in question is a part of plaintiff's line of railroad, and the portion of the structure lying within this state is not subject to taxation by the local assessing and taxing officers, but the state board of equalization alone has jurisdiction to assess the same. Second—No portion of said bridge is within the corporate limits of Nebraska City, and therefore the municipal authorities thereof had no power to tax the same for any purpose whatever.

The first contention is in the teeth of the decision of this court in *Cass County v. Chicago, B. & Q. R. Co.*, 25 Neb. 348, where it was distinctly ruled that the west half of the railroad bridge across the Missouri river at Plattsmouth was subject to taxation by the local assessor and not by the state board of equalization. That decision is vigorously assailed as being unsound, and standing alone as a precedent upon the question therein considered. An investigation of the subject anew is sought

herein. In the opinion of the writer, any discussion of that decision at this time, or of the first ground above stated for relief in this case, would be mere *obiter*, since the trial court found, and its finding is sustained by the proofs, as will hereafter appear, that no portion of the railroad bridge at Nebraska City is included within the geographical limits of such city. It will be soon enough to approve or overrule the decision alluded to when the question therein determined shall fairly arise in a pending cause.

The facts upon which the second ground for relief are predicated are substantially these: The territorial legislature of Nebraska in 1855 passed an act incorporating Nebraska City, the first section whereof provided "that all the territory within the geographical limits of Nebraska City, as designated upon the plat of said city, together with all the additions that may be hereafter made thereto according to law, is hereby declared to be a city by the name of Nebraska City." (Session Laws 1855, p. 391.) At the same session of the legislature there was enacted a law incorporating as Kearney City all the territory included in the boundaries of such city as designated upon the plat thereof. (Session Laws 1855, p. 417.) These two cities were consolidated by legislative enactment in 1857, and declared to be a corporation by the name and style of Nebraska City. (Session Laws 1857, p. 53.) The recorded plats of the two cities thus consolidated show a strip of land 160 feet wide lying between their eastern boundaries and the west bank of the Missouri river, which strip is designated on the plats as "Levee 160 feet wide." The west end of the railroad bridge is 120 feet east of the east boundary line of Nebraska City, as shown by the plats aforesaid, so that no portion of the bridge is within the limits of such city, unless the corporate boundaries were legally extended by ordinance No. 226 passed by the mayor and council on December 5, 1892, the first section of which follows:

"Section 1. That the following described land and territory be, and the same is hereby, included in the corporate limits of the city of Nebraska City, Otoe county, state of Nebraska, and the said limits are hereby extended so as to embrace and to include the same, to-wit: Commencing at the city limits on the quarter-section line running east and west through section ten (10), township eight (8), in range fourteen (14) east of the sixth principal meridian, in Otoe county, state of Nebraska, thence east to the middle of the channel of the Missouri river; thence down said channel until it intersects north and south line 350 west, and parallel to the north and south eighty-acre line in the southwest quarter of section ten (10); thence south to the city limits; thence in a northwesterly direction along the city limits to the place of beginning; also the surface of the ground and the accretion thereto lying between the corporation line of said city and the Missouri river within the above described line, being a part of section ten (10), in township eight (8), in range fourteen (14) east of the sixth principal meridian, in Otoe county, state of Nebraska, and containing less than five acres."

The adoption of said ordinance was wholly insufficient to change the boundaries of the municipality. The statute at that time in force designated the mode for the annexation of adjacent territory to a city of the first class having less than 25,000 inhabitants. (Compiled Statutes 1891, ch. 13*a*, art. 2, secs. 4, 6.) The one for which provision is made in said section 4 permits such annexation to be accomplished by the passage of an ordinance by the mayor and council extending the corporate limits so as to include territory contiguous or adjacent to the city, which by the authority or acquiescence of the owner has been subdivided into tracts or parcels containing not to exceed five acres. The record fails to establish that the real estate sought to be annexed by the ordinance in question had been subdivided by the owner into parcels of the size specified by said section 4. It is true the

amount of land attempted to be added to the city does not exceed five acres, but that is an unimportant consideration, and does not meet the legislative requirement that the contiguous territory must have been subdivided by the proprietor into parcels of not to exceed five acres, in order to entitle the same to be attached to the corporation by the mere passage of an ordinance ordering it to be annexed. It is a familiar doctrine that municipal corporations can exercise only such powers as are conferred by law, either expressed or implied. Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity. It does not appear that the method provided in section 4 for the extending of the boundaries of a city of the class of Nebraska City has been pursued. The other statutory mode of annexation of adjacent real estate has not been observed, since it is not claimed that the land embraced within the description contained in the ordinance has been by the proprietor or owner thereof laid out into lots, blocks, avenues, and alleys or other grounds, nor has a plat thereof been made, acknowledged, and recorded as section 6 contemplates and requires. The ordinance was therefore in and of itself ineffectual to extend the limits of the municipality.

It is suggested that the boundaries of the city were enlarged so as to include the said strip of land 160 feet wide lying immediately east of the platted territory, by ten years' adverse usage by the city authorities. Doubtless, the mayor and council entertained a different view, else the ordinance to which reference has been made would most likely never have been adopted. They hardly would have attempted to annex territory which was already regarded as embraced within the boundaries of the city. Moreover, this record fails to show that the city limits were changed to include this adjacent territory by virtue of any adverse use or occupancy of the premises. No part of the bridge being within the geo-

graphical limits or boundaries of Nebraska City, the taxes levied and assessed thereon by the municipal authorities are unauthorized and void. (*Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369.)

In argument it is said that plaintiff has an adequate remedy at law, and that injunction will not lie to restrain the collection of the tax. It is true a court of equity will not interfere to prevent the enforcement of a tax merely because the assessment was irregular, but injunction may be resorted to where the whole tax is absolutely void and the enforcement thereof would be inequitable and against conscience. (*Touzalin v. Omaha*, 25 Neb. 817; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Bellvue Improvement Co. v. Bellvue*, 39 Neb. 876; *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369.) As the authorities of Nebraska City had no jurisdiction to impose the taxes in controversy plaintiff may invoke the aid of a court of equity to prevent the collection thereof. For the reason stated, the decree of the district court is right and it is

AFFIRMED.

WILLIAM M. ELLIOTT V. CARTER WHITE-LEAD COMPANY.

FILED JANUARY 19, 1898. No. 7673.

1. **Pleading and Proof:** VARIANCE. There can be no recovery if there is a material variance between the allegations and the proof. The *allegata* and *probata* must agree.

2. **Trial:** DIRECTING VERDICT. Where the evidence is uncontradicted, and all reasonable men must draw the same conclusion therefrom, it is not error for the court to direct a verdict in favor of the party entitled thereto under the pleadings and proofs.

3. **Review:** ORAL INSTRUCTIONS. Error in giving an oral instruction is not available in this court where no exception was specially taken on that ground in the trial court at the time the instruction was given.

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

Weaver & Giller, for plaintiff in error.

I. R. Andrews, contra.

NORVAL, J.

William M. Elliott sued the Carter White-Lead Company to recover for personal injuries. At the close of the plaintiff's testimony the jury, in obedience to an oral instruction of the trial court, returned a verdict for the defendant. A motion for a new trial was overruled, and judgment was entered against the plaintiff in accordance with the verdict. Subsequently, on motion of the defendant, an order was entered requiring that security for costs be given by the plaintiff, who prosecutes this error proceeding.

The defendant is the owner and operator of a factory in the city of Omaha for the manufacture of white lead, and plaintiff was in its employ. An inclined wooden elevator was used by the defendant to hoist pigs of lead from railway cars up and into a vat on the inside of the company's building. This elevator consisted of two pine planks about fourteen feet long, nine inches wide, two inches thick on the upper edge and three inches on the lower, fastened or bolted parallel to each other, and about two feet apart, so as to permit the passage between them of an endless chain with an apron attachment. This elevator stood at an angle of about 45 degrees, with one end resting on the foundation of the building and the other passing through the floor above into the room containing the vat. A pig of lead weighing about 100 pounds being placed on the lower part of the elevator was pushed or slid up and along the upper edges of said planks by the apron attached to the endless chain to the top of the elevator, where it fell into the vat, the apron continuing on around; and on reaching

the bottom at each revolution another pig of lead was placed on the apron, which in like manner was elevated to the vat in the room above. The continual sliding of the pigs of lead had worn several scallops on the surface of the upper edges of the two planks to the depth of about one-fourth of an inch. A few hours prior to the injury hereafter mentioned the elevator was repaired by nailing on the upper edge of each plank, for the entire length, a strip of iron two inches wide and about one-eighth of an inch in thickness. These strips of iron were fastened with eight-penny nails driven about nine inches apart and near the center of the scallops. Shortly after said repairs were completed plaintiff assisted in unloading a car of lead. His portion of the work was to carry the pigs of lead from the car and place them on the elevator, one at a time, in proper position to be pushed up by the apron. After he had been thus at work between three and four hours, a pig of lead, which he had placed on the elevator, was carried in the usual way by the apron until it was within a short distance of the top, when one end thereof, it is claimed, caught upon a protruding nail which threw the pig of lead down the elevator and upon the foot of plaintiff, causing the injury which is made the basis of this action.

It is urged that the elevator was defective and out of repair, and that the defendant was negligent in not instructing the plaintiff in the use of the same and in not apprising him of the danger and hazard of the work he was called upon to perform. By the undisputed testimony it was established that the elevator had just been repaired and placed in a safe condition for use, and that the pig of lead which caused the injury was the first one to fall after the making of the said repairs. Moreover, the specific act of negligence charged in the petition is that the nails used for fastening the iron bands to the planks were so small that they worked loose, and protruded and extended above the upper surface of said bands, enabling the nails to catch the lead

and causing it to fall upon plaintiff's foot. This averment is not sustained by a scintilla of evidence. On the contrary, it is claimed in the brief of plaintiff that the accident was occasioned by the weight of the pig of lead depressing the iron strip down into one of the scallops already mentioned, causing the nail to protrude and catch one end of the pig of lead, whereby it was thrown down the elevator. The petition does not charge that the injury resulted in any such manner. If it occurred in the mode suggested, it is remarkable that some one of the several hundred pigs of lead which plaintiff had placed on the elevator prior to the accident, during the same evening, was not also caught on the protruding nail and thrown down, since the pigs of lead were shown to be nearly all of the same size and weight. As to the failure of defendant to instruct plaintiff in the method of operating the elevator and of the danger and hazard of the employment, it is sufficient to say that no negligence in that regard is imputed to the defendant in the petition. A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the *allegata* and *probata* must agree. (*Worth v. Buch*, 34 Neb. 703; *Imhoff v. House*, 36 Neb. 28; *Luce v. Foster*, 42 Neb. 818.)

Doubtless, where different minds may honestly draw from the evidence different conclusions as to whether negligence or the absence thereof is established, the question as to the conclusion to be reached is a proper one for the jury, and not for the trial court. It is likewise firmly settled in this state that where the evidence is uncontradicted and all reasonable men must draw the same inference therefrom, the question of negligence is one of law for the court, and in such case it is not error for it to direct a verdict in favor of the party entitled thereto under the proofs adduced. (*Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; *Woolsey v. Chicago, B. & Q. R. Co.*, 39 Neb. 798; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556; *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb. 840.) It was unfortunate that the plaintiff re-

ceived the injury, but it was one of the risks incident to his employment, and which he assumed. An examination of the evidence set forth in the bill of exceptions reveals that no other verdict in the case could have been properly returned; hence it was proper practice for the trial court to direct a finding for the defendant.

It was urged that it was error for the trial judge to instruct the jury orally. There are two ready answers to this contention. The error was without prejudice, inasmuch as under the pleadings and evidence the defendant was entitled to have a verdict directed. (*Zittle v. Schlesinger*, 46 Neb. 844.) In the next place the action of the court cannot be reviewed, as no objection was specifically taken to the instruction at the time it was given on the ground that it was not in writing. (*Worback v. Miller*, 4 Neb. 31; *City of Chadron v. Glover*, 43 Neb. 732; *Jolly v. State*, 43 Neb. 857; *Omaha & Florence Land Co. v. Hansen*, 32 Neb. 449.)

After judgment, the court below sustained a motion made before trial requiring the plaintiff to give security for costs on the ground that he was a non-resident. Why the court did not pass upon the motion at an earlier period is not disclosed. It may be possible that the ruling was obtained before judgment, and that the date of the decision was erroneously stated in the transcript. For present purposes, however, the transcript must be treated as correct. Conceding the position contended for by plaintiff to be sound, that the defendant waived its right to have security given by the delay in having the motion called to the attention of the court, nevertheless the sustaining of the motion will not authorize a reversal, because plaintiff was not in the least prejudiced by the ruling. Judgment for costs had already been entered against him and the action dismissed. The court did not attach any penalty to the failure of plaintiff to comply with the order relating to security for costs, nor has such security been given. The judgment is

AFFIRMED.

EDWARD LORENZ V. STATE OF NEBRASKA.

FILED JANUARY 19, 1898. No. 9508.

1. **Criminal Law:** EVIDENCE: OPINION OF ATTORNEY GENERAL. A conviction in a criminal case will ordinarily be reversed where the attorney general declines to file a brief on the ground that the evidence is insufficient to sustain the judgment.
2. **Homicide:** EVIDENCE. The evidence in the case examined, and *held* not sufficient to support the verdict.

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

W. R. Starr, for plaintiff in error.

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

NORVAL, J.

The defendant below, Edward Lorenz, a boy sixteen years old, was tried and convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for life. The petition in error, among other assignments, alleges that the verdict is not sustained by the evidence. The attorney general has declined to file a brief in the cause, giving as a reason therefor that he is convinced, upon an examination of the record, that said assignment is well taken; therefore, upon the authority of *George v. State*, 44 Neb. 757, and *McAlcer v. State*, 46 Neb. 116, we would be justified in reversing the judgment and sentence. A careful perusal of the evidence adduced by the state on the trial, and none was introduced by the defense, satisfies us that it is insufficient to sustain a verdict of guilty. It may be the accused committed the crime charged, but if so, the state has failed to prove it.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. JOSEPH W. THOMAS, RECEIVER OF MIDLAND STATE BANK, APPELLEE, AND LEPHA J. MCCARGAR, APPELLANT.

FILED JANUARY 19, 1898. No. 9252.

Banks and Banking: INSOLVENCY: TRUSTS: AGENCY. When an agent, in accordance with a long course of business, deposits in his own name as agent moneys of his principal with his knowledge and consent in a bank which becomes insolvent, the moneys so deposited will not be declared a trust fund in favor of the latter, and established as a preferred claim.

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

The facts are stated in the opinion.

B. N. Robertson, for appellant:

The right of appellant under her mortgage is not limited to the chattels described therein, but extends to the proceeds of the property. (*Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *McLeod v. Evans*, 66 Wis. 401; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786; *Baker v. New York Nat. Exchange Bank*, 100 N. Y. 31.)

Agency of the bank in closing out the hardware stock was established. The hardware stock was impressed with a trust in favor of Mrs. Jones and appellant. (*People v. City Bank*, 96 N. Y. 32; *Hamer v. Sidway*, 124 N. Y. 538; *National Bank of Fishkill v. Speight*, 47 N. Y. 668; *Wilson v. Dawson*, 52 Ind. 513.)

The Midland State Bank was a collecting agent, and acquired no title to the proceeds of the draft. (*Branch v. United States Nat. Bank*, 50 Neb. 470; *Drovers Nat. Bank v. O'Hare*, 119 Ill. 646; *Nurse v. Satterlee*, 46 N. W. Rep. [Ia.] 1102; *State v. State Bank of Wahoo*, 42 Neb. 896; *Davenport Plow Works v. Lamp*, 45 N. W. Rep. [Ia.] 1049; *In re Knapp*, 70 N. W. Rep. [Ia.] 626; *State v. Midland State Bank*, 52 Neb. 1; *Independent District of Boyer v.*

King, 45 N. W. Rep. [Ia.] 908; *Myers v. Board of Education*, 51 Kan. 87; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. [Va.] 547; *First Nat. Bank of Central City v. Hummel*, 14 Colo. 259; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756; *Third Nat. Bank v. Stillwater Gas Co.*, 30 N. W. Rep. [Minn.] 440; *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 62.)

John L. Kennedy, contra.

NORVAL, J.

This is an appeal from an order of the district court refusing to order the receiver of the Midland State Bank to pay the amount of the claim of Lepha J. McCargar as a preferred claim.

The facts upon which the right to a preference is based may be summarized as follows: On January 13, 1896, Alexander M. McCargar, who was engaged in the hardware business in the city of Omaha, executed on his stock and fixtures three chattel mortgages, one in favor of Mrs. William H. Jones for $1,957.13, one to his wife, Lepha J. McCargar, securing $500, and the third to the Midland State Bank for $1,280. The mortgages had priority in the order named. The mortgagees took possession of the chattels under their mortgages, advertised and sold the property at public sale on February 7, 1896, to the Midland State Bank for $2,650, but it failed to pay the amount of its said bid. Thereupon a written agreement was entered into between the three mortgagees to the effect that the property was to be placed in the possession of said A. M. McCargar for the purpose of sale under the direction of the parties, the proceeds arising therefrom to be applied in paying off the mortgages in the order of priority, and the stock remaining was to belong to the bank. In pursuance of said agreement, A. M. McCargar took possession of the mortgaged property and continued to dispose of the same at retail until September 6, 1896, the proceeds being deposited

as received in the Midland State Bank to the credit of "A. M. McCargar, Agt. for mortgagees." The moneys were subsequently drawn by McCargar upon his checks and applied according to the terms of the agreement, in payment of the expenses and on the mortgage of Mrs. Jones. The debt of the latter was thereby reduced to $902.15, but nothing had been paid on the other two mortgages. On the date last mentioned the entire remainder of the mortgaged stock was sold to George Mortimer, of Shelton, this state, for $1,929.07, who drew a sight draft for said sum on a bank at Shelton payable to the order of the Midland State Bank, which the latter bank forwarded to the Shelton bank, and on September 8, 1896, received as proceeds of the same a draft drawn by the Shelton bank on the First National Bank of Omaha. The Midland State Bank on the following day deposited this draft in the Union National Bank of Omaha, received credit for the amount thereof, and on the same day the draft was paid by the said First National Bank. On September 8 the Midland State Bank credited the account of "A. M. McCargar, agent for mortgagees," with the amount of said draft, and two days later McCargar as agent drew a check on the account in favor of his wife, Lepha J. McCargar, for the amount due on her mortgage, which check was the same day delivered to Mrs. McCargar, who retained the same without presentation for payment until after the Midland State Bank closed its doors on September 15. McCargar as agent also drew a check on said account for $902.15 in payment of the balance due on Mrs. Jones' mortgage, and another check to the Midland State Bank for the amount of the balance of the proceeds of the mortgaged chattels remaining in said bank. Mrs. McCargar was aware that the money realized from the sale of the property was being deposited by her husband in said bank.

The question involved is whether Mrs. McCargar, under the facts just stated, is entitled to have a trust in her

favor enforced against the funds of the Midland State Bank in the hands of the receiver. Said bank was not the agent or trustee of Mrs. McCargar in the disposal of the hardware stock. On the contrary, by the written agreement entered by the three mortgagees, Mr. McCargar was appointed to represent all of them for the purpose of disposing of the mortgaged property and applying the proceeds arising from the sale to the satisfaction of the mortgages in the order of the priority of the liens. That McCargar converted the property into money in accordance with the terms of the trust is undisputed. But instead of paying Mrs. Jones and Mrs. McCargar the amounts due them respectively, as under the terms of the tripartite agreement it was his duty to do, he, with the knowledge of his wife, deposited the proceeds of the sales, from time to time as the same were received, in the Midland State Bank on open account to the credit of "A. M. McCargar, Agt. for mortgagees." These deposits having been made with her knowledge and consent, the legal effect is precisely the same as if they had been made to Mrs. McCargar in person. In that case the relation of debtor and creditor would have been created and the money thus deposited would not have been impressed with the character of a trust fund. Had the money been deposited by McCargar without the knowledge of his wife or her subsequent ratification of his action in the premises a trust could have been enforced in her favor against the bank, since it received the funds with full information of their trust character.

It is urged that the Midland State Bank was a collecting agent of the draft drawn in its favor by Mr. Mortimer, the purchaser of the remainder of its stock, and that the bank acquired no title to the proceeds of the draft. It is undoubtedly true that the draft was collected through the agency of the bank, and on its receipt of the proceeds of the collection, it was its duty to pay over the same to A. M. McCargar, as the agent of the mortgagees. This was done, and the amount de-

posited to the credit of McCargar as such agent, precisely in accordance with the manner in which McCargar had conducted the business of the trust for several months preceding, and with the full knowledge of his wife. She subsequently recognized the deposit by accepting a check for the amount of her mortgage debt on the bank drawn by McCargar as agent. We are convinced the appellant is not entitled to have a trust declared in her favor, and that the court below did not err in refusing to order the receiver to pay the amount due Mrs. McCargar as a preferred claim. The case is unlike *State v. State Bank of Wahoo*, 42 Neb. 896. In that case the money was deposited without the knowledge or consent of the owner, and there was no subsequent ratification, while here the converse was true. The other decisions cited in brief of appellant are no more nearly in point than the one just mentioned. The decree is

AFFIRMED.

THEODORE WIDEMAIR V. WILLIAM H. WOOLSEY, SHERIFF.

FILED JANUARY 19, 1898. No. 7687.

1. **Exemption.** Under section 521 of the Code of Civil Procedure, a judgment debtor, who is the head of a family and has no homestead—*i. e.*, owns neither lands, town lots, nor houses subject to exemption under the homestead laws of the state—may claim as exempt from forced sale on execution personal property to the value of $500.
2. **Homestead.** The words "subject to exemption as a homestead," as used in said section 521, do not refer to "houses" alone, but apply to "lands" and "town lots" as well.

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

Davidson & Giffen, for plaintiff in error.

J. Hall Hitchcock and *Hugh La Master, contra.*

NORVAL, J.

This suit was brought for damages for the conversion of certain goods, wares, harness, and merchandise belonging to plaintiff. The district judge directed a verdict for defendant. The facts which must control the decision of the cause are, briefly stated, as follows: Plaintiff was a married man, residing with his family in the town of Cook, this state, where he was engaged in the business of making harness. His entire personal property did not exceed in value the sum of $500. He owned the lot on which his harness-shop was located, but did not reside thereon. His wife was the owner of three vacant and unoccupied lots in the town of Cook. Plaintiff and his wife lived in rented property, and at no time since their marriage did they reside upon, or occupy as a home, any real estate belonging to them, or either of them. The defendant, as sheriff of Johnson county, levied upon, took into his own possession, and sold, the goods in dispute under and by virtue of two executions issued upon two separate judgments recovered against plaintiff, and the proceeds of the sale were applied towards the satisfaction of said executions and judgments. Prior to the sale plaintiff filed with the defendant, in accordance with the provisions of section 522 of the Code of Civil Procedure, an inventory, under oath, of the whole of the personal property owned by plaintiff, and demanded that the same be appraised and released from the levies as exempt, with which request defendant refused to comply.

The point presented for consideration is whether the property levied upon was exempt under the laws of the state. The question is one of statutory construction. Section 521 of the Code of Civil Procedure is as follows:

"Sec. 521. All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property."

The contention of defendant is, which was the view taken by the trial court, that the words "subject to exemption as a homestead," as employed in said section, apply alone to "houses." In other words, a debtor is not entitled to the benefits of the provisions of said section 521 if he owns either lands or town lots or any real estate whatever, although the same may be vacant and unoccupied. We cannot yield assent to such doctrine. Homestead and exemption laws are invariably construed liberally in favor of the debtor who claims the protection of their provisions. The exemption of $500 in personal property was given by the legislature to every judgment debtor, being the head of a family, who owns no homestead. Such provision was made in lieu of a homestead. If such debtor owns any real estate, either lands or town lots, or any houses so impressed with the character of a homestead as to render the same exempt from levy and sale on execution, he cannot invoke the protection of section 521. On the other hand, he is entitled to the exemption of $500 in personal property if he has no real estate, or house, which is exempt from judicial process, even though he owns unoccupied lands or town lots in which no right of homestead exists. This is the plain meaning of the law, and is in accord with the construction placed upon said section 521 of the Code in *Hamilton v. Fleming*, 26 Neb. 242. That was an action to recover exempt personal property levied upon by the sheriff under a writ of attachment. It was urged that the petition did not state a cause of action. The court sustained the pleading, saying: "Upon an examination of the petition, we find that it is alleged that at the time the said order of attachment was levied upon the goods of defendant in error she was a resident of this state and the head of a family, and not the owner of a homestead, and had filed her inventory of said property with plaintiff in error, and notified him that she selected said property to hold exempt from levy and sale under the laws of this state. While these allegations do not follow strictly the lan-

guage of the statute, yet they must be held sufficient. There is no allegation in terms that defendant was not the owner of 'lands, town lots, or houses subject to exemption as a homestead' as in section 521 of the Civil Code; but the allegation that she was not the owner of a homestead must be treated, when assailed after verdict, as equivalent to the use of the language contained in the statute. By the section of the Code above referred to, a homestead may consist of lands or town lots with the necessary buildings thereon, or of houses, and they are all included within the term 'homestead' as used in the petition; and the averment must be taken as negativing the ownership of a homestead of either character."

In construing the provisions of said section 521, in *Stout v. Rapp*, 17 Neb. 470, the court observed: "In order to secure the benefit of this section it must appear that the 'head' of the family has no real estate exempt. If the head of the family has a home in which the family resides, the exemption provided for by this section does not exist. They cannot have both. (*Axtell v. Warden*, 7 Neb. 182.) If he had no homestead, he would not only be entitled to this exemption, but either party (husband or wife) might select it from the personal property of the husband."

In *Williams v. Golden*, 10 Neb. 434, COBB, J., speaking of the intention of the legislature in enacting said section 521, said: "Evidently it was their intention to give the landless debtor an exemption of personal property in lieu of the more wealthy debtor's homestead exemption."

There is no room to doubt that every head of a family in this state is entitled to claim personal property to the value of $500 as exempt from sale under execution where he has no real estate or house constituting a homestead, or in respect of which exemption from judicial process could be successfully asserted. Under the undisputed facts in the case at bar no homestead character had been impressed upon either the business property owned

by the plaintiff or the lots belonging to his wife. He having "neither lands, town lots, or houses subject to exemption as a homestead," the personal property seized by the defendant is exempt from levy and sale under the executions, and, therefore, the district court erred in directing a verdict for the defendant.

We have been urged to enter a judgment in this court in favor of the plaintiff in accordance with section 594 of the Code of Civil Procedure, for the minimum value placed upon the property by the witnesses. An examination of the evidence discloses that this is not a proper case for the enforcement of the provisions of said section, as there are controverted facts which should be determined by the trial court, or a jury. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

E. G. WEST ET AL., APPELLEES, V. W. H. REEVES, IMPLEADED WITH F. A. REYNOLDS, APPELLANT.

FILED JANUARY 19, 1898. No. 7764.

1. **Mechanic's Lien: VENDOR'S LIEN: PRIORITY.** The lien of a person who furnishes material for the erection of a house upon land in possession of the vendee under an executory contract of purchase is subordinate to the lien of the vendor who retains the legal title to secure deferred installments of the purchase price, except in cases where the vendor himself promotes the improvement or causes it to be made.
2. ———: WAIVER OF VENDOR'S LIEN. A vendor who retains the legal title to land sold does not, by mere silence and inaction, waive his right to a purchase-money lien in favor of one who furnishes building material to improve the property.

APPEAL from the district court of Dawson county. Heard below before HOLCOMB, J. *Reversed.*

W. D. Giffin and *Warrington & Stewart*, for appellant.

W. J. Trotter, contra.

SULLIVAN, J.

On April 16, 1892, the defendant Reynolds, being the fee owner of certain real estate in Gothenburg, sold the same to his co-defendant, Reeves, who paid a portion of the purchase price, executed promissory notes for the balance, took a bond for a deed, and entered into possession of the property. Afterwards, Reeves bought on credit from the plaintiff material for the purpose of, and which he used in, building an addition to the dwelling-house on the premises. Within the time limited by the statute, a mechanic's lien for the amount remaining due for this material was filed in the proper office. In this action, which was brought by the plaintiff to foreclose his lien, he contends that it is entitled to priority over the lien of Reynolds for the deferred installments of the purchase price of the land. The improvement in question was not made in compliance with any obligation imposed on Reeves by the terms of the contract of purchase. The contract for the material was not made with Reynolds nor with his agent; it was made with Reeves alone, and the lien resulting therefrom can only attach to Reeves' interest in the land.

It is argued on behalf of the appellee that Reynolds waived his right to a prior lien by reason of his silent observation of the improvement as it progressed. This claim is not backed by the citation of any authority and is not, we think, entitled to serious consideration. Reeves had a right to improve the property and charge his interest therein with the cost of the improvement whether Reynolds consented or objected. His consent would have been immaterial and his objection impertinent. It follows that the defendant Reynolds is entitled to a first lien for the unpaid purchase-money, and that the court erred in subordinating his lien to that of the plaintiff. This conclusion is sustained by the following decisions: *Birdsall v. Cropsey*, 29 Neb. 672; *Irish v. Lundin*, 28 Neb. 84; *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272;

Bohn Mfg. Co. v. Kountze, 30 Neb. 719. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES H. ROHMAN V. WILLIAM GAISER.

FILED JANUARY 19, 1898. No. 7778.

1. **Contract:** PROVISION FOR BENEFIT OF THIRD PERSON. A provision in a contract between the state and a person contracting with it for the erection of a public building is valid which imposes on the contractor the duty of paying for material furnished and used in the erection of such building.
2. **Sales:** DELIVERY: PLEADING. Statements in the answer construed in connection with an allegation of the petition and held to import an admission of the delivery of the material for the price of which this suit was brought.
3. **Action:** CONTRACT: PARTIES. One not a party to a contract may maintain an action thereon when such contract was made for his benefit or the benefit of a class to which he belongs.

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

Daniel F. Osgood, for plaintiff in error.

Benjamin F. Johnson, contra.

SULLIVAN, J.

This action was brought to recover a balance alleged to be due the defendant in error for material furnished to John Lanham and used by him in the erection of a chapel and dormitory for the Home for the Friendless at Lincoln. The action was upon a bond to the board of public lands and buildings executed by Lanham as principal, and J. C. McBride and the plaintiff in error as sureties. Said bond was conditioned as follows:

"The condition of this obligation is such that, whereas,

the above bounden, John Lanham, has been awarded a contract to build, erect, construct, and complete a chapel and dormitory for the Home for the Friendless located at Lincoln, Lancaster county, Nebraska; and, whereas, the said John Lanham has agreed to furnish all work, labor, and materials necessary for the building, erecting, and completing of said chapel and dormitory, and has agreed to settle and pay in full for all work and labor performed, and has agreed to settle for and pay all material-men, for any and all material actually furnished in the erecting, constructing, building, and completing said chapel and dormitory: Now, therefore, if the said John Lanham shall well and truly keep and perform each and every covenant, stipulation, and agreement contained in said contract and according to the plans and specifications on file in the office of the commissioner of public lands and buildings, and shall pay in full for all work done and labor performed, and shall pay all laborers' and mechanics' wages, and shall settle in full and pay for all material actually furnished in the constructing, erecting, and completing said chapel and dormitory of the Home for the Friendless, according to the terms of the contract, then this obligation to be void, otherwise to remain in full force and effect.

"JOHN LANHAM.
"J. C. MCBRIDE.
"CHARLES H. ROHMAN."

There was a trial in the district court which resulted in a verdict and judgment for Gaiser, whereupon Rohman brought the case here for review by petition in error.

The principal contention of the plaintiff in error is that the clause in the bond requiring the contractor to pay for material used was inserted without statutory authority therefor, and hence did not create a valid obligation. This precise question was before this court in the case of *Sample v. Hale*, 34 Neb. 220, where it was held that such a provision was valid and that the sureties on the contractor's bond would be liable for all debts

arising thereunder. The doctrine of that case was subsequently approved in *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649, *Kaufmann v. Cooper*, 46 Neb. 644, and in other cases.* The provision in Lanham's contract with the board for the payment of all material used in the construction of the Home for the Friendless inured to the benefit of Gaiser. It is a proposition firmly established in the jurisprudence of this state that one not a party to a contract may maintain an action thereon, when such contract is made for his benefit or the benefit of a class to which he belongs. (*Cooper v. Foss*, 15 Neb. 515; *Shamp v. Meyer*, 20 Neb. 223; *Doll v. Crume*, 41 Neb. 655; *Barnett v. Pratt*, 37 Neb. 349.)

It is also assigned for error that the verdict is not sustained by sufficient evidence. The petition charges that Gaiser furnished material to Lanham to the amount of $875. In addition to a general denial, the answer states "that the plaintiff has been paid in full for all claims and demands for material furnished the defendant John Lanham, as alleged in plaintiff's petition. This is, in effect, an admission of the furnishing of the material as the plaintiff in his petition claims it was furnished, coupled with an attempt to avoid the consequent liability by pleading that the same has been paid for. (*Blumenthal v. Mugge*, 43 Mo. 427; 1 Ency. Pl. & Pr. 795.) It follows that no proof upon this point was necessary. The judgment is

AFFIRMED.

Habig v. Layne, 38 Neb. 743; *Lyman v. City of Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Hickman v. Layne*, 47 Neb. 177; *Fitzgerald v. McClay*, 47 Neb. 816; *King v. Murphy*, 49 Neb. 670.

ANDREW D. RICKETTS V. FREDERICK J. ROGERS.

FILED JANUARY 19, 1898. No. 7757.

1. **Contract:** CONSTRUCTION: QUESTION FOR COURT. When the meaning of a written contract can be ascertained without the aid of extrinsic evidence, its interpretation belongs to the court and not to the jury.

2. ———: ———: ———. Contract in suit examined in connection with the undisputed evidence and *held* to present no reason for committing its interpretation to the jury.

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

Ricketts & Wilson, for plaintiff in error.

References: *Sanford v. Sornborger*, 26 Neb. 295; *Pryor v. Hunter*, 31 Neb. 678; *Treitschke v. Western Grain Co.*, 10 Neb. 358; *Hamley v. Doe*, 36 Neb. 398; *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600; *Swartz v. Duncan*, 38 Neb. 782; *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. Rep. 377; *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Ia. 185; *Regan v. Baldwin*, 126 Mass. 485; *Harbach v. Miller*, 14 Neb. 9; *Treat v. Price*, 47 Neb. 875; *Wagner v. Ladd*, 38 Neb. 161; *Weber v. Kirkendall*, 44 Neb. 766.

Lamb & Adams, contra.

SULLIVAN, J.

This was an action in the district court for Lancaster county. A trial resulted in a verdict and judgment against Ricketts, who brings the case to this court for review by petition in error.

The facts are these: In July, 1892, Rogers sold Ricketts a half-section of land in Lancaster county subject to the right of way of the Fremont, Elkhorn & Missouri Valley Railroad Company. The purchase price agreed upon was $12,300, of which $600 was cash. The balance was to be paid March 1, 1893, when possession was to be delivered, an abstract of title furnished, and deed of con-

veyance executed to the purchaser. At the appointed time the parties came together to carry out their agreement. It was then discovered that Rogers had previously conveyed to the railroad company, in addition to the right of way, a strip 130 feet wide and 1,000 feet long out of the northeast corner of the land aforesaid. On account of Rogers' inability to make title to this strip Ricketts demanded a rescission of the contract or a suitable abatement from the purchase price. Thereupon a discussion ensued touching the damage occasioned by the loss of the three-acre strip. Ricketts insisted that the damage was $500 and Rogers maintained that it did not exceed $120, and offered to compromise for that sum. The evidence is conflicting as to the terms on which the transaction was consummated, but it is not disputed that an agreement was reached, in pursuance of which Rogers delivered the deed for the land, received the purchase price, except $250, and took from Ricketts the written contract here set out:

"RICKETTS & LYON, GRAIN.
"A. D. Ricketts.
"References: First National Bank, American Exchange National Bank.
"LINCOLN, NEB., March 1, 1893.

"Mr. F. J. Rogers has left in my hands two hundred and fifty dollars to cover damages for a strip of land 130 feet wide and 1,000 feet long, along the right of way of the Fremont & Elkhorn Valley R. R., which strip commences on the north line of west half of section 18, town 11, range 7, Lancaster county, Nebraska, and runs 1,000 feet south on west side of right of way of said railroad. The condition of this contract is this: If Mr. F. J. Rogers makes A. D. Ricketts a good warranty deed for said strip of land, then the said Ricketts is to refund the $250 to Rogers. A. D. RICKETTS."

As to whether the $250 was retained as agreed compensation for the loss of the three-acre strip or as an in-

demnity for actual damages to be thereafter ascertained is a question about which the parties do not agree. The contract quoted was executed after the delivery of the deed and payment of the purchase-money, except the sum of $250. It was executed at Rogers' request, expressed in this language: "You give me something in black and white to show that you owe me $250 on the purchase price of the farm." The entire controversy between the parties related to the amount of the purchase-money which Ricketts should retain as compensation for the loss of the three-acre strip; and thus it appears that the written contract was made and delivered as the final repository and appropriate evidence of the conclusion reached upon the matter in dispute.

At the trial the court declined to construe the contract and submitted it to the jury for construction. In view of the conceded facts this was error. This agreement recites that $250 is left in Ricketts' hands to cover damages, and clearly prescribes the condition on which Rogers shall be entitled to receive it. Its essential terms are not ambiguous or obscure, and extrinsic evidence was not needed to aid in its exposition. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CORTELYOU, EGE & VANZANDT ET AL. V. JUSTIN MCCARTHY, SR.

FILED JANUARY 19, 1898. No. 7759.

1. **Action on Supersedeas Bond: PLEADING.** The averments of the petition *held* to sufficiently state a cause of action on a supersedeas bond.
2. ———: ———. In an action on a supersedeas bond, *held* unnecessary to allege the issue and return of an execution *nulla bona*.
3. **New Trial: JOINT MOTION.** A motion for a new trial should be overruled as to all the parties joining therein if it is not available to any one of them.

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

H. M. Uttley, for plaintiffs in error.

H. E. Murphy and *M. F. Harrington, contra.*

RYAN, C.

On November 6, 1890, Justin McCarthy, Sr., recovered a judgment against the firm of Cortelyou, Ege & Vanzandt in the district court of Holt county. This judgment was affirmed in the supreme court (*Cortelyou v. McCarthy,* 37 Neb. 742), and this action was brought upon the supersedeas bond given in the original action. From a judgment rendered as prayed the principals and sureties on the bond prosecute error to this court.

It is first urged that the petition failed to state a cause of action against the parties to the bond. The petition recited the pendency of the action, the rendition of judgment, the giving of the bond copied in the petition, and its approval, the affirmance of the judgment, the issuance of a mandate and the fact that said mandate had been spread upon the records of the aforesaid district court. It was averred that no part of the judgment had been paid, except a sum for which credit was given in the petition, and that there remained, and still continued due, the sum of $1,480, for which amount judgment was prayed. This we think sufficiently stated a cause of action.

There were averments in the petition disclosing the issuance and return *nulla bona* of an execution on the judgment after its affirmance, but this we have purposely omitted, because such averments are not required in an action on an undertaking of the nature of that herein sued upon. (*Flannagan v. Cleveland,* 44 Neb. 58; *Johnson v. Reed,* 47 Neb. 322.) This renders it unnecessary to consider whether or not there was error in permitting the sheriff to amend his return, a matter with

respect to which plaintiffs in error have complained in their petition in error and in their brief.

It is contended that there was error in sustaining a demurrer to certain defenses pleaded in the amended and substituted answer. This alleged error is not now available, for the reason that after this ruling was made the defendants in the district court withdrew their said amended and substituted answer and elected to stand upon a single designated defense in the original answer.

We cannot determine that there was error in the refusal of the district court to grant the application of the defendants for a continuance, because the affidavits on which such application was founded were not preserved by a bill of exceptions.

The motion for a new trial was jointly made by the defendants in the district court; hence that motion is available to none of the said defendants unless it is available to all. (*Long v. Clapp*, 15 Neb. 417; *Boldt v. Budwig*, 19 Neb. 739; *Hoke v. Halverstadt*, 22 Neb. 421; *Hagler v. State*, 31 Neb. 144; *Dorsey v. McGee*, 30 Neb. 657; *Scott v. Chope*, 33 Neb. 41.) This consideration renders unavailable the argument that there was no proof of the execution of the supersedeas bond, for there was direct undisputed evidence that said bond was signed by Mr. Cortelyou.

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

AFFIRMED.

LIFE INSURANCE CLEARING COMPANY V. MARGUERITE ALTSCHULER.

FILED JANUARY 19, 1898. No. 7727.

1. **Insurance:** WAIVER OF CONDITION: EVIDENCE. The evidence in this case examined, and *held* to have justified the jury in finding that there was a waiver of a condition precedent with respect to the delivery of a policy, the existence of such condition not having been communicated to the insured.

2. **Appearance**: REVIEW: RECORD. A special appearance must be assumed to have been properly overruled when the affidavit upon which it was founded does not appear in the record in the supreme court.

3. **Continuance**: SUFFICIENCY OF APPLICATION: REVIEW. An application for a continuance which failed to disclose the names of absent parties whose testimony was desired, and the nature of their testimony, *held* properly to have been denied.

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

Tibbets, Morey & Ferris, for plaintiff in error.

M. A. Hartigan, contra.

RYAN, C.

In this case there was recovered a judgment against the plaintiff in error in the district court of Adams county in the sum of $2,513.65, upon an insurance policy held by defendant in error on the life of her husband, Sigmund Altschuler. This policy was dated April 5, 1893, and Sigmund Altschuler died August 14 of the same year. We shall not undertake an analysis of the pleadings, but shall refer to such portions thereof as shall become necessary whenever the necessity arises.

James Hale testified that in 1893 he was one of the general agents of the Equitable Life Insurance Society at Grand Island for the western half of this state, and that by reason of the prospectus of the plaintiff in error soliciting the submission to it of rejected applications for examination he had become acquainted with said plaintiff in error. With such policies as plaintiff in error would issue there was always sent to said witness a certificate of health, filled out ready to be signed by the applicant, or rather the policy holder, and by the doctor who had examined the applicant when the first application was made. This certificate was intended to show that the condition of the party to be insured had continued as it was when the original application was

made. Mr. Hale, when the policy on the life of Mr. Altschuler was received by him at Grand Island, also received the health certificate to be brought up to the date of the policy, which, only upon the bringing forward of such certificate, he was authorized to deliver. It is not pretended that this condition precedent was known by Mr. Altschuler or any one acting for him. Mr. Hale forwarded the policy and certificate to his brother in Holdrege, by whom these documents were entrusted to a Mr. Feeney. It seems that Mr. Feeney lost the certificate which ought to have been signed, but he did not fail to deliver the policy, and the first quarter's premium, $53.95, was remitted by draft to Hale. This draft was cashed by Hale and its proceeds held by him until after the death of Mr. Altschuler. This amount he then tendered to the defendant in error, who refused to receive it. Whether or not there was a waiver of the condition with reference to the health certificate was submitted to the jury upon conflicting evidence as a question of fact, and we cannot interfere with its conclusion. We must therefore accept the policy as one binding upon the plaintiff in error.

It is urged that the acceptance of the second premium of $53.95 was brought about by the fraud of Mrs. Altschuler in leading plaintiff in error to believe her husband was not ill when, in fact, he was at the point of death. If the policy had been issued before the time this alleged misrepresentation took place we cannot understand why this policy should be invalidated by the fact that Mr. Altschuler, since the issue of the policy, had sickened and was about to die. If there was any such misrepresentation and fraud as, under proper conditions, might be available, it cannot be considered on this branch of this case, for neither fraud nor misrepresentation was pleaded with reference to the acceptance of this payment.

Plaintiff insists that the district court erroneously held that proper service of summons had been made upon the insurance company. The return of the sheriff

showed service upon O. H. P. Hale as its agent in Adams county. In support of the objections to the service made by a special appearance for that purpose alone there seems to have been filed certain affidavits, but they are not to be found in the record; hence the ruling of the district court must be sustained.

Before the trial began there was an application for a continuance on account of the alleged absence of material witnesses. This application is recited to have been founded upon an affidavit made by Mr. Ferris, one of the attorneys for plaintiff in error. There is no such affidavit in the record. The motion itself fails to disclose the names of the absent witnesses and what would be the testimony of each. It is obvious that we cannot say in view of these omissions that the district court erred in denying a continuance. At a later date, but while the trial was in progress, there was another application, which was oral, and in this the request was but for a short time to permit of a search in the restaurants and hotels of Hastings for O. H. P. Hale and P. M. Feeney. It was not disclosed by the record that these parties were to be used as witnesses, much less was there a suggestion with reference to the nature of the testimony they would give. The court did not err in denying this request.

We have carefully considered the instructions in the light of the printed briefs for plaintiff in error and have discovered no just ground for complaint. The judgment of the district court is

AFFIRMED.

JOSEPH AINSWORTH, EXECUTOR, APPELLEE, V. JOSEPH H. TAYLOR, APPELLANT.

FILED JANUARY 19, 1898. No. 9399.

1. **Appeal in Equity: RULINGS ON EVIDENCE: REVIEW.** An appeal of an equitable action to the supreme court pursuant to the provisions of section 675, Code of Civil Procedure, does not present

for review the correctness of a ruling of the district court excluding proffered evidence; such ruling must be presented as prescribed by section 584 *et seq.*

2. Executors: ACTIONS: EVIDENCE. Evidence *held* sufficient to sustain the judgment of the district court.

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

C. A. Baldwin, for appellant.

G. W. Shields, contra.

RYAN, C.

There has already been a description of the issues involved in this case upon a former consideration thereof on a petition in error. (*Taylor v. Ainsworth*, 49 Neb. 696.) There has now been another trial of these issues in the district court of Douglas county which resulted in a similar judgment to that already reversed, and the defendant again seeks a reversal; this time, however, by appeal. We have carefully examined the evidence adduced and feel satisfied that there was sufficient to sustain the judgment entered by the district court, and there might be an affirmance but for the fact that there are complaints in the brief of appellant as to the rulings of the district court whereby were excluded various matters of evidence. One of these will serve to illustrate our views with regard to all, and we shall therefore consider but one of the rulings which appellant in argument insists was erroneous.

The action was by an executor to recover money in her lifetime entrusted by his testatrix to the defendant. There was no attempt to deny the receipt of the money, but Taylor, the defendant, pleaded that he should not be required to pay it to the executor because of an arrangement between himself and said testatrix, the nature of which is sufficiently indicated by a portion of the bill of exceptions, to which we shall refer in this connec-

tion. J. L. Shivers, a witness in no way disqualified, was under examination and had testified that he was acquainted with the testatrix and had talked with her concerning the transaction pleaded in the answer in this action. The bill of exceptions describes the further examination of this witness in this language:

"Q. Now state, if you please, what that conversation was.

"Mr. Shields: Now I object to that, as incompetent, irrelevant, and immaterial, and as calling for testimony tending to vary the terms of a written agreement between the deceased and the defendant, and for the further reason that it appears from the question that the contract, if any was made, was in the nature of a will disposing of property after the death of the decedent and, not being in writing witnessed by two witnesses in the form of a will, is void."

"Counsel for the defendant thereupon offered to show by the testimony sought to be elicited by the question objected to that the testatrix had told witness that the money had been by her entrusted to Taylor upon an agreement between them that Taylor would pay testatrix $80 each year as interest and such portions of the principal as she would require, and, that when she died, whatever balance had not meantime been paid to her was to become the property of Taylor. The objection was sustained and the proposed evidence was excluded. We are asked to consider the alleged error in this ruling of the court, notwithstanding the fact that there has been filed neither a motion for a new trial in the district court, nor a petition in error in this court. The question thus presented is, whether or not an erroneous ruling of the district court, assuming that the ruling was of that class, can be urged on an equitable appeal as ground for the reversal of a judgment when such alleged error has neither been challenged by a motion for a new trial nor by a petition in error. Section 675 of the Code of Civil Procedure provides: "In actions in equity either

party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court of the state; the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree rendered or final order made therein, and all the depositions, testimony and proofs offered in evidence on the hearing of the cause, and have said cause properly docketed in the supreme court; and on failure thereof the judgment or decree rendered or final order made in the district court shall stand and be proceeded in as if no appeal had been taken." In this section there is no requirement that errors shall be assigned. If a party elects to appeal from a judgment in an equitable action, his election seems to imply that he is content to retry the cause in the supreme court upon the evidence actually considered by the district court. Section 582 of the Code of Civil Procedure is as follows: "A judgment rendered, or final order made, by the district court may be reversed, vacated, or modified by the supreme court for errors appearing on the record." Section 584 of the same Code, referring to the provisions of section 582 and others immediately preceding it, contains this language: "The proceedings to obtain such reversal, vacation, or modification, shall be by petition entitled 'petition in error' filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue," etc. These provisions clearly contemplate only the consideration of errors appearing on the record and require that each alleged error shall be specially set forth in the petition in error. The strictness with which the requirements of specific assignments has been enforced is amply illustrated in every volume of the reports of the opinions

of this court. Not only must the errors be pointed out in the petition in error, but even this is unavailing, if there has been a failure to file a motion for a new trial even in equity cases. (See *Scroggin v. National Lumber Co.*, 41 Neb. 196, and the authorities therein cited.) There is perceived no reason why all this strictness should be dispensed with, merely because an unsuccessful litigant chooses to have his case docketed as an appeal case rather than as an error proceeding in the supreme court. Because of the statutory provisions above indicated and of the reasonableness of the requirement that errors must be specifically pointed out, we are precluded from considering the errors argued in the brief of appellant and the judgment of the district court is

AFFIRMED.

SAMSON BURKHOLDER V. MCKINLEY-LANNING LOAN & TRUST COMPANY ET AL.

FILED JANUARY 19, 1898. No. 7751.

Review: SUFFICIENCY OF EVIDENCE. In this case but one question is presented, and that is the sufficiency of the evidence to sustain the judgment of the district court. An examination of all the evidence disclosing that this objection is not well taken, said judgment is affirmed.

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

John W. Tipton and *Ed L. Adams*, for plaintiff in error.

Tibbets Bros., Morey & Ferris, contra.

RYAN, C.

The McKinley-Lanning Loan & Trust Company brought this action for the foreclosure of a mortgage executed to said plaintiff by Samson Burkholder and his wife to secure payment of ten promissory notes made

by Samson Burkholder to said company, each of which said notes was for the sum of $17.50. There was made defendant A. P. Tillinghast, by whom a cross-petition was filed asking the foreclosure of a mortgage likewise made by Samson Burkholder and his wife to said company to secure payment of a note for $1,400 executed by Mr. Burkholder to said company, by which company it had been transferred to Tillinghast. The notes secured by the two above described mortgages, as well as the mortgages themselves, bore date September 28, 1892. The notes for $17.50 fell due in succession at intervals of six months reckoning from their date. The $1,400 note was due in five years from its date and the interest thereon at six per cent per annum was evidenced by ten semi-annual coupon notes. In the petitions for foreclosure it was averred, and by the answer admitted, that the first semi-annual payments due the respective holders of the mortgages sought to be foreclosed had not been paid when foreclosure proceedings were instituted. In each of the mortgages there was a provision that a failure to make any semi-annual payment thereby secured, for a period of ten days after the same fell due, rendered the whole amount secured due and subject to collection. The contention of plaintiff in error was that the loan was really made at the rate of eight and one-half per cent per annum; that for two and one-half per cent per annum distinct coupons were made, and that, if the foreclosure was permitted for the amount of the ten notes of $17.50 each at the end of the first year of the term of the loan, the amount would include interest at a higher rate than ten per cent per annum, and that the loan under such circumstances was usurious. The claim of the holders of the mortgage was that the notes for $17.50 each simply represented the commission which Mr. Burkholder had agreed to pay for obtaining the loan at the rate of six per cent per annum, and that these notes were not for any portion of interest. On conflicting evidence the district court adopted the contention of plaintiff, and

this conclusion having support in the evidence cannot be disturbed. The petition in error presents no other question and the judgment of the district court is

AFFIRMED.

JOHN THOMPSON, APPELLANT, V. JAMES THOMPSON, APPELLEE.

FILED JANUARY 19, 1898. No. 9482.

1. **Quieting Title:** REVIVOR OF ACTION: RENTS. In an equitable action by a devisee to quiet title and obtain possession of real property it was sought to recover the rental value of the land which had accrued previous to the revivor of the action in the name of such devisee. Whether or not the devisee under any circumstances would be entitled to such recovery of rent is not determined, because neither put in issue by the pleadings nor argued by counsel.

2. **Improvements:** QUIETING TITLE: RENTS. An action of the nature above indicated was pending several years before the death of a testator who was the original plaintiff. The devisee, in whose name the action was revived upon the death of the testator, on his petition recovered for rent until the time of the filing of said petition as though the defendant had during his entire possession been the tenant of the devisee. Supported by sufficient evidence in the same case there were findings that the possession of the defendant had been taken and held in good faith and that lasting and valuable improvements had been made during such possession by such defendant under circumstances which justified him in making them. *Held*, That the district court properly charged the land finally adjudged to belong to plaintiff with the fair value of such improvements even though some of said improvements were made after the commencement of the suit by the testator.

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

Sawyer, Snell & Frost, for John Thompson.

References: *Thompson v. Thompson*, 30 Neb. 492, 49 Neb. 157; *Goble v. O'Connor*, 43 Neb. 59; *Carter v. Brown*, 35 Neb. 675; *Jackson v. Loomis*, 4 Cow. [N. Y.] 168; *Fletcher v. Brown*, 35 Neb. 660.

Samuel J. Tuttle, contra.

References: *Gallagher v. Mars*, 50 Cal. 23; *Fairchild v. Rasdall*, 9 Wis. 350; *Callanan v. Judd*, 23 Wis. 343; *Gould v. Lynde*, 114 Mass. 366; *Osborn v. Osborn*, 29 N. J. Eq. 385; *Russ v. Mebius*, 16 Cal. 350; *Courvoisier v. Bouvier*, 3 Neb. 52; *Hansen v. Berthelsen*, 19 Neb. 433; *O'Brien v. Gaslin*, 20 Neb. 347; *Kelley v. Palmer*, 42 Neb. 423; *Dailey v. Kinsler*, 31 Neb. 340; *City of Hastings v. Foxworthy*, 45 Neb. 676; *Merriam v. Goodlett*, 36 Neb. 384; *Skinner v. Skinner*, 38 Neb. 756.

RYAN, C.

The history of this case serves to illustrate the bitterness which is ordinarily the characteristic of a family quarrel. On September 20, 1887, John Thompson, senior, began this litigation by filing his petition in the district court of Lancaster county. On a trial of the issues joined thereon in that court he was unsuccessful and, on an appeal to this court, the judgment against him was reversed. (*Thompson v. Thompson*, 30 Neb. 489.) A lifetime of eighty years' duration was not long enough to enable plaintiff to see this litigation closed, for during its pendency this court has been required to affirm the probate of the will of this octogenarian. (*Thompson v. Thompson*, 49 Neb. 157.) On November 21, 1896, this action was revived in the name of John Thompson, junior, a son of the elder Thompson above referred to, and, by his will, the sole devisee of the land in controversy. After this revivor there was filed a new petition, which we shall now describe, premising, however, that while we might have doubts of the right of the devisee as such to the entire relief prayed by him, we do not deem it advisable to consider this question, which has neither been put in issue by the pleadings nor argued by counsel.

The averments of the petition necessary to be considered were, in effect, that John Thompson, senior, on

April 14, 1881, obtained from the Burlington & Missouri River Railroad Company an executory contract, by the terms of which he was entitled to receive a deed of conveyance of the land herein in controversy upon making certain payments; that in April, 1887, for the sole purpose of obtaining a loan to make the last of said payments, the said holder of said executory contract assigned the same to the defendant James Thompson; that the said James Thompson had refused to reconvey said land to John Thompson, senior, during his lifetime, or to John Thompson, junior, as devisee of John Thompson, senior, though often requested so to do. The final paragraph and prayer of this petition were as follows:

"13. That the rental value of said land during the time that the defendant has been in possession of the same as aforesaid is $300 a year and the defendant has not paid or accounted for the same to this plaintiff or the said John Thompson, senior, in his lifetime, and there is now due and owing from the defendant to the plaintiff, as rent for the use and occupation of said land, the sum of $2,400. Wherefore plaintiff prays that the defendant may be decreed to have no claim, title, estate, or interest whatsoever in or to said land, and that the title of the plaintiff to said land may be adjudged to be made valid as against any and all claims of said defendant; that the defendant be forever enjoined and barred from asserting any claim whatsoever in and to said land adverse to the plaintiff, and that plaintiff's title to said land may be confirmed and quieted and the sheriff directed to put him in possession thereof; also that plaintiff may have and recover a personal judgment against the defendant for the sum of $2,400 and for such other, further, and different relief as may be just and equitable, including costs of suit."

By an answer and reply such issues were joined as rendered pertinent this finding of the district court:

"6. That at or about the time of the procurement of the said loan, John Thompson, senior, in accordance with

his plans and promises in that behalf made, and as he then particularly desired, without any undue influence, unfair practices, or fraud on the part of any one, and more particularly of the defendant James Thompson, made and executed his last will and testament wherein he bequeathed to the defendant all of his property, both real and personal,—his real property consisting only of the land now in controversy herein,—and delivered the same to the keeping of the said son James, the defendant; that the defendant James Thompson, believing that he was to be the owner of the land upon the death of his father, and at his father's request, in good faith, and being in the lawful possession of said land, erected a dwelling house and made other lasting and valuable improvements thereon, the value thereof being as hereinafter found, paying the interest on the mortgage loan and the taxes on said land and has continued so to do up to the present time."

The items found were for breaking the land, $160; dwelling house, stable, and other buildings, $902.30; labor in making improvements, $400; other improvements, $231.71. The total value of these improvements made by James was $1,694. In addition to the above sum of $1,694 for improvements the district court credited James Thompson with the interest on the mortgage loan, which he had paid, $900, and taxes on the real property in dispute, $217.66. The grand total of the allowances in favor of James was, therefore, $2,811.66, and against this there was charged for rent the sum of $1,800. For the difference, $1,011.66, James was decreed entitled to a lien against the real property in controversy. The evidence satisfies us that the figures above set out were substantially just and will, therefore, be so accepted. It is urged, however, that James should be disallowed payment for improvements made on the land after suit had been brought to set aside his title. In this case, as shown by the above quoted finding, there are special features which render inequitable the rule in-

voked. James was rightfully in possession when he made the improvements and they were made at the request of his father. The evidence shows that this request was made because the father of James contemplated making his home for the remainder of his life with James in the house erected at the instance of the father. The court found that the other improvements were made under the same circumstances, and that all these were made upon the faith of an existing will entrusted to the keeping of James, in which will James was named as sole devisee. A subsequently executed will substituted John Thompson, junior, as sole devisee, but this, while it was finally probated as the controlling will of the father, did not alter the fact that James, in reliance on the provisions of the will first executed and the request of his father in connection with the making thereof, acted in good faith in improving the raw prairie land as he did. Aside from this consideration there is another of great weight, and that is, that in the petition of plaintiff it was sought to hold James liable for the rent of the property up to that time just as though he had been a tenant of plaintiff. In making proofs of this rental value of the land the witnesses for plaintiff increased their estimates, year by year, as they themselves stated, because of the increased improvements which, meantime, had been made. Under all these circumstances we are of the opinion that the district court was merely requiring equity to be done in charging the land, of which John was decreed the owner, with the value of these improvements, even though some of them were made after the commencement of this action.

On behalf of James Thompson, on his appeal, we are urged to reconsider some of the views expressed by this court determining the former appeal, but this we do not think the facts justify. It may be possible that some conclusions differing from those of the district court might perhaps have been reached by us had we originally passed upon the evidence, but this question we need not

determine, for there was sufficient to justify the result actually attained, and the judgment of the district court is therefore

AFFIRMED.

VESTA HAGENSICK, APPELLEE, V. TOBIAS CASTOR ET AL., APPELLANTS.

FILED JANUARY 19, 1898. No. 7750.

1. **Estoppel by Deed:** QUITCLAIM. The general rule is that an ordinary quitclaim deed vests only in the grantee such title or estate as the grantor was at the time of the execution and delivery of the deed possessed of; and if a grantor in such a deed subsequently acquires the title to the real estate thereby conveyed, that title does not inure to the grantee in the quitclaim deed.

2. ———: RECITAL OF ESTATE CONVEYED. Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance.

3. ———: ———. Such an estoppel operates upon the estate and binds an after-acquired title as between parties and privies. *Van Rensselaer v. Kearney*, 52 U. S. 297, followed.

4. ———: DESCRIPTIO PERSONÆ. In 1887 George H. Ohler was absent from home and had been for several years, and his children, believing him dead, partitioned among themselves his real estate. They effected this by quitclaim deeds from one to another, each deed reciting that the grantor "being one of the three heirs of George H. Ohler." In 1891 Ohler died owning this real estate and it descended to his heirs, the three children who had already partitioned it. *Held*, (1) That the recital in the quitclaim deeds, "being one of the three heirs of George H. Ohler," was not a mere *descriptio personæ* of the grantor, but an assertion by such grantor that he was then an heir at law of Ohler; (2) that the grantors in said quitclaim deeds had by such recital estopped themselves and those claiming under them from asserting that they were not heirs of George H. Ohler in 1887, and estopped from asserting the title to the land which they acquired by his death in 1891, against the grantees in said quitclaim deeds and those claiming under them.

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

The opinion contains a statement of the case.

Griggs, Rinaker & Bibb, for appellants:

The quitclaim deeds do not work an estoppel because they contained no covenants, and conveyed only the interest of grantors in the premises. (*Lavender v. Holmes*, 23 Neb. 345; *Holbrook v. Debo*, 99 Ill. 372; *White v. Brocaw*, 14 O. St. 339; *Gibson v. Chouteau*, 39 Mo. 536; *Gates v. Hunter*, 13 Mo. 365; 7 Am. & Eng. Ency. Law 10, 11; *Hanrick v. Patrick*, 119 U. S. 156.)

The quitclaim deeds work no estoppel, because the word "heirs," as used therein, evidently means children. (*Heard v. Horton*, 1 Den. [N. Y.] 165; *Conger v. Lowe*, 124 Ind. 368; *Levengood v. Hoople*, 124 Ind. 29.)

The truth that grantors were not heirs at the time they made their quitclaim deeds appears in the record without objection and by solemn admission and stipulation of all parties. There is therefore no estoppel by virtue of the deeds. (Bigelow, Estoppel [3d ed.] 298; 7 Am. & Eng. Ency. Law 5; *Pelletreau v. Jackson*, 11 Wend. [N. Y.] 110.)

J. H. Grimm and *Hastings & McGintie*, also for appellants.

Halleck F. Rose and *Webster, Rose & Fisherdick*, for appellee:

When a deed sets forth on its face by way of recital or averment that the grantor is seized or possessed of a particular estate, or where the seizure or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized of such estate

at time of conveyance. The estoppel works upon the estate and binds an after-acquired title between parties privies. (Rawle, Covenants for Title [5th ed.] sec. 245; Bigelow, Estoppel [5th ed.] 396; 2 Herman, Estoppel, secs. 640, 647; *Van Rensselaer v. Kearney*, 11 How. [U. S.] 325; *Bush v. Cooper*, 18 How. [U. S.] 83; *French v. Spencer*, 21 How. [U. S.] 240; *Clark v. Baker*, 14 Cal. 629; *Root v. Crock*, 7 Pa. St. 378; *Bachelder v. Lovely*, 69 Me. 38; *Magruder v. Esmay*, 35 O. St. 231; *Lindsay v. Freeman*, 83 Tex. 264; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Goodtitle v. Bailey*, Cowp. [Eng.] 597; *Nixon v. Carco*, 28 Miss. 414.)

The tenants derive title from a common ancestor, and having gone into a partition of the property on certain terms, by mutually releasing and conveying to each other certain allotments in severalty, the law annexes a warranty of title, from the fact that the transaction was a partition of a common estate, and as between the parties and privies this implied warranty is a complete estoppel against each of the other heirs to claim any estate in the portion set off in severalty to plaintiff. (Bigelow, Estoppel [3d ed.] 346; 1 Washburn, Real Property 431, 432; *Tewksbury v. Prorizzo*, 12 Cal. 21; *Morris v. Harris*, 9 Gill [Md.] 26; *Patterson v. Lanning*, 10 Watts [Pa.] 135; *Venable v. Beauchamp*, 3 Dana [Ky.] 321; *Feather v. Strohoecker*, 3 P. & W. [Pa.] 505.)

Where lands are conveyed by deed, which ordinarily operates only to transfer vested interests, such as a quitclaim, or deed of bargain and sale, but it distinctly appears on the face of the deed that it was intended to transfer any future or expectant interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently-acquired interest. (2 Story, Equity Jurisprudence [13th ed.] sec. 1040*b*; *Hannon v. Christopher*, 34 N. J. Eq. 467; *McWilliams v. Nisly*, 2 S. & R. [Pa.] 509; *Powers' Appeal*, 63 Pa. St. 443.)

RAGAN, C.

In 1875 George H. Ohler resided in Saline county, Nebraska, and was seized in fee-simple of a tract of land therein containing 280 acres. At this date Ohler left home and never returned, although he seems to have been heard from by members of the family from time to time. In June, 1887, his three children, Vesta Hagensick *née* Ohler, James Ohler, and Electa Wheeler *née* Ohler, partitioned among themselves the father's real estate. This partition was effected by quitclaim deeds executed by the children, one to the other, each of the deeds reciting that the grantor therein "being one of the three heirs of George H. Ohler." Each child took possession of that part of the real estate allotted to him under the partition. In 1891 the ancestor died, and soon after that two of his heirs, James Ohler and Electa Wheeler, conveyed to Tobias Castor by warranty deed all the real estate which the decedent owned in his lifetime, except eighty acres thereof. The Castor conveyance by its terms included the part of the decedent's estate allotted to Vesta Hagensick in the partition thereof made by the decedent's children in 1887. On the 8th of July, 1892, Castor deeded to one Rosamond B. Westervelt the lands conveyed to him by the two children, and on the same day Westervelt, by another conveyance, became invested with the title to the eighty-acre tract above mentioned which had been allotted to Electa Wheeler in the partition made of the father's real estate by his children in 1887. In the district court of Saline county Vesta Hagensick brought this action against Castor and others to have quieted and confirmed in her the title to the real estate allotted to her by the partition made thereof by Ohler's children in 1887. She had a decree as prayed and Castor and others have appealed.

1. The district court found, and the evidence sustains the finding, that the quitclaim deeds made by the children of George H. Ohler to one another in June, 1887, of his

real estate were made and accepted by said children with the purpose and intent of effecting among themselves a voluntary partition and division of the lands of their father, they then believing him to be dead, and believing that they were then seized of said lands as his heirs at law; that each of said children entered into the possession of the portion of the lands allotted to him by the partition made thereof and held and occupied such lands in severalty to the commencement of this suit; that in each of said quitclaim deeds made by said children the grantor therein recited that he or she was one of the three heirs of George H. Ohler; that by such recital such grantor intended to define the estate conveyed to be an estate of inheritance vested in him as an heir at law of George H. Ohler. As a conclusion of law the court found that the said parties who had executed said quitclaim deeds, and all persons claiming through or under them, were, by reason of the recital in said deeds that the grantors therein were heirs of George H. Ohler, estopped to dispute that assertion, and consequently were estopped from claiming the title to such real estate, which had descended to said parties, as heirs of George H. Ohler on his death in 1891.

Was this conclusion of the district court correct? We think it was. The general doctrine undoubtedly is that an ordinary quitclaim deed vests only in the grantee such title or estate as the grantor was, at the time of the execution and delivery of the deed, possessed of; and that if a grantor in such deed subsequently acquires the title to the real estate thereby conveyed, that title does not inure to the grantee in the quitclaim deed. (Compiled Statutes, ch. 73, sec. 51, and cases hereinafter cited.) The conveyance made to Vesta Hagensick by her brother and sister in June, 1887, of the real estate in controversy was a quitclaim deed; the grantors in that deed had no title to the real estate which it attempted to convey and, therefore, Vesta Hagensick acquired no title by that deed. In 1887 George H. Ohler was still alive, and his two children who conveyed a part of his real estate to

Vesta Hagensick were not then his heirs, and as such had no title to the real estate they attempted to convey; but the two children who made this conveyance to Vesta Hagensick subsequently thereto by the death of their father in 1891 became invested as his heirs with the title to two-thirds of all the real estate of which George H. Ohler died seized. In other words, the two children who executed the quitclaim deed to Vesta Hagensick subsequently acquired title to that real estate, and this title so subsequently acquired would not inure to the benefit of or vest in Vesta Hagensick, if the conveyance made to her by her brother and sister, and the contract on which such conveyance was predicated, was, and was intended by the parties thereto to be, nothing more than a quitclaim of any interest which the grantors therein possessed or were supposed to possess to the real estate conveyed. But the district court has found, and the evidence sustains it, that the conveyance made to Vesta Hagensick by her brother and sister was intended by the parties thereto to vest in her the title which the grantors in those deeds had to the land as heirs of their ancestor, they then believing him to be dead; and the conveyance made to Vesta Hagensick by her brother and sister is not only a quitclaim deed, but it contains the solemn recital or statement that the grantors in those deeds were then and there heirs of George H. Ohler. This statement is not, as counsel for appellants seem to argue, a mere *descriptio personæ* of the grantors. The statement is written in the body of the deed following the description of the real estate conveyed. Nor by any reasonable construction can the statement be construed to mean that the grantor was one of the children of George H. Ohler; but it is a recital, a statement, an asseveration, and representation of the grantor that he was then and there an heir at law of George H. Ohler; and this conveyance was accepted and acted upon in the belief that the statement made was true.

The question then is, can these grantors or those claim-

ing under them now be heard to assert the fact that they were not then heirs of Ohler as against the representation made by them in their deed? We think the most respectable authorities in the country answer this question in the negative. A case which so answers the question under consideration, and in which it was most thoroughly considered, is *Van Rensselaer v. Kearney*, 52 U. S. 297. The court said: "On the part of the complainant it is insisted that the conveyance is a deed of bargain and sale, and quitclaim, without any covenants of title of warranty, and therefore could operate to pass only the estate for life of which the grantor was then seized; that it contains no appropriate words, when taken together, by force of which the subsequently acquired title inured to the benefit of the grantee, or those claiming under him, or that can estop the heirs from denying that he had any greater estate than the tenancy for life; and that the deed purports on its face to grant and convey simply the right, title, and interest which the grantor possessed in the premises at the time, and nothing more. * * * The general principle is admitted, that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. * * * A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance;

and, therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance." The court, after citing and reviewing the authorities, proceeds as follows: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment, that he is seized or possessed of a particular estate in the premises and which estate the deed purports to convey; or what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase; and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not un-

frequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." This case expresses our views in far better language than any we are able to command. To the same effect see *Bush v. Person*, 59 U. S. 82; *Lessee of French and Wife v. Spencer*, 62 U. S. 228; *Clarke v. Baker*, 14 Cal. 612; *Magruder v. Esmay*, 35 O. St. 221; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Wells v. Stecklebery*, 52 Neb. 597. Following the rule laid down in these cases, we hold that the grantors in the quitclaim deeds made to Vesta Hagensick, by reciting therein that they were then and there the heirs of George H. Ohler, have forever estopped themselves and all persons claiming under them from disputing that assertion. The decree of the district court is

AFFIRMED.

W. J. WILLIAMSON V. HEINRICH GEORGE.

FILED JANUARY 19, 1898. No. 7770.

Covenants: EVIDENCE. Evidence examined, and *held* to sustain the finding of the jury that the recitals of the deed in controversy do not express the actual contract made between the parties.

ERROR from the district court of Hamilton county. Tried below before WHEELER, J. *Affirmed.*

Hainer & Smith, for plaintiff in error.

John A. Whitmore, contra.

RAGAN, C.

W. J. Williamson brought this suit in the district court of Hamilton county against Heinrich George. The latter had a verdict and judgment and Williamson brings the same here for review on error.

In his petition in the district court Williamson alleged the purchase by him of a quarter section of land in Kansas from George; that the latter executed to him a deed of conveyance for said land warranting the same to be free of all incumbrance except the taxes and a mortgage of $500 on the land which Williamson assumed and agreed to pay as a part of the consideration for such conveyance; that at the time of said conveyance the land was incumbered by a mortgage for $100 in addition to the $500 mortgage assumed by Williamson. George in his answer admitted the sale of the land to Williamson and the execution and delivery to him of a deed therefor, but he interposed as a defense to the action that the contract between him and Williamson was that he would sell and convey his equity only in this land to Williamson for $100; that he was a Russian unable to read or write the English language, and could understand but very little of it when spoken; that Williamson paid him the $100 and he, George, and his wife executed the deed of conveyance, but that Williamson caused to be fraudulently inserted therein the covenant against incumbrance contrary to the agreement between the parties.

Several complaints are made in the brief of counsel for the plaintiff in error here as to the action of the district court in the admission and exclusion of evidence on the trial. We have carefully examined this record and it must suffice to say that we do not think any action of the district court in that respect was prejudicial to the plaintiff in error.

Complaints are also made by the plaintiff of the action of the district court in giving and refusing to give certain instructions. We have likewise examined these and

reached the conclusion that the plaintiff in error was not prejudiced by any instruction given or refused by the district court. The serious question in the case, and the one that has given us the most trouble, is whether this finding of the jury is supported by the evidence. The evidence on the part of Williamson tends to show that the contract between him and George is fairly expressed in the deed of conveyance made by the latter. On the other hand, the evidence of George, who testified at the trial through the medium of an interpreter, tends to show that he owned the land subsequently conveyed to Williamson; that it was heavily incumbered; that he was unable to pay the incumbrance; that he had been advised by a friend in Kansas that he could get $100 for his equity in the land; that this information was conveyed to George by a letter and the letter was shown to Williamson; that Williamson then contracted with George to buy the latter's equity in the land for $100, which sum he paid; that Williamson explained in German, which language George understood, the contents of this deed after it was drawn and before it was executed, and that he made such an explanation of it that George understood, not that he was warranting the title of this land to be free from incumbrance, but that he was simply parting with his equity in the land for $100. The evidence for the defendant in error is very meager and somewhat unsatisfactory, but, after giving the record the most careful study of which we are capable, we are constrained to say that we think the evidence sustains the finding of the jury to the effect that the deed executed by George and his wife does not recite the actual contract made between the parties. The judgment of the district court is

AFFIRMED.

CREIGHTON UNIVERSITY, APPELLEE, V. EDWARD C. ERFLING ET AL., APPELLANTS.

FILED JANUARY 19, 1898. No. 7772.

Review: EVIDENCE. The record presents for consideration no disputed question of law. Evidence examined, and *held* to sustain the decree of the district court.

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

Arthur C. Wakeley, for appellants.

Frank T. Ransom, contra.

RAGAN, C.

Edward C. Erfling and others appeal from a decree of the district court of Douglas county foreclosing an ordinary real estate mortgage against their property. The appeal is based upon the contention of the appellants that they were not allowed by the district court certain credits to which they claim they were entitled. The record presents no disputed question of law. It would subserve no useful purpose to even summarize the evidence here. In our opinion the contentions of the appellants are untenable. The evidence justifies the decree of the district court and it is

AFFIRMED.

JOHN E. CASTILE v. BENJAMIN F. FORD ET AL.

FILED JANUARY 19, 1898. No. 7779.

1. **Defect of Parties:** OBJECTION. A defect of parties plaintiff appearing on the face of the petition must be objected to by demurrer on that ground, or it will be waived.

2. **Executions:** EXEMPT PROPERTY: WRONGFUL SEIZURE: DAMAGES. The seizure and retention of exempt property, known by the officer to be exempt, and after its exempt character has been legally established, constitute an abuse of process for which the officer is liable. The judgment plaintiff will be liable also, if, knowing the facts, he advised the seizure or retention or participated in the officer's acts.

3. ———: ———: ———: ———. In such case the ultimate return of the property goes only in mitigation of damages; it is no defense to the action.

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

B. N. Robertson and *C. W. Young*, for plaintiff in error.

Cavanagh & Thomas, contra.

IRVINE, C.

Castile alone brought this action against Ford and Daley, who were constables, the Consolidated Coffee Company, and William Preston & Co., alleging in the petition that on the 5th day of December, 1892, the Consolidated Coffee Company and Preston & Co., each having judgments against Matilda Castile, the wife of plaintiff, caused executions to be issued thereon and placed in the hands of Daley for service; and that "on the —— day of December, 1892," Daley levied upon certain chattels "of plaintiff and Matilda Castile." Facts are stated constituting such property exempt from execution, and it is alleged that the defendants, confederating together to oppress and harass the plaintiff, and knowing the property to be exempt, seized and withheld it, and threatened to

sell it. Plaintiff obtained from the district court of Douglas county an injunction perpetually restraining Daley from selling the property; whereupon the defendants caused Daley to deliver it to Ford who levied upon it by virtue of other executions issued at the instance of the coffee company and Preston & Co. Plaintiff filed the appropriate affidavit and inventory to procure its release, and the defendants, in pursuance of said combination and confederation, refused to surrender it; whereupon, at the suit of plaintiff, a writ of mandamus was issued by the district court requiring the release of the property on the "—— day of January, 1893." Special damages are pleaded by way of injury to the goods, because of their detention, for loss of time, and for attorneys' fees expended in procuring the release of the goods. Early in the trial objection was made to the introduction of any evidence on the ground that the petition did not state a cause of action, in that it alleged that the property was the joint property of husband and wife while the husband sued singly. The court sustained the objection and a dismissal followed. The action of the trial court cannot be sustained on the ground stated in the objection. The defect suggested was, at most, a defect of parties plaintiff. This appeared on the face of the petition and was waived by failure to demur on that ground. (Code of Civil Procedure, secs. 94, 96.) We need not, therefore, consider whether the point would have been well taken had it been seasonably raised. Otherwise there can be no doubt that a cause of action was stated. The petition alleged a willful and malicious attempt to seize and sell property known to be exempt, and a second attempt after the first failed. Whether or not an officer is liable for seizing exempt property in the absence of a claim for exemption, there can be no doubt that he is liable for withholding it after the exemption is established, or for seizing it again for the same debt. The petition in this respect charges a flagrant abuse of process, and charges that it was the result of a conspiracy in which all the defendants

participated. They would in such case be jointly liable with the officer. (*Murray v. Mace*, 41 Neb. 60.) In such case the fact that the goods were ultimately returned goes only in mitigation of damages; it is not a defense. Plaintiff would still be entitled to recover all other damages available in cases of trespass. We need not determine whether a recovery could be had for all the special damages here pleaded. The district court did not proceed far enough to reach that question. There could certainly be a recovery for the detention of the property, and for injuries done to it while in the defendants' possession. It is asserted that there is no allegation of any withholding, but in this assertion counsel err. The petition in effect alleges a withholding from the "—— day of December, 1892," to the "—— day of January, 1893." While these dates are not certainly stated and the petition in that respect may have been open to motion, the averments are sufficient against a general objection on the trial.

REVERSED AND REMANDED.

SAMUEL M. MELICK v. CYRUS D. KELLEY.

FILED JANUARY 19, 1898. No. 7737.

Contracts. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.

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

J. L. Caldwell, for plaintiff in error.

Webster, Rose & Fisherdick, contra.

IRVINE, C.

Kelley brought this action against Melick to recover an unpaid portion of a promissory note executed by de-

fendant to plaintiff. The defense was that the note was given as part consideration for the sale by plaintiff to defendant of certain real estate; that after it became due a contract had been entered into whereby the note was to be surrendered upon the defendant's executing to plaintiff a reconveyance of the real estate, and sending the deed to a bank in Cheyenne for delivery to plaintiff, upon plaintiff's surrender to the bank of the note; that defendant had complied with his part of the contract, but plaintiff had refused to accept the deed or surrender the note. The plaintiff had judgment and the defendant prosecutes this proceeding in error.

It would be useless to rehearse the evidence in detail. It wholly fails to disclose the consummation of any contract between the parties, such as the defendant pleads. The negotiations were entirely by means of letter. The first letter, which apparently contained a proposition from Kelley to Melick, is not in evidence, nor is there any proof of its contents. Nowhere in the evidence does there appear any proof as to what lands were to be reconveyed. If all which Kelley had conveyed to Melick were contemplated, it appears that the offer was not complied with, because, while the deed tendered covered all the property, it appears that two lots had by Melick been conveyed to a stranger, and the deed was to be delivered only on the erasure of the descriptions of those two lots. Furthermore, the deed was sent with a demand that Kelley should agree to refund all taxes which Melick had paid. This coupled the acceptance of Kelley's proposition with a condition, which for its enforcement required a counter-acceptance by Kelley which was not given. In any view, assuming for the proposal all that defendant claims, there was no absolute, unconditional acceptance thereof, and the contract was not completed. To establish an express contract it is necessary to show a definite proposal and an unconditional and absolute acceptance thereof.

AFFIRMED.

HOMER D. WAGER ET AL. V. PHILIP S. WAGONER.

FILED JANUARY 19, 1898. No. 7692.

1. **Insane Persons**: SUITS: NEXT FRIEND. One who is insane, but who has not been so adjudged, and who has no guardian, may sue by his next friend.
2. **Review**: INCOMPETENT EVIDENCE: HARMLESS ERROR. A judgment in a case tried to the court without the intervention of a jury will not be reversed because of the admission of incompetent or immaterial evidence when there was sufficient competent evidence to sustain the finding.
3. **Insane Persons**: DEEDS: AVOIDANCE. In order to avoid the deed of an insane person, it is unnecessary to prove that there was fraud or other wrong-doing inducing its execution.
4. ———: ———: ———: CONSIDERATION. The deed of an insane person may be set aside without returning the consideration, at least when it does not appear that a return in specie is practicable.

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

J. S. Armstrong and *Charles Riley*, for plaintiffs in error:

An action by an insane person should be brought by a properly-appointed guardian, and not by a next friend. (*Covington v. Neftzger*, 30 N. E. Rep. [Ill.] 764; *Dorsheimer v. Roorback*, 18 N. J. Eq. 438; *Nichol v. Thomas*, 53 Ind. 42; *Tiffany v. Worthington*, 65 N. W. Rep. [Ia.] 817; *Row v. Row*, 41 N. E. Rep. [O.] 239.)

Duffie & Van Dusen and *Howell & Spear, contra.*

IRVINE, C.

This action was brought in the name of Philip S. Wagoner by William J. Wagoner as his next friend, against Homer D. Wager and two others. The petition alleged that Philip S. Wagoner was, on August 25, 1893, insane and wholly incapable of contracting, that he was the owner of certain described land in Boone county, and that the defendants conspired together to defraud him thereof,

and procured him to convey said land to Wager for a grossly inadequate price. The answers were in effect general denials. There was a trial to the court and a general finding for the plaintiff, followed by a decree requiring Wager to reconvey to the plaintiff.

The first question presented is whether the action may be maintained by a next friend. It is both pleaded and proved that there had been no adjudication of insanity and no guardian appointed. Under such circumstances we have no doubt that the action was properly brought by a volunteer as the next friend of the insane person. One is not an outlaw, although insane, and the courts will interfere to protect his rights of person and of property at the instance of one who volunteers on his behalf. This does not open up the way to vexatious litigation by irresponsible persons, because the court would in such case have the power, expressly reserved in the case of infants, to discontinue the suit if it turn out to be not in the interest of the plaintiff to have it prosecuted, to substitute another person by appointment for the volunteer if he should be deemed unsuitable, or to substitute the duly appointed guardian if one should be appointed *pendente lite*. To hold that a suit may not be so maintained would frequently deprive lunatics of all protection, because it may often happen that the time occupied in procuring the appointment and qualification of a guardian would render all relief impracticable. The cases holding that a lunatic may not sue by next friend are for the most part those where a guardian or committee has been appointed, or where, as in Ohio and in Illinois, a statute makes adequate provision for suing in another manner. (*Row v. Row*, 41 N. E. Rep. [O.] 239; *Covington v. Neftzger*, 30 N. E. Rep. [Ill.] 764.) In the latter state, perhaps before the statute was passed, but certainly on a consideration of the law independent of statute, it had before been held that a next friend might sue. (*Chicago & P. R. Co. v. Munger*, 78 Ill. 300.) In New Jersey it was once held that a next friend might sue at law, but not in equity. (*Dor-*

sheimer v. Roorback, 18 N. J. Eq. 438.) This was because the chancellor thought there was no semblance of authority for such a proceeding in equity except one or two loose *dicta* referred to in the opinion. He must have overlooked *Nelson v. Duncombe*, 9 Beav. [Eng.] 211, and *Light v. Light*, 25 Beav. [Eng.] 248, both earlier cases. There was also suggested a distinction between cases of total and partial incapacity, but we think there can be no ground for proceeding differently merely because of the degree or duration of the mental derangement. Nor is there in this state any room for a distinction in this respect between law and equity. The procedure is the same. The practice here resorted to is supported by the English cases already cited as well as by *Jones v. Lloyd*, L. R. 18 Eq. Cas. 265, *Rock v. Slade*, 7 Dowl. 22, and in this country by *Plympton v. Hall*, 56 N. W. Rep. [Minn.] 351, *Reese v. Reese*, 15 S. E. Rep. [Ga.] 846, *Edwards v. Edwards*, 36 S. W. Rep. [Tex.] 1080, *Holzheiser v. Gulf W. T. & P. R. Co.*, 33 S. W. Rep. [Tex.] 887, *Dudgeon v. Watson*, 23 Fed. Rep. 161, *Whetstone v. Whetstone*, 75 Ala. 495, and *Chicago & P. R. Co. v. Munger*, *supra*.

It is next argued that the court erred in finding under the evidence that Philip Wagoner was insane at the time of his making the deed to Wager. We have examined the voluminous evidence in the case and are satisfied that there is sufficient competent testimony to preclude any interference with the finding of the trial court. In this connection attention is called to the fact that the court received in evidence the record of certain proceedings before the insanity board of Douglas county, whereby an inquiry had been made under chapter 40, Compiled Statutes. It was held in *Dewey v. Algire*, 37 Neb. 6, that the record of such proceedings is not admissible in a case like this for the purpose of proving insanity; but it is established by repeated decisions of this court that, in a case which has been tried by the court without a jury, the judgment will not be reversed because of the admission of incompetent or immaterial evidence, when there was suf-

ficient competent evidence to sustain the finding. Moreover, this record could hardly have prejudiced the defendants because it showed that the plaintiff was not adjudged insane.

It is asserted next that the charge of conspiracy made in the petition is not sustained by the evidence. It is not necessary to the relief granted that it should be. If the plaintiff was insane, his deed was void and might be so decreed, although there was no conspiracy and no fraud. This issue might affect the liability of Wager's co-defendants, against whom, as well as Wager, the judgment went for costs, but we cannot consider any question affecting them alone, because all the defendants joined in the motion for a new trial and the petition in error, and if the judgment was correct as to one it must be affirmed as to all. (*Dorsey v. McGee*, 30 Neb. 657.)

Finally it is contended that Wager should receive restitution of the consideration by him paid. This, in the case of an insane person, is not essential as a condition of granting relief. (*Dewey v. Algire, supra; Rea v. Bishop*, 41 Neb. 202.) It did not appear that the ability existed to restore the consideration in specie. The right to recover it back as money had and received or otherwise was not a question involved in the case and is not now open to consideration.

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. GRANITE STATE FIRE INSURANCE COMPANY.

FILED JANUARY 19, 1898. No. 7678.

Actions: RAILROAD COMPANIES: FIRES: INSURANCE: ESTOPPEL. Property partially insured was burned by the negligence of a railroad company. The insurer paid to the insured the amount of the policy and took from him an assignment of his cause of action against the railroad, to the extent of the insurance paid. The insured then sued the railroad company for the remainder of his loss. The railroad company knew of the insurance company's

rights and pleaded the assignment, but abandoned the defense and stipulated that judgment should go against it. *Held*, That the insurance company was not precluded by its knowledge of the pendency of that suit, nor by the settlement thereof, from afterwards maintaining an action against the railroad to recover the amount of the insurance by it paid.

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

The opinion contains a statement of the case.

J. M. Thurston, *W. R. Kelly*, and *E. P. Smith*, for plaintiff in error:

The cause of action arising from the negligence of the railroad company is indivisible. The claim of the insurance company should have been presented in the action by the insured. The insurer cannot maintain a separate action against the railroad company for the amount paid under its policy. (*Rockingham Mutual Fire Ins. Co. v. Bosher*, 39 Me. 256; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 593; *Hall v. Railroad Co.*, 13 Wall. [U. S.] 370; *Phœnix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312; *Gales v. Hailman*, 11 Pa. St. 515; *British & Foreign Marine Ins. Co. v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. [Tex.] 112; *The Propeller Monticello v. Mollison*, 17 How. [U. S.] 153; *Smith v. Jones*, 15 Johns. [N. Y.] 229; *Willard v. Sperry*, 16 Johns. [N. Y.] 121; *MacDougall v. Maguire*, 35 Cal. 274; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. [U. S. C. C.] 1; *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625; *Hundhausen v. Bond*, 36 Wis. 29-41; *Yates v. Whyte*, 4 Bing. N. C. [Eng.] 272; *Randal v. Cockran*, 1 Ves. Sr. [Eng.] 98; *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333; *First Presbyterian Society of Green Bay v. Goodrich Transportation Co.*, 7 Fed. Rep. 257; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 643; *Norwich Union Fire Ins. Society v. Standard Oil Co.*, 59 Fed. Rep. 984; *Continental Ins. Co. v. Loud & Sons Lumber Co.*, 93 Mich. 139; *Pratt v. Radford*, 52 Wis. 118; *Home Mutual Ins. Co. v. Ore-*

gon R. & N. Co, 26 Pac. Rep. [Ore.] 857; *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 339; *Hustisford Farmers Mutual Ins. Co. v. Chicago, M. & St. P. R. Co.*, 66 Wis. 58; *State Ins. Co. v. Oregon R. & N. Co.*, 20 Ore. 563; *North Shore R. Co. v. McWillie*, 5 Mont. Q. B. [Can.] 122.)

Insurer did not by subrogation acquire the right to maintain suit in its own name. (*Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. Cas. [Va.] 710-12; *Grubbs v. Wysor*, 32 Gratt. [Va.] 131; *Hart v. Western R. Co.*, 13 Met. [Mass.] 99-105; *Mason v. Sainsbury*, 3 Doug. [Eng.] 61; *Clark v. Inhabitants of the Hundred of Blything*, 2 B. & C. [Eng.] 254.)

The insured sued the railroad company and recovered a judgment, which defendant paid. The insurer had notice of the pendency of that action and was estopped from afterward maintaining a suit against the railroad company for the amount paid under the policy. (*City of Boston v. Worthington*, 10 Gray [Mass.] 496; *Chicago v. Robbins*, 2 Black [U. S.] 418; *Clarke v. Carrington*, 7 Cranch [U. S.] 322; *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 284; *Stanley v. Goodrich*, 18 Wis. 534; *Pratt v. Donovan*, 10 Wis. 320.)

The insurer having refused to be made a party to the suit by insured, the judgment in favor of the latter is *res judicata*. (*Miller v. Covert*, 1 Wend. [N. Y.] 488; *Guernsey v. Carver*, 8 Wend. [N. Y.] 493; *Bendernagle v. Cocks*, 19 Wend. [N. Y.] 209; *Trask v. Hartford & N. H. R. Co.*, 2 Allen [Mass.] 331; *Rittenhouse v. Levering*, 6 Watts & S. [Pa.] 197; *Newcomb v. Cincinnati Ins. Co.*, 22 O. St. 382; *McCormick v. Irwin*, 35 Pa. 117; *Goswiler's Estate*, 3 Pen. & W. [Pa.] 203; *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 436.)

Charles O. Whedon, contra:

The settlement of insured's claim by the railroad company did not affect the rights of insurer. If so intended it is a fraud upon the insurer and does not impair its rights or remedies. (*Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Clark v. Wilson*, 103 Mass. 223; *Mon-*

mouth County Mutual Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; *Graff v. Kipp,* 1 Edw. Ch. [N. Y.] 618; *Hart v. Western R. Co.,* 13 Met. [Mass.] 99; *Ætna Fire Ins. Co. v. Tyler,* 16 Wend. [N. Y.] 397; *Gracie v. New York Ins. Co.,* 8 Johns. [N. Y.] *237; *Timan v. Leland,* 6 Hill [N. Y.] 237; *Trask v. Hartford & N. H. R. Co.,* 2 Allen [Mass.] 331; *Mayor v. Stone,* 20 Wend. [N. Y.] 139; *Rockingham Mutual Fire Ins. Co. v. Bosher,* 39 Me. 253; *Perrott v. Shearer,* 17 Mich. 48; *Atlantic Ins. Co. v. Storrow,* 1 Ed. Ch. [N. Y.] 621.)

Upon payment of insured's claim under the policy insurer acquired a right of action against the railroad company. (24 Am. & Eng. Ency. Law 306; 2 May, Insurance sec. 454; Harris, Subrogation [1st ed.] sec. 624; Wood, Insurance [1st ed.] secs. 473, 474.)

The insurer may maintain the action in its own name. (Code of Civil Procedure, sec. 30; *Connecticut Fire Ins. Co. v. Erie R. Co.,* 73 N. Y. 399; *Garrison v. Memphis Ins. Co.,* 19 How. [U. S.] 317; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.,* 41 Fed. Rep. 643; *Home Ins. Co. v. Pennsylvania R. Co.,* 11 Hun [N. Y.] 182; *Hustisford Farmers Mutual Ins. Co. v. Chicago, M. & St. P. R. Co.,* 66 Wis. 58; *St. Louis, A. & T. R. Co. v. Fire Ass'n,* 55 Ark. 163; *London Assurance Co. v. Sainsbury,* 3 Doug. [Eng.] 245; *Mills v. Murry,* 1 Neb. 327; *Seymour v. Street,* 5 Neb. 93; *Hicklin v. Nebraska City Nat. Bank,* 8 Neb. 463; *Hoagland v. Van Etten,* 22 Neb. 684.)

Charles E. Magoon, also for defendant in error.

IRVINE, C.

From admissions in the pleadings and from the stipulation of facts whereon this case was tried we gather the following facts: One Erickson was the owner of land along the line of the railroad owned by the plaintiff in error, on which were certain buildings and personal property of the value of $3,900, which were wholly destroyed by fire set out by the negligence of the railroad company. Erickson had insurance on the property, written by the

defendant in error, to the amount of $1,000. The insurance company paid the loss and Erickson assigned to it his cause of action against the railroad company to the extent of $1,000. Erickson then brought suit against the railroad company, alleging the loss of his property through its negligence, its value as $3,900, and the insurance and payment to him of $1,000 by the insurance company, and prayed damages for $2,900. The railroad company answered in that case, alleging the assignment to the insurance company, and another assignment to a stranger of the remainder, and that Erickson was, therefore, not the real party in interest. After issues were so joined a settlement was made between the railroad company and Erickson, whereby it was agreed that judgment should be entered in favor of Erickson for $1,750. A jury was impaneled, a verdict returned in accordance with the stipulation, judgment entered thereon and paid. Pending this suit the railroad company had notified the insurance company of its pendency, and the insurance company had refused to intervene, notifying the railroad company at the same time of its intention to hold the railroad company under the assignment. After the judgment in favor of Erickson was entered and paid, this suit was begun by the insurance company to recover to the extent of $1,000 and interest. The railroad pleaded the foregoing facts. The case was submitted to the court without a jury, on a stipulation of facts, which left no issue to be determined from evidence. The court found for the insurance company and entered judgment accordingly. The assignments of error relied on relate to the correctness of the conclusions of law reached by the district court.

Certain propositions contended for by the railroad company are undoubtedly correct, and any consideration of the case must proceed from the starting point thereby established. At common law a chose in action, with certain exceptions not here material, was not assignable, so as to permit the assignee to sue in his own name.

The right of an insurance company to recover against a wrong-doer, whose negligence has subjected the insurance company to a liability, whether the company's right be based on an equitable subrogation or an express assignment, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured. Any defense available against the insured is equally available against the insurer, except as to acts of the insured after payment of the loss and with notice to the wrong-doer of the insurer's rights. That principle goes no farther. A cause of action for tort, such as this, is indivisible without the consent of the defendant. A person injured cannot, by assignments of portions of his damages, subject the defendant to a multiplicity of suits for the same wrong. The authorities cited by the railroad company really tend to establish nothing more than the foregoing principles.

We take it that this case is controlled by the following considerations: Under our Code of Civil Procedure actions must, with a few express exceptions not relating to this case, be brought in the name of the real party in interest. (Code, sec. 29.) The assignee of a chose in action may maintain an action thereon in his own name without the name of the assignor. (Code, sec. 30.) The original cause of action being indivisible, unless by the consent of the defendant, Erickson should have joined the insurance company as a plaintiff in his action. If the company refused to so join, it might have been made a defendant. (Code, secs. 40, 41, 42.) The railroad's answer in the Erickson suit was therefore good, and stated a valid defense; its abandonment of the defense and stipulation for judgment against it amounted then to a waiver of a good defense and a voluntary payment. Knowing, as it then knew, of the rights of the insurance company, it is not protected, by that voluntary payment of Erickson's claim, against a valid claim of the insurance company not included in that settlement. Its action was equivalent to express consent to a splitting of the cause

of action, and it can claim no estoppel against the insurance company because it acted with full knowledge of its rights and of its intention to assert them.

Not a single case cited conflicts with the views expressed. In *London Assurance Co. v. Sainsbury*, 3 Doug. [Eng.] 167, Langdale had suffered a loss through the riots of 1780. He sued the inhabitants under the riot act. Allowance was made in that suit for the insurance by him received, and he had judgment for the difference. The insurance company then brought suit. The case was, therefore, much like this. It was held by a divided court that the insurance company could not sue. Lord Mansfield, who with Mr. Justice Buller formed the majority, held that this was so because the common law forbade an assignee to sue in his own name, but said: "If by law either Langdale or the plaintiffs might sue, I have no doubt that it may be shown, from what passed at the trial, that the sum sought to be recovered was not included in the damages, otherwise the plaintiffs might recover against Langdale and show the verdict as conclusive evidence." With us an assignee may sue, and we have therefore in this case, not an authority against the insurance company, but the great weight of Lord Mansfield's opinion that under a state of the law like ours, the action would lie under precisely similar circumstances.

Some cases, such as *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. [U. S.] 1, and *Norwich Union Fire Ins. Society v. Standard Oil Co.*, 59 Fed. Rep. 984, state the rule generally that where the loss is greater than the insurance the insurer may not sue. These were cases where the insurer attempted to sue before payment to the insured, and are merely authority for the propostion that the claim is indivisible, and that the railroad company should therefore have insisted on its defense against the partial action of Erickson. The former case holds that the rule applies not only to the common law, but the statute of Missouri, but cites the statute as permitting only the as-

signment of actions based on contract. With us the right of assignment extends to torts. In *State Ins. Co. v. Oregon R. & N. Co.*, 20 Ore. 563, the rule was stated that in such case the insurance company must not sue alone. This does not conflict with our views as a general statement, but it is perhaps worthy of notice that that decision is based on the premise that in Oregon the distinction between actions at law and suits in equity has not been abolished and that the statutory provision permitting an unwilling party, who should be plaintiff, to be made a defendant, applies only to equity cases.

In Wisconsin it is held that the insurance companies must join in one action, and the insured with them if he retains any interest. (*Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625; *Pratt v. Radford*, 52 Wis. 114.) That the court was only deciding what we have said, that in the first case the railroad company might have defended on the ground that all were not joined, and not that a confession or settlement of the first suit would bar another by parties not included in the first, is manifest from the language of Lyon, J., in *Pratt v. Radford:* "Had the defendants paid the plaintiff the damages claimed, knowing that the latter had received from the insurance companies the amounts insured, the defendants would still be liable to an action by such companies to recover the amounts so paid, and the release of the plaintiff would be no defense to the action."

In *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, it was held that if the wrong-doer pays the assured after payment to him by the insurer, and with knowledge of that fact, it is a fraud on the insurer, and will not protect the wrong-doer from liability to him.

AFFIRMED.

JAMES W. HORKEY V. W. W. KENDALL, SHERIFF.

FILED JANUARY 19, 1898. No. 7718.

1. **Affidavit:** VERIFICATION: NOTARY PUBLIC. A notary public who is the attorney of one of the parties to an action is not permitted to take the affidavit of his client for the purpose of procuring an attachment.
2. **Attorney and Client:** VERIFICATION OF PLEADING: STATUTES. The amendment of 1887 to section 118 of the Code, notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, article 3, constitution.
3. **Affidavit for Attachment:** VERIFICATION. An affidavit to procure an attachment, sworn to before a notary who is also plaintiff's attorney, is not a nullity, but a mere irregularity which cannot be attacked collaterally.
4. **Attachment:** PLEADING: EVIDENCE. The rule that an officer attaching property in the possession of a stranger claiming title must, in order to justify, not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued, does not require that strict regularity in all the attachment proceedings must be shown, but only that there was such a substantial compliance with every essential requirement as to create a valid lien.
5. ———: ———: ———: REPLEVIN. An officer from whom goods held under attachments have been replevied may prove the attachments under a general denial; and, although he adds to the general denial a special plea of one attachment, he may nevertheless prove other attachments.

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

T. T. Bell and *Henry Nunn*, for plaintiff in error.

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

IRVINE, C.

This was an action of replevin by Horkey against Kendall, who was sheriff of Howard county, for certain chattels, part of which Horkey claimed to own absolutely,

and part under a chattel mortgage from one Dobry, the general owner. As to the first portion he was successful; as to the mortgaged chattels there was a judgment against him for their return or their value, and of the latter portion of the judgment he complains.

The district court received in evidence, over the objection of the plaintiff, an affidavit filed by the Western Manufacturing Company to procure an attachment against Dobry. The defendant justified under the writ issued thereon. By other documents offered in evidence at the same time it appeared that Frank J. Taylor, the notary public before whom the affidavit was made, also appeared in the attachment suit as the attorney of record of the plaintiff. The objection was based on that fact. Section 370 of the Code of Civil Procedure prescribes the purposes for which an affidavit may be used, among them the obtaining of a provisional remedy. Section 371 prescribes what officers may take such affidavits; to-wit, "any person authorized to take depositions." Immediately following are certain sections with reference to depositions. Sections 374 and 375 designate the officers who may take them, among them notaries public. Section 376 is as follows: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." These sections must be construed together, and their joint effect is to prohibit the attorney for either party from taking the affidavit whereby a provisional remedy is obtained. It is claimed, however, that section 118, as amended in 1887, has modified the foregoing provisions. Prior to 1887 the material portion of section 118 was as follows: "The affidavit verifying pleadings may be made before any person before whom a deposition might be taken." Chapter 93 of the Laws of 1887 is entitled "An act to amend section 118 of title 7 entitled 'Pleadings in Civil Actions' of the Code of Civil Procedure of the state of Nebraska, and repeal said original section." By this act the material

portions of section 118 are amended to read as follows: "The affidavit verifying pleadings may be made before any notary public or other officer authorized to administer oaths * * * and nothing herein shall be construed to prohibit an attorney at law, who is a notary public, from swearing a client to any pleading or other paper or affidavit in any proceeding in the courts of the state." As indicated by the title to the act of 1887, title 7 of the Code, of which section 118 forms a part, is entitled "Pleadings in Civil Actions." Section 91 enacts that the only pleadings allowed are the petition of the plaintiff, the answer or demurrer of the defendant, the demurrer or reply of the plaintiff, and the demurrer of the defendant to the reply. Subsequently come the well-known requirements as to verification of pleadings of fact, and section 118 appears in that connection. The pleadings therein referred to were evidently pleadings in the specific, technical sense, as defined by section 91. We refer to this because it is asserted that this court, in *Jordan v. Dewey*, 40 Neb. 639, has declared such affidavits as the one in question to be pleadings. In that case the court was dealing with the method of trying motions to dissolve attachments, and stated that on the trial of such motions the affidavit for the attachment and that traversing the averments of that affidavit constitute the pleadings on which such motion is to be tried. That is, the issues of fact are to be found from an inspection of these two affidavits. The word "pleading" was not there used in its specific or technical sense, and the court was not attempting to amend section 91 or section 118. In *Payne v. Briggs*, 8 Neb. 75, Judge COBB, speaking for the court, criticised quite severely the practice of taking depositions in the office of an attorney in the case, and sometimes before a notary who is his clerk. In *Collins v. Stewart*, 16 Neb. 52, the court had reversed a judgment because the trial court had refused to strike from the files certain affidavits offered as evidence on a motion to dissolve an attachment, but sworn to before one of the at-

torneys. In the light of those decisions it is not improbable that the legislature intended, by the last clause of the amendment of 1887, to entirely remove the disability resting on an attorney who happens also to be a notary public, at least so far as it prevented him from taking his own client's affidavit in any proceeding. But, if that was the object of the legislature, it endeavored to effect it by unconstitutional means. The constitution provides (art. 3, sec. 11) that no bill shall contain more than one subject, which shall be expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. This requires that an act, not complete in itself, and being in effect amendatory of other acts, shall expressly recite and repeal the sections amended. (*Smails v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Neb. 407; *Holmberg v. Hauck*, 16 Neb. 337; *State v. Lancaster County*, 17 Neb. 85; *Touzalin v. Omaha*, 25 Neb. 817; *Stricklett v. State*, 31 Neb. 674; *Trumble v. Trumble*, 37 Neb. 340; *City of South Omaha v. Taxpayers' League*, 42 Neb. 671.) And, although the title of "an act to amend" a certain other act is sufficient for the purpose indicated by that title, it does not indicate the purpose of engrafting by amendment upon that act provisions not germane to its original subject. (*City of Tecumseh v. Phillips*, 5 Neb. 305; *White v. City of Lincoln*, 5 Neb. 505; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb. 507; *Miller v. Hurford*, 11 Neb. 377; *State v. Pierce County*, 10 Neb. 476; *Trumble v. Trumble, supra*; *State v. Tibbets*, 52 Neb. 228.) Applying these tests to the act of 1887, the scope claimed for it, and perhaps indicated by its text, would make it operate as an amendment of section 371, as explained by sections 374, 375, and 376. It does not refer to, recite, or repeal any of those sections. Its title indicates only a purpose to amend section 118, which embraced only the subject of verifying pleadings. We cannot, without permitting a violation of the constitution, give it any broader effect as amended.

But it does not follow because the affidavit was irregular, and might have been quashed on motion for that purpose in the attachment suit, that the plaintiff in this case can avail himself of the defect. In *Oberfelder v. Kavanaugh*, 21 Neb. 483, this court laid down the following rule: "When an officer attaches property found in the possession of a stranger claiming title, in an action for such taking, the officer, in order to justify it, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued." Several times since has this language been repeated with approval; but in each case with regard to a substantial defect in the proof of the attachment, one that would not only lead to a reversal on petition in error by the attachment defendant, but one reaching to the very validity of the lien acquired or sought to be acquired. Thus in the leading case there was no proof of any affidavit. An attachment without an affidavit would be void. In *Williams v. Eikenberry*, 22 Neb. 210, and in *Paxton v. Moravek*, 31 Neb. 305, the writ of attachment itself was not offered in evidence. In *Williams v. Eikenberry*, 25 Neb. 721, the pendency of the action to which the attachment was ancillary was not proved. In *Bartlett v. Cheesebrough*, 32 Neb. 339, the debt was not proved. In *Spaulding v. Overmire*, 40 Neb. 21, there was no competent evidence of any of the proceedings. The court did not, in any of the cases, hold or intend that there could be no justification if some inconsequential irregularity was made to appear. On the contrary, the object is to establish an interest founded on a valid lien, and the proof is sufficient if this be shown. Irregularities not going to the existence and validity of the lien are not open to such a collateral attack. (*Scrivener v. Dietz*, 68 Cal. 1.) The provisions of our Code as to the competency of officers administering oaths to affiants are substantially declaratory of the common law, and both at the common law and under statutes like ours it is very generally held that the making of an affidavit

before an attorney in the case, if he be an officer generally authorized to take affidavits, is an irregularity merely, which must be attacked at once by motion, or it will be waived; and that such an affidavit is not a nullity. (*Gilmore v. Hempstead*, 4 How. Pr. [N. Y.] 153; *Smith v. Ponath*, 17 Mo. App. 262; *Linck v. City of Litchfield*, 141 Ill. 469; *Swearingen v. Howser*, 37 Kan. 126; *Haward v. Nalder*, Barnes [Eng.] 60.) In *Wilkowski v. Halle*, 37 Ga. 678, an attachment was held void where the affidavit was made before one of the attorneys who was a notary, but in that state notaries not only take the affidavit, but they approve the bond and issue the writ. This attorney had done all three acts, and the reasoning of the court was entirely directed against permitting him to approve the bond and issue the writ. In *Owens v. Johns*, 59 Mo. 89, the clerk of the court was plaintiff and made the affidavit before his own deputy. This was held void. It was the same as if he had taken his own affidavit. In *Greenvault v. Farmers & Mechanics Bank*, 2 Doug. [Mich.] 498, the affidavit was taken before an officer not authorized to take any affidavits. As pointed out in *Swearingen v. Howser, supra*, there is a clear distinction between the administration of an oath by one not authorized to administer oaths, and the administration of an oath by one generally authorized, but forbidden to do so in a particular case. In the first case no power exists, and the act is a nullity; in the other the power exists, but it has been wrongfully exercised. We have found no cases other than the three commented upon which tend to support the theory that the affidavit was void. We are convinced that it was not and that it was properly received in evidence.

The defendant in his answer pleaded specially a justification under a writ of attachment sued out by the Continental National Bank. He also pleaded by general denial, and offered in evidence the attachment at the suit of the Western Manufacturing Company. It is argued that the court erred in receiving this evidence. It is admitted that the evidence would generally be relevant

under a general denial, but it is asserted that the defendant having elected to plead specially, should be restricted to the special matter pleaded. *Westover v. Vandoran*, 29 Neb. 652, is cited as supporting that contention. In the case cited there was no general denial, and the question was as to the necessity of replying to the special matter pleaded. In *Williams v. Eikenberry*, 22 Neb. 210, it was held that the general denial and special plea of justification were not inconsistent, and that an election between them could not be required, although the special matter might be proved under the general denial. That case rules this. Although the special plea was here superfluous, it did not render irrelevant to the general denial matter which would have been relevant in the absence of the special plea.

There are a few other assignments of error, but they are not discussed in the briefs.

AFFIRMED.

WILLIAM MACK V. CHARLES PARKIESER.

FILED FEBRUARY 2, 1898. No. 7809.

1. **New Trial:** OBJECTIONS TO INSTRUCTIONS. Objections to instructions must be specifically and separately assigned in a motion for a new trial.
2. **Instructions:** REVIEW. Instructions must be read and construed together, and if so considered they state the law applicable to the case and without confusion or conflict, a single paragraph is not erroneous for the reason that in and of itself it may be incomplete.
3. **Trial:** MOTION TO DIRECT VERDICT: WAIVER OF ERROR. If there is interposed for defendant at the close of the evidence in chief for the plaintiff a motion that the court instruct the jury to return a verdict for defendant and such motion is overruled, by the introduction of evidence for defendant in support of the defense error in the overruling of the motion, if any, is waived.

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

William A. Redick, for plaintiff in error.

C. P. Halligan, contra.

HARRISON, C. J.

This action was instituted by defendant in error in the district court of Douglas county to recover damages which he alleged had been suffered by him by reason of the breach of the covenants of a warranty deed executed and delivered to him by plaintiff in error in the conveyance of certain lands. Pleadings were filed by which issues were joined, and a trial thereof resulted in a verdict and judgment favorable to defendant in error. The cause is presented here by error proceeding on behalf of the unsuccessful party in the trial court.

One assignment of error to which attention is directed in the argument in the brief filed is that the court erred in giving paragraph numbered 5 of its charge to the jury. In the motion for a new trial the assignment in regard to error in giving instructions was as follows: "That the court erred in giving to the jury paragraphs numbered 1, 2, and 5 of the charge of the court on its own motion." This method of grouping in one assignment several numbered paragraphs, of the giving of each of which it is desired to assign error, has repeatedly been considered by this court, and it has been as often held that if any one of the group is unobjectionable the assignment will be no further examined. These portions of the charge were not all, if any, erroneous and the assignment is unavailing. No objection is urged against any except the one numbered 5; further than this, paragraph 5, when read in connection with other paragraphs of the charge, was not open to the complaint urged against it.

There is but one other question argued which it is stated was raised by the court's refusal at the close of the evidence introduced for defendant in error to instruct

the jury to return a verdict for the plaintiff in error. This, it appears, was a verbal request or motion to the effect just stated and which was refused by the court. It is unnecessary to examine this question as, for the plaintiff in error on the overruling of this motion, there was offered and received evidence in support of his defense; and the error, if any, in overruling the motion was thus waived.

This disposes of all the errors urged in the argument here, and it follows that the judgment of the district court must be

AFFIRMED.

NORVAL, J., not sitting.

P. L. JOHNSON, APPELLEE, V. MARGARET A. ENGLISH ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7812.

1. **Evidence:** DOCUMENTS: INDORSEMENTS: OFFER. An offer and reception in evidence of a certificate of purchase at tax sale, if it have an indorsement of an assignment thereon, do not include and carry with them as evidence such assignment, unless the offer and reception were sufficiently broad to and did include such indorsement.

2. ———: CONSTRUCTION OF STIPULATION. Certain of the words employed in a stipulation of the parties examined and construed, and *held* not to be an admission or statement that the original purchaser at tax sale was the assignor of the party asserting ownership of the certificate of purchase at tax sale by assignment thereof to him by such purchaser, and not an admission or statement that such an assignment had been made.

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

James P. English, for appellants.

Ralph W. Breckenridge, Saunders, Macfarland & Dickey, and *George E. Pritchett, contra.*

HARRISON, C. J.

The appellee, P. L. Johnson, commenced this action in the district court of Douglas county to foreclose a tax lien against a lot in Hanscom Place addition to the city of Omaha. It was of the allegations of the petition that one E. B. Baer had on a stated date purchased the designated property at tax sale and received a certificate of such tax sale and that he subsequently paid certain taxes which were assessed against the property. It was also pleaded that the appellee Johnson became the owner of the tax sale certificate by purchase from E. B. Baer and its due assignment and transfer by the latter. Andrew J. Hanscom, who was of the parties defendants in the district court, answered, and among the matters pleaded set forth the execution and delivery to him and his ownership of a mortgage of the premises in controversy and prayed its foreclosure and establishment as a first lien on the property. The appellants answered, setting forth certain matters by reason of which it was asserted the claimed lien of appellee Johnson was of none effect and denied the assignment of the certificate to him and his ownership thereof. The trial resulted in the appellee Johnson being accorded a lien as claimed and it was allotted priority to that of Andrew J. Hanscom, of which there was a foreclosure decreed.

In this, an appeal to this court on behalf of the holders of the title to the lot involved in the suit, it is contended that there was no evidence that Johnson was the owner of the certificate of purchase at tax sale—that it was not shown to have been assigned to him. The fact of assignment of the certificate and Johnson's consequent ownership thereof was of the issues raised by the pleadings, and it devolved on him to produce the proof of such fact. The certificate of purchase at tax sale is a creature of the statute and the law by which it was created also prescribed the manner in which its sale or assignment might be evidenced. See sections 116 and 117 of article

1, chapter 77, Compiled Statutes, in the latter of which it is stated: "The certificate of purchase shall be assignable by indorsement, and the assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser; and the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence of such assignment." Whether it may be sold and its transfer proved in a manner other than provided in the statutory law we need not now discuss or determine. In this action a transfer by indorsement was alleged and relied on, and whether established by proof is to be our inquiry.

It is of the findings of the court embodied in its decree that "The court further finds that on or about the first day of February, 1894, the said E. B. Baer sold, assigned, and transferred the said tax certificates, together with all his right, title, and interest therein and to the taxes paid thereon, to P. L. Johnson, this plaintiff, who is now the owner and holder thereof," etc., from which we would be induced to expect the record to disclose the evidential facts to warrant such conclusion. The bill of exceptions does not purport to contain all the evidence introduced during the trial. All evidence of a documentary character is, we presume, omitted therefrom. The following stipulation appears in said bill: "In order to avoid incumbering the record by attaching copies of the exhibits referred to in the bill of exceptions, it is hereby stipulated by and between all of the parties to this suit, that all the taxes and special assessments set out and mentioned in the petition of the plaintiff were duly, legally, and regularly assessed and levied, and were valid liens upon the real estate set forth in the petition, and that said taxes and special assessments were paid by E. B. Baer, the party mentioned in the petition. As plaintiff assignor." The certificate was offered and received in evidence, and it was stated in argument that as the certificate is not contained in the bill of exceptions, and the court has stated in its finding that

the certificate was duly assigned, it is fair to presume that the assignment from Baer to Johnson did appear indorsed thereon, but even if it did, this would not be sufficient, for the offer and reception of the certificate would not and did not carry with it and include the reception of the indorsement as substantive evidence of the assignment. To effect this it was necessary that the indorsement be identified, offered, and received in and of itself independently as testimony of the certificate. No offer or reception as testimony of the indorsed assignment, if it existed, was made or had during the trial and it was not of the evidence. See *Schroeder v. Neilson*, 39 Neb. 335, where, in an action on a promissory note by the indorsee or assignee thereof, the note was introduced with the indorsement thereon, but without any direct reference to or proof of the latter, it was stated in an opinion in an error proceeding to this court in regard to whether the introduction and proof of the indorsement were thus accomplished as follows: "The answer of Neilson denied Schroeder's ownership of the note. The note was drawn payable to the order of Ingolsbe & Co. It was indorsed 'Ingolsbe & Co., O. Ingolsbe.' There was no proof offered that the indorsement 'Ingolsbe & Co.' was made by that firm, a member thereof, or by anyone else. The note was offered and admitted in evidence, but that did not prove that the indorsement thereon was that of the payee." See also *Cummins v. Vandeventer*, 52 Neb. 478, an action for the foreclosure of a mechanic's lien, on the trial of which the original account and claim of lien with the indorsement of the county clerk of the filing thereof was offered and received in evidence without reference to or including in the offer and reception the filing as substantive testimony in and of itself. It was held that the offer and reception of the lien did not include and carry with it the indorsement. See to the same effect *Noll v. Kenneally*, 37 Neb. 879. It follows that the assignment was not shown and the right of Johnson to maintain the action

did not appear, and the finding of the court on this point was without support in the evidence.

It is further argued in this connection that it is admitted in the stipulation, which we have quoted herein, that the assignment had been made. The stipulation, we gather from the record, was in type-writing to and including the words petition, after which there was a period; following this mark there was written in the stipulation with pen and ink the words, "as plaintiff assignor." The contention for appellee is that these words are used in the stipulation of Baer, the original owner of the certificate of tax sale, in a descriptive sense and indicative of the relation which he bore to Johnson, the appellee, and amount to an admission that he was plaintiff's assignor and assigned the certificate to appellee. This to us is a strained construction of the stipulation. Taking the words to which we have referred in the connection in which they were placed by the writer and reading them as it seems proper to, all things considered, they must be construed to mean and to refer to Baer as the party mentioned in the petition as the assignor of plaintiff, now the appellee Johnson. This being true, there is nothing in the record to show that Baer had assigned the certificate to Johnson or the latter's ownership of said instrument.

The decree of the district court to the extent it awarded appellee Johnson a lien and the foreclosure thereof must be reversed and the case remanded to the district court for further proceedings.

REVERSED AND REMANDED.

JOSEPH STOREY ET AL. V. MACHA M. BURNS.

FILED FEBRUARY 2, 1898. No. 7821.

Proceedings in Equity: REVIEW. A review by petition in error of the proceedings during the trial in the district court of an equity cause cannot be obtained in this court if no motion for a new trial was filed in the trial court; and in a case so presented here, the record will be examined no further than to ascertain whether the pleadings state a cause of action or defense and support the judgment or decree.

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

Capps & Stevens, for plaintiff in error.

Batty, Dungan & Burton and *M. A. Hartigan, contra.*

HARRISON, C. J.

This action was commenced by the defendant in error in the district court of Adams county December 29, 1893, to procure the foreclosure of a real estate mortgage. Issues were joined, and on June 23, 1894, as a result of a trial, the defendant in error was awarded a decree.

The cause is presented to this court by petition in error on behalf of the defendants in the district court. There was no motion for a new trial filed for plaintiffs in error in the trial court. It is the rule that to obtain a review in this court by petition in error of the proceedings during the trial of such an action as this a motion for a new trial must be made in the trial court as in a law action. (*Carlow v. Aultman*, 28 Neb. 672; *Hansen v. Kinney*, 46 Neb. 207.) In an error proceeding to this court, where it appears that no motion for a new trial was filed in the district court, no further examination will be made than to ascertain whether the pleadings state a cause of action or defense and support the judgment or decree rendered. (*Hansen v. Kinney, supra.*) The petition in the

present case states a cause of action and supports the decree. The latter must therefore be

AFFIRMED.

IOWA LOAN & TRUST COMPANY, APPELLEE, V. ROBERT C. STIMPSON ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7801.

1. Executions: APPRAISEMENT: FRAUD. If a sale of real estate under order of sale or execution is attacked on the ground of a fraudulent appraisement, no active fraud being claimed or attempted to be shown except in the low value placed on the property as compared with a value given in evidence adduced on the subject, to support the objection the discrepancy must be so great as in and of itself to raise a presumption of fraud in making the appraisement.

2. ———: ———: NOTICE TO DEBTOR. There is no requirement of the law that notice be given the debtor of the making of an appraisement.

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

F. G. Hamer, for appellants.

Fred A. Nye, contra.

HARRISON, C. J.

In this, an action to foreclose a real estate mortgage, the proceedings were prosecuted to a decree and, after stay, a sale of the mortgaged premises, which was confirmed. From the order of confirmation an appeal to this court has been perfected.

In the brief filed for the appellant it is argued that the sale should not have been confirmed for the reasons: First, the appraisement of the property was so low as to raise the presumption of fraud; second, no notice was given the debtor of the appraisement of the property. In regard to the first of these reasons it appears from the

record that it rests solely on the differences in value of the property which were placed on it by persons called for the purpose in the three appraisements which were had before a sale was made and in the testimony in affidavits of parties filed for appellant. The point argued is of a matter of which complaint must first be addressed and presented to the district court, or a judge thereof, and determined on the evidence adduced, and the resultant finding, as embodied in and shadowed by the decree or order, must govern and be allowed to prevail, unless manifestly wrong. After an examination of all the evidence herein we cannot disapprove the finding of the district court, cannot say that it was palpably wrong in the conclusion which it must have reached, that there was not such a great discrepancy between the appraisal value of the property and the values stated in the affidavits as to raise a presumption of fraud. This being true, there is nothing in this branch of the argument which calls for a reversal of the order of the district court.

In regard to the second stated reason it must be said that the appraisement was one of the steps prescribed by law to be taken by the officer conducting the sale and of the occurrence of which the statute does not require any notice to be given. It is a part of the proceedings of which parties must take notice. (*Smith v. Foxworthy*, 39 Neb. 214.) The argument that notice should be given the debtor of the time of the appraisement might with propriety be addressed to the legislature. Courts can but enforce the law as made, not read into it what may suggest itself as proper or probably beneficial. It follows that the order of the district court must be

AFFIRMED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. JOHN MULVIHILL ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7785.

1. **Foreclosure of Mortgage:** MASTER COMMISSIONER. Power is conferred on the district court in section 852 of the Code of Civil Procedure to authorize in a decree of foreclosure of a mortgage against real estate some person to execute the decree to the extent it orders a sale of the real property, and such person is referred to in sections 451, 452, and 453 of the Code as a "master commissioner."

2. ———: ———: POWERS. Sections 451, 452, and 453 of the Code, section 852, and the sections in relation to sales of real estate under levy of an execution are to be read and construed connectedly, and when this is done power is conferred thereby on the person designated by the court in a decree of foreclosure of a real estate mortgage to make the sale, to conduct the same in the manner prescribed in the Code for making sales under levy of execution, including that of administering the oath to the parties called to make the appraisement of the property.

3. ———: ———: OATH. There is no requirement of statute that the person designated by the court in its decree of foreclosure of a mortgage on real estate to make the sale be sworn or take, subscribe, and file an oath.

4. ———: ———: ———. Where such person is acting or has acted and the appraisement or the sale is attacked by motion to set aside, if that an oath had been taken, or taken and subscribed, was an essential requirement, on hearing, it must be presumed in the absence of a showing to the contrary that there had been a compliance with the requirement.

5. ———: ———: ———. Semble. A district court should in the decree by which it authorizes the person to make a sale of real estate under mortgage foreclosure also require that such person take, or take and subscribe, an oath and also give a bond for the true performance of the assigned duty. (*Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508.)

6. ———: APPRAISEMENT. The evidence introduced on the point of objection to a sale of real estate under decree of foreclosure of a mortgage, that the value fixed in the appraisement was too low, *held* sufficient to sustain a finding of the district court of a tenor contrary to that of the objection.

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

Gregory, Day & Day, for appellants.

Wharton & Baird, G. W. Shields, J. W. West, Frank Heller, Silas Cobb, Montgomery & Hall, Guy R. C. Read, John W. Lytle, and *Frank T. Ransom, contra.*

HARRISON, C. J.

In this, an action commenced in the district court of Douglas county to foreclose a mortgage on real estate, a decree of foreclosure was entered in which was included the appointment of a special master commissioner to execute the portion of the decree in reference to a sale of the property. A stay was effected by request filed; at its expiration order of sale issued and the master commissioner proceeded with the preliminaries attendant as prescribed by law on all sales of the character of this one. As one of the steps an appraisement was made which, on motion of the appellants herein, was set aside. A second appraisement was then made, to which objections were filed, presented, and, on hearing, overruled, and the sale was proceeded with to a completion. A return of the sale was made, and on motion for confirmation and hearing on objections to the sale the sale was confirmed; from which order this appeal was taken.

The points urged in argument are, first, that the master commissioner never qualified, did not take or subscribe an oath in the proceedings; second, that the appraisers were never sworn to make appraisement as required by law, in that the oath was administered to them by the acting special master commissioner, who had never qualified by taking the oath of office and was not authorized in any manner to administer an oath to the appraisers; third, that all proceedings had herein and acts committed or done by the acting special master commissioner were without force or effect and not binding in law upon the appellants; fourth, that the valuation given the property in the appraisement was so much

lower than its true value that the appraisement and sale should have been set aside.

It may be said that the third point, as stated in the brief of appellants, but embodies the conclusion or the result of the establishment of the point designated "First," and will need no separate discussion. A question which arises under the first point urged is, was the person appointed by the court in its decree to make the sale required to take and subscribe an oath? It is claimed in argument that he was "an especially appointed officer" within the meaning of section 1, chapter 10, Compiled Statutes 1897, in which it is stated: "All state, district, county, precinct, township, municipal, and especially appointed officers, except those mentioned in section 1, article 14, of the constitution, shall before entering upon their respective duties, take and subscribe the following oath, which shall be indorsed upon their respective bonds. * * * If any such officer is not required to give bond, the oath shall be filed in the office of the secretary of state, or of the clerk of the county, city, village, or other municipal subdivision of which he shall be an officer." It seems from a reading of the provisions of this section, including that which prescribes where the oath shall be filed, that it refers to state, district, county, precinct, township, or municipal officers either elected or appointed and not to a person who has by the decree of a court been appointed to make a sale provided for in the decree and for no other purpose. Such a person cannot be called an officer in a proper sense or use of the term. The person designated by the decree to execute it to the extent it directed a sale was not an elected or appointed officer of the state or any subdivision enumerated in the section and was not by reason of its existence required to take, subscribe, and file an oath therein set forth. The authority of the court to appoint a party to make a sale in an action of foreclosure of a real estate mortgage is conferred by section 852 of the Code of Civil Procedure, which is as fol-

lows: "All sales of mortgaged premises under a decree in chancery shall be made by a sheriff, or some other person authorized by the court in the county where the premises or some part of them are situated, and in all cases where the sheriff shall make such sale he shall act in his official capacity and he shall be liable on his official bond for all his acts therein, and shall receive the same compensation as is provided for by law for like services upon sales under speculation [execution]." There is no requirement in the section just quoted that the one designated by the court to make the sale shall be sworn, nor is there any provision of our statutory law in which such requirement appears; and we conclude he may act without being sworn. (To the same effect see *Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508.) Whether the court might not, in its decree by which authority is given the party to act, also demand of him to take, subscribe, and file an oath and further to give bond conditioned for the faithful performance of the duties assigned him, it would seem in all good reason should be answered affirmatively. It has been held by this court that an officer, a moderator of a school district, may hold the office and perform the duties thereof without being sworn, the office being one established by law and there being no provision of statute that an oath be taken by such officer. (See *Franz v. Young*, 30 Neb. 360. See also *Laird v. Leap*, 42 Neb. 834; 16 Am. & Eng. Ency. Law 1021, note 3; *Commonwealth v. Cushing*, 99 Mass. 592; *Commonwealth v. Dugan*, 53 Mass. 233; *McAlister v. Commonwealth*, 6 Bush [Ky.] 581.) There is another reason why this point in the argument must be determined adversely to the contention of counsel for appellants on the subject of whether the party who made the sale had been sworn. There was no showing, other than a certificate of the clerk of the district court, that "no oath of special master commissioner has been filed in above entitled case." This is attached to the bill of exceptions, but was not made a part of it, and it but established that no oath of the party referred

to had been filed in the case, and not that he had not taken the oath; and if the law had required it, in the absence of a showing to the contrary, the presumption would prevail that the party designated in the decree to make the sale and acting, or who had acted, had been duly qualified. (16 Am. & Eng. Ency. Law 1021, note 3; *Nelson v. People*, 23 N. Y. 293; *Dayton v. Johnson*, 69 N. Y. 419.)

The second point argued, and to which we have hereinbefore specifically alluded, is to the effect that the appraisement was void for that the appraisers had not been sworn. The basis of this is that the party assigned in the decree to make the sale was not authorized to administer an oath, and if he would have been so empowered had he prior to the appraisement taken an oath, he had not done so and the attempt by him to administer the oath to the appraisers was without force or effect. It is said in the brief: "He can only act within the spirit and letter of the statute; unless he is authorized to administer an oath, the attempt to qualify freeholders by him, without an oath, renders such an appraisement absolutely void, and we have this anomaly of the present proceedings: an officer of the statute performing a high judicial office, without the solemnity of an oath, and undertaking to perform the function of a judicial officer in administering an oath, when he has not been qualified by taking the oath upon his own part." In section 852 of the Code of Civil Procedure, which we have hereinbefore quoted, the power is conferred on the court to designate the party who shall make the sale. Sections 451, 452, and 453 provide as follows:

"Sec. 451. Real property may be conveyed by master commissioners as hereinafter provided: First—When, by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. Second—When specific real property is required to be sold under an order or judgment of the court.

"Sec. 452. A sheriff may act as a master commissioner under the second subdivision of the preceding section. Sales made under the same shall conform in all respects to the laws regulating sales of land upon execution.

"Sec. 453. The deed of a master commissioner shall contain the like recital, and shall be executed, acknowledged, and recorded as the deed of a sheriff, of real property sold under execution."

In the opinion in the case of *State v. Holliday*, 35 Neb. 327, these three sections of the Code and section 852 were quoted, and it was in effect held that each and all of the sections refer to the same person who is denominated in sections 451-453 as a master commissioner, but is not so named in 852 or given any appellation other than a general one of person. In *McKeighan v. Hopkins*, 14 Neb. 361, sections 451 and 452 were quoted and construed in connection with sections 491*a*-491*d* and 495 of the Code relative to appraisements and sale of real estate under writ process or order of court, and it was said: "These provisions apply to all sales of real estate under the process of the court, whether upon execution or order of sale." It seems clear from a perusal of all the sections of the Code that they should be read and construed connectedly, as we have seen has been done; and if so, it is further evident that the person authorized by the court to make the sale is to proceed therein as stated in the manners indicated in the sections of the Code to a number of which in relation to the particular subject we have herein more or less directly referred. In one of them, 491*a*, it is stated: "Whenever, hereafter, execution shall be levied on any lands and tenements, the officer levying the same shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, or persons, or corporation against whom the execution is levied, in the property so levied upon." This confers the power to administer the oath to the ap-

praisers, and, by force of the sections connectedly, on the person who makes the sale by authorization of the court; nor is this an unheard-of anomaly (if such it may truly be called), or one which stands alone in our statutory law. Of the legislative enactments, in regard to elections, in sections 15 and 16, chapter 26, Compiled Statutes, it is provided:

"Sec. 15. Previous to any vote being taken, the judges and clerks of election shall severally take an oath or affirmation according to the form prescribed in chapter on official bonds.

"Sec. 16. In case there shall be no judge or justice of the peace present at the opening of the polls, it shall be lawful for the judges of election to administer the oath or affirmation to each other and the clerks of election; and the person administering such oath or affirmation shall cause an entry thereof to be made and subscribed by him, and prefix to each poll book."

Here oaths are required to be administered by persons who have not been sworn. We must conclude that the party who was designated in the decree to make the sale could administer the oath to the parties called as appraisers.

In relation to the further objection that the value of the property sold, fixed by the appraisers, was too low, and so much so that it furnishes a sufficient reason for setting the sale aside, it must be said that this was a question submitted to the trial court on evidence adduced on behalf of the parties appellants and appellee; and after examination of the evidence, in which there was, as is usual in such cases, quite a considerable difference of opinion, we cannot say that the finding of the district court thereon was manifestly wrong. There was ample evidence to support the finding, hence it will not be disturbed. The order of the district court is

AFFIRMED.

AULTMAN, MILLER AND COMPANY, APPELLANT, V. ALFRED L. BISHOP ET AL., APPELLEES.

FILED FEBRUARY 2, 1898. No. 7730.

1. **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, and *Rice v. Winters*, 45 Neb. 517, followed.

2. ———: PARTIES. The party to whom the debt of another has been paid, the payment of which furnishes the basis of the claim for subrogation, is a proper and necessary party to the action for subrogation.

3. ———: MORTGAGES: ATTACHMENT. One Bishop, engaged in business, gave a mortgage on his stock in trade and other personal property to D., W. & Co. A., M. & Co., to whom Bishop was indebted, very soon afterward began an action against him in which it procured a writ of attachment to issue and its levy on the stock in trade and personal belongings of the tradesman. D., W. & Co., predicating its right and title to the property on the mortgage by Bishop to it, commenced an action in a court of Iowa wherein it alleged the conversion of the property by A., M. & Co. The plaintiff recovered a judgment for the value of the property, such value being fixed by the verdict. The judgment was paid by A., M. & Co. One of the grounds for attachment in the suit in this state was the alleged fraudulent transfer or disposal of the property by Bishop, the mortgages to D., W. & Co. furnishing the basis for said allegation. A motion was filed to discharge the attachment, which, on hearing, was overruled, and subsequent to the judgment rendered against it in Iowa, A., M. & Co. prosecuted the suit and attachment in this state to final judgment. After payment of the judgment rendered by the Iowa court, A., M. & Co. instituted this action in the same court in which it had its judgment and order to sell the property under attachment. The object sought in this action was its subrogation to the rights of D., W. & Co. under the mortgages under which the last mentioned company had asserted and been accorded rights in the suit in Iowa. *Held*, That the subrogation was properly allowable as to the right to subject the property to the payment of the sum which A., M. & Co. had paid to extinguish the Iowa judgment, but not to receive a deficiency judgment against Bishop or enforce

payment by him personally of any balance of such amount remaining after the application of the proceeds of the property to the payment thereof.

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

Hainer & Smith, for appellant.

Howard M. Kellogg, contra.

HARRISON, C. J.

The plaintiff in its petition filed in this action in the district court of Hamilton county pleaded that Alfred L. Bishop, of defendants, was for two years prior to November 24, 1890, engaged in business in the city of Aurora, in this state, selling at retail agricultural implements, musical instruments, sewing machines, buggies and wagons, etc., and that on the said date he was indebted to plaintiff in sums aggregating about $1,600 for purchases of it of certain portions of the articles which he had in stock for sale; that Deere, Wells & Co., of Council Bluffs, Iowa, did business in this state, and under the same firm name and style and on the 17th of December, 1890, the defendant Bishop executed and delivered to Deere, Wells & Co. two chattel mortgages, each, according to its words and figures, being for the purpose of securing the payment to the designated mortgagee the total sum of $13,115.22 in stated sums and at fixed dates. In one of the mortgages as the property thereby subjected to a lien there was described specifically the articles which the mortgagor then had, as a dealer, for sale and in the other certain enumerated stock of the horse kind. It was also alleged that on December 26, 1890, the plaintiff instituted an action in the district court of Hamilton county against said Bishop to recover an alleged balance then its due from him in the sum of $1,673.44, and at the same time filed in said action its affidavit in attachment, stating therein, among other things, that

the defendant had made a fraudulent disposition of his property; that plaintiff procured a writ of attachment to issue and to be levied on certain property, which was that included and described in the mortgages to Deere, Wells & Co.; and that on March 27, 1893, during the pendency of a term of the said district court, on a full hearing of the cause on its merits, Bishop was adjudged indebted to plaintiff in the sum of $1,031.90 and the attached property was ordered to be sold and the proceeds applied in satisfaction of the judgment; that said judgment is still in full force and effect; that no appeal has been taken therefrom and no part has been collected or paid. It was further averred that during the year 1891, Deere, Wells & Co. commenced an action against plaintiff in a district court of Iowa to recover of and from the plaintiff the value of the property which had been taken for plaintiff under the writ of attachment in this state in its action against Bishop; that Deere, Wells & Co. claimed ownership of the property under and by virtue of the two chattel mortgages executed and delivered to it by Bishop; that issues were joined in the action in the Iowa court and a trial had which resulted in a judgment in favor of Deere, Wells & Co. in the sum of $3,500, which the plaintiff of the present action afterwards paid in full, together with the costs, $155.46; and that Deere, Wells & Co. had received the amount of the judgment from the clerk of the court, to whom it was paid by the plaintiff herein; that Alfred L. Bishop attended at the trial of the cause in Iowa and was a witness therein on behalf of Deere, Wells & Co., "and aided, abetted, and assisted Deere, Wells & Co. in obtaining the said judgment." The prayer of the petition was as follows: "Wherefore plaintiff prays that it may be ordered, adjudged, and decreed by this court that plaintiff by operation of law succeeded to all the rights of the defendant Deere, Wells & Co. under and by virtue of the terms of said chattel mortgages as to all of such property that said Deere, Wells & Co. procured the value of in the action of con-

version tried in said district court of Pottawattamie county, and that plaintiff be subrogated to each and all of the rights of said Deere, Wells & Co. and be permitted and allowed to foreclose said chattel mortgages so far as relates to the property which was taken into consideration upon the trial of said action of conversion; that said defendants, and each of them, may be barred and foreclosed of all equity of redemption and other interest in or to said mortgaged property; that an account may be taken of the property now in the hands of the sheriff and being held under and by virtue of the order of attachment issued in the cause pending in this court, and that said property may be sold according to law and out of the proceeds thereof the plaintiff be allowed a credit upon the amount he paid to said Deere, Wells & Co. upon the judgment aforesaid, and that defendant Alfred L. Bishop be adjudged to pay any deficiency which may remain after applying the proceeds of said sale toward the payment of the amount of said judgment, together with interest and costs; that it further be ordered that the sheriff of this county sell said property under the order of this court in this cause; that the property be released from the order made in the case wherein the plaintiff was plaintiff and the defendant Alfred L. Bishop was defendant and heretofore tried in this court, and that an order releasing said property from the attachment proceedings as heretofore alleged be made without prejudice to any right of plaintiff to enforce said judgment for the full amount thereof and to the same extent as if no order had been made for the sale of the attached property, and for such other, further, or different relief as may be just and equitable in the premises."

To this petition for Alfred L. Bishop there was the following answer: "The defendant Alfred L. Bishop, for answer to the petition of the plaintiff herein, admits that he was in business in Aurora, Nebraska, prior to November 24, 1890, as alleged; admits the bringing of a suit against him by plaintiff, the issuance and service of an

attachment therein, the seizure of goods thereon, and the rendition of final judgment in this court in said action as alleged. He admits that Deere, Wells & Co. commenced an action against this plaintiff in Pottawattamie county, Iowa, and that he testified as a witness in said action, and that the judgment rendered therein has been paid by the plaintiff. He alleges that in the action brought against him in this court by the plaintiff, the pleadings, record, and proceedings in which are made a part of the petition herein, he filed a motion and affidavit for the discharge of the attachment theretofore issued; that a full hearing was given thereon, upon both affidavits and oral testimony; that to sustain the attachment and the allegation in their affidavit, as a ground therefor, that this defendant had disposed of his property with intent to defraud his creditors, the plaintiff claimed, and introduced evidence to prove, that the mortgages now set out in the plaintiff's petition were fraudulent both in fact and law; that said claim was controverted by this defendant; that a full hearing was had upon said question, the same was argued to the court by counsel; that this court expressly found and decided in said proceedings that said mortgages, set up in plaintiff's petition, were in law, though not in fact, fraudulent and void as against the other creditors of this defendant; that the lien of the plaintiff's attachment was superior to the lien of said mortgages, and upon that ground the court sustained said attachment and, on final judgment being given in said case, ordered the attached property sold for the payment of the same, from which judgment and order no appeal or proceedings in error were prosecuted by either party. Wherefore this defendant submits to the court that both plaintiff and this defendant, parties to said action, are bound and concluded by said finding and decision of this court therein, that the plaintiff is barred and estopped from claiming that the mortgages set out in the petition constitute any lien upon, or give any claim whatever to, the goods conveyed by the attachment and described in

the petition herein; that, as between the plaintiff and this defendant, all questions as to the ownership of the property seized under said attachment, and all questions as to the priority of right as between said mortgage and attachment liens has been fully adjudged and finally settled by the order of this court in said action. This defendant therefore prays that the plaintiff's petition be dismissed at its costs, and for such other or different relief as may be equitable in the premises."

To this answer the plaintiff filed a general demurrer. For Deere, Wells & Co. there was filed a general demurrer to the petition. On hearings the demurrer of Deere, Wells & Co. to the petition was overruled and that of plaintiff to Bishop's answer was sustained. Subsequently a stipulation was entered into between the plaintiff and Bishop and filed which was as follows: "It is hereby stipulated and agreed, by and between the parties to the above entitled cause, that the plaintiff shall take into its possession the property now held by the sheriff of Hamilton county, Nebraska, under and by virtue of a writ of attachment issued in a certain cause heretofore pending in this court, wherein the plaintiff herein was plaintiff, and the defendant herein, Alfred L. Bishop, was defendant; that said plaintiff shall be required to account for the sum of $1,450 in lieu of said property, and that the making and entering into this stipulation shall in nowise or manner abridge or affect any of the rights of either of the parties to this action, and that any judgment or order made in this cause shall operate upon said amount, and that the plaintiff shall be required to apply said amount as may be finally adjudged in said cause, in the same manner and to the same extent as any such judgment or order might be made as against said property."

Deere, Wells & Co. elected to stand on their demurrer and Bishop to stand on his answer and to plead no further; and on final submission of the cause the court adjudged that the plaintiff be subrogated to the rights of

Deere, Wells & Co. in and to the property taken under the writ of attachment in the former case of plaintiff against Bishop; that the property be released from the lien and levy of the attachment; and it was further stated in the judgment as follows: "The parties to this action having stipulated in writing, which stipulation is on file in this cause, that said property was of the value of $1,450 and that the same has been turned over to the plaintiff, it is ordered that said plaintiff make no further account for said property. Plaintiff then moved the court for judgment, and the award of execution for any deficiency yet remaining after applying said $1,450 upon the amount of said judgment for $3,500, together with its interest to this date, which motion the court overruled, and refuses to require said defendant Alfred L. Bishop to make further accounting, or be liable for the amount paid to said Deere, Wells & Co. other than the payment of said $1,450."

It is insisted that as to Deere, Wells & Co. the petition did not state a cause of action, hence it was an error to overrule its demurrer thereto. The contention on this point is to the effect that Deere, Wells & Co. was not further interested in the matter and was neither a proper nor necessary party to the action. Creditors to whose rights a party seeks to be subrogated are necessary parties to an action to obtain such subrogation. (*Harris v. Watson*, 20 S. W. Rep. [Ark.] 529; *Bond v. Montgomery*, 20 S. W. Rep. [Ark.] 525; *Kyner v. Kyner*, 6 Watts [Pa.] 227.)

Coming now to the main question raised and argued, viz., Was the appellant entitled to be subrogated to the rights of Deere, Wells & Co. under its mortgages as against Bishop, the mortgagee, and if so, to what extent? we will call attention to this: That it arises under a demurrer to the answer in which it is claimed that the appellant's attachment in an action in the same court in which this was instituted, and in which all parties in this were also parties, was adjudicated to be the superior lien;

that the mortgages by Bishop to Deere, Wells & Co. were, as to creditors of whom appellant was one, fraudulent and void; that having obtained such an adjudication the appellant cannot now assert to the contrary and enforce the mortgages. Whatever adjudication, if any, of the question of the liens on the property of the appellant's attachment and the mortgages of Deere, Wells & Co. prior to the trial of the action of conversion in the court in Iowa of the rights of the same parties, it being that taken under appellant's attachment and also mortgaged to Deere, Wells & Co., was, on the hearing of a motion to dissolve the attachment, overruled and there was no final order or judgment in the original action in this state until a date subsequent to the judgment rendered in the Iowa court. Appellant obtained a final judgment in the original action here prior to payment of the judgment in Iowa. The judgment in the original action in this state did not affect the question of the validity of the mortgages as between the immediate parties to them, the mortgagor and mortgagee; as between them they were not adjudged void or in any manner or degree disturbed or touched by the adjudication.

The right of subrogation is a creation of equity and independent of any contractual relations between the parties. (*Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482.)

In *Ætna Life Ins. Co. v. Town of Middleport*, 8 Sup. Ct. Rep. 625, it was said: "The doctrine of subrogation in equity requires (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 the case of *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 in any particular case depends upon the peculiar facts and circumstances of such case." See also *Rice v. Winters*, 45 Neb. 517, where the doctrine announced in *Bank v. Wright* was followed, and it was further stated: "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."

We think that by the adjudication in the Iowa court in the action of conversion (it must be borne in mind that this occurred prior to any final order or adjudication in the court in this state of the respective rights of the litigants, the appellant and Deere, Wells & Co.) the appellant became entitled to the right and title of Deere, Wells & Co. by virtue of its mortgages to the property; this for the reason that in order to maintain its possession of the property it had been compelled to pay its value to Deere, Wells & Co. Bishop had transferred the property to Deere, Wells & Co. and was not further interested than that its value, its proceeds, should be applied in the extinguishment partially or wholly of his indebtedness to Deere, Wells & Co. The last mentioned party received its value, and to the appellant it seems but fair to accord the continued possession of the goods, and such right or title as it had, by paying the Iowa judgment paid a consideration for to Deere, Wells & Co.,—this was the right to the value or proceeds of the property. (See

Adler v. Lang, 28 Mo. App. 440.) The matters litigated in the Iowa action were the right to the possession of the property and its value, by being adjudged to pay its value to Deere, Wells & Co., and complying therewith appellant but became entitled to enforce the mortgages under which Deere, Wells & Co. had recovered, and this only against the property and to apply its proceeds to the payment of the amount which it had paid to Deere, Wells & Co. It had the property under its attachment, and by reason of such possession it was summoned to the Iowa court and there participated in a trial in which it was declared to be a wrong-doer and to make restitution to the party wronged. The value of the property was a matter directly in issue and, presumably after a full presentation, was fixed by the judgment of the court as between the two litigant companies. The property of Bishop was in effect applied at a determined valuation on his indebtedness to Deere, Wells & Co. The appellant became entitled by payment of the judgment to proceed against the thing involved as the bone of contention—the property; and to exhaust it in his repayment of the amount it had been forced to pay. Bishop could not and cannot complain, for it is but a payment of the debt which, by the execution and delivery of the mortgages, he said it should be taken to pay, in case of his failure or default in satisfying the same; but to allow the appellant to apply the property on the amount it paid to Deere, Wells & Co., the judgment of the Iowa court, and in a sum less than the value fixed by such judgment, and to recover from Bishop any sum a balance of the amount it paid, would be to take Bishop's property and to pay his debt with it in a stated sum and further require that he pay again a portion of the same debt. We are satisfied that appellant could claim and be accorded subrogation to the extent the property would satisfy the amount it paid Deere, Wells & Co., but not to enforce any part of it as a personal claim against Bishop. Bishop was not a party to the case in the Iowa court and could not

be and was not bound by any portion of the adjudication there, and might be heard to complain of the valuation placed on the property if so disposed; nor did the fact, as pleaded in the petition, that he was in attendance there at the trial as a witness, coupled with the further statement of the conclusion that he aided, abetted, and assisted Deere, Wells & Co. in obtaining the judgment, present any matter which can avail to bind him. (See *Schribar v. Platt*, 19 Neb. 625.)

It is argued for appellees that a long time elapsed between the date of the payment of the Iowa judgment by appellant and the time of this action, and the property was of such a character that it had greatly depreciated in value; hence it would be unfair to Bishop to have it applied at the depreciated valuation and he be compelled to pay the balance. This cannot be considered, for the reason that it is not of the pleadings and, consequently, has no place in the case. It is true that the parties stipulated that the appellant should be required to account for the sum of $1,450 in lieu of said property, but it was also of the stipulation that it should in nowise or manner abridge or affect any of the rights of either of the parties to the action, and no argument is made that it did so affect or change any of the rights of the parties, and we will leave it where the parties themselves have been content to leave it, with no particular comment on or discussion of it or its effect.

It follows from what has been said herein that the judgment of the district court was correct and will in all things be

AFFIRMED.

STATE OF NEBRASKA, EX REL. DOUGLAS COUNTY, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED FEBRUARY 2, 1898. No. 9812.

1. **Taxation:** PURPOSES: STATUTES. The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially or strictly private is invalid.
2. **Constitutional Law:** PUBLIC PURPOSE. It is for the legislature in the first instance to decide what is and what is not a public purpose, but its determination of the question is not conclusive upon the courts.
3. **Taxation:** VALIDITY OF STATUTE. A tax law will not be declared invalid on the ground that the tax is not for the benefit of the public, unless it was imposed for the furtherance of an object or enterprise in which the public has palpably no interest.
4. ———: ———: INTERSTATE EXPOSITIONS: COUNTY BONDS. Chapter 24, Laws 1897, authorizing counties to participate in interstate expositions, to issue bonds for such purpose, and to provide for the levy of a tax for their payment, does not contravene the constitution on the ground that the object of the statute is to advance individual interest merely and not to promote the public welfare.
5. ———: ———: ———: ———: PROCEEDS. An appropriation of the money arising from the sale of the bonds issued under said act for the erection of suitable buildings, and maintaining the same, and a county exhibit at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898, is for a public purpose or use, and not in violation of the constitution.
6. **Statutes:** CONFLICT: CONSTRUCTION. It is a well settled rule of construction that special provisions in a law relating to particular subject-matter will prevail over general provisions in other statutes so far as there is a conflict.
7. **Counties:** BONDS: INTERSTATE EXPOSITION. An affirmative vote of two-thirds of all of those cast on the proposition is sufficient to carry county bonds issued under chapter 24, Session Laws 1897, for the purpose of making a county exhibit at an interstate exposition.

ORIGINAL application for a writ of mandamus to compel the auditor of public accounts to register bonds issued by relator for the purpose of raising funds for an exhibit at the Trans-Mississippi and International Exposition. *Writ allowed.*

Howard H. Baldrige, H. L. Day, and *Montgomery & Hall,* for relator.

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

NORVAL, J.

This was an original application to this court for a peremptory writ of mandamus, on the relation of Douglas county, to compel the respondent, as auditor of public accounts, to register in his office 100 certain coupon bonds of said county, aggregating $100,000, voted for the purpose of raising money to enable it to participate in the Trans-Mississippi and International Exposition to be held in the city of Omaha during the year 1898. In 1897 the legislature of this state passed an act entitled "An act to authorize counties to participate in interstate expositions, to issue bonds for such purpose, and to provide for a tax for the payment of such bonds." (Session Laws 1897, p. 192, ch. 24.) The first three sections of said law are here reproduced:

"Section 1. Whenever one thousand (1,000) voters of any county in the state of Nebraska having over one hundred thousand population shall petition the board of county commissioners or the board of supervisors to that end, any such county shall be and hereby is authorized to issue the bonds of such county, to become due twenty (20) years from the date thereof, and to bear interest at the rate not to exceed five (5) per cent per annum, to provide for the expenses of promoting the interests of such county by participating in any interstate exposition held in the state of Nebraska and making at such exposition a county exhibit, improving or beautifying the grounds, and erecting or aiding in the erection of a suitable building or buildings therefor, and maintaining the same during such exposition, to an amount to be determined by the board of county commissioners or board of supervisors, not exceeding one hundred thousand dollars

($100,000); *Provided*, The board of county commissioners or board of supervisors shall first submit the question of the issuing of such bonds to a vote of the legal voters of such county at a general or special election, such question to be submitted entire after notice to such voters published in any newspaper of general circulation in such county for four (4) weeks next prior to such election; and *Provided*, That such interstate exposition shall first have been recognized by the congress of the United States by an appropriation of a sum not less than one hundred thousand dollars ($100,000).

"Sec. 2. The proposition when submitted shall contain a statement of the amount necessary to be raised each year for the payment of the interest of said bonds and for the payment of the principal thereof at maturity.

"Sec. 3. If two-thirds (⅔) of the votes cast on such proposition at any such election be in favor thereof, the said bonds shall be authorized and the proper officers of the county shall thereupon issue said bonds and the same shall be and continue a subsisting debt against such county until they are paid."

Section 4 of said act provides for the levying of a sufficient tax by the proper county officers upon all of the taxable property of the county to pay the principal and interest upon said bonds as the same become due and payable.

The relation shows that the proposition to issue the bonds in question was submitted to the electors of the county, and the same was adopted by them in strict conformity to the provisions of the said legislative enactment. The respondent has declined to register the bonds for the reason their legality is questioned; but he has not, by answer or otherwise, advised the court of the particular grounds upon which their validity is assailed, nor has he submitted any authorities in opposition to the issuance of the writ. Counsel for relator, in the briefs and at the bar, have argued two propositions, to which attention will be given, namely: First—

Whether the bonds were voted for a lawful object or purpose. Second—Did the proposition to issue them receive the requisite affirmative vote of the electors of the county?

The following principles are too well established by the authorities to require discussion at this time:

First—The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially private is void. (1 Dillon, Municipal Corporations sec. 508; Cooley, Taxation [2d ed.] 55, 103; 25 Am. & Eng. Ency. Law 87, and the numerous cases cited in note 2 on said page.)

Second—It is for the legislature in the first instance to decide whether the object for which a tax is to be used or raised is a public purpose, but its determination of the question is not conclusive. (*Supra.*)

Third—To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind. (*Turner v. Althaus*, 6 Neb. 54; *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411; *Brodhead v. City of Milwaukee*, 19 Wis. 658; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 150; *People v. Common Council of East Saginaw*, 33 Mich. 164; *Walker v. City of Cincinnati*, 21 O. St. 14; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147; *Weismer v. Village of Douglas*, 64 N. Y. 91; *Loan Association v. Topeka*, 20 Wall. [U. S.] 664.)

In the last case it was said: "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of public use, and the courts can only be justified in interposing when the violation of this principle is clear and the reason for interference cogent. And in deciding whether in a given case the object for which the taxes are

assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

The language of Folger, J., in his opinion in *Weismer v. Village of Douglas*, 64 N. Y. 99, deserves to be reproduced here: "It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, state and municipal. When we come to ask, in any case, what is a public purpose, the answer is not always ready, nor easily to be found. It is to be conceded that no pinched or meager sense may be put upon the words, and that if the purpose designated by the legislature lies so near the border line that it may be doubtful on which side of it it is to be domiciled, the courts may not set their judgment against that of the lawmakers."

In *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 420, occurs this language: "While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the lawmaking power respecting the wisdom or necessity thereof. For 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."

In the light of the principles already stated, is the

legislation, under which the bonds in question were voted, illegal on the ground that it authorized the imposing of burdens upon the public, by way of taxation, in aid of a private enterprise, and not in furtherance of an object which is public in its character? The answer must be in the negative. The statute under review does not attempt, or purport, to authorize the issuance, or donation, of the bonds to private individuals, or the corporation under whose auspices the exposition is to be held. Nor does the act contemplate that the money derived from the sale of the bonds shall be devoted to promote the interest of a few; but the intention of the law was to enable any county availing itself of its provisions to raise the means with which to meet the expenses of erecting a suitable building or buildings, and maintaining the same, and an exhibit of the resources of the county at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898. The proceeds of the bonds are to be disbursed, for the purpose mentioned in the law, by Douglas county, through its officers and agents. We cannot determine judicially that such an object is purely private, and not public in its character, especially in view of the legislation and adjudication in this state now to be mentioned. The legislature in 1891 appropriated $50,000 "to provide for a presentation of the products, resources, and possibilities of the state of Nebraska at the World's Columbian Exposition." (Session Laws 1891, p. 395, ch. 57.) An additional appropriation of $35,000 was subsequently made for the same purpose. (Session Laws 1893, p. 380, ch. 41.) Both of those amounts were paid by the state treasurer, and the money was expended without any one challenging the legality of the appropriations on the ground that they were not made for the public good. Our legislature appropriated $100,000 at the last session for the purpose of defraying the expenses of the state in making a proper exhibit of its resources and products in the said Trans-Mississippi and International Exposi-

tion. (Session Laws 1897, p. 369, ch. 88, sec. 4.) Section 3, article 1, chapter 2, Compiled Statutes, provides that $2,000 shall be paid annually out of the state treasury to the state board of agriculture to be used in payment of premiums awarded by said board at the state fair; and section 10 of the same article and chapter authorizes the payment to the state horticultural society of $1,000 annually for the use and benefit of said society. The legislature has each session made the appropriations required by said sections, for the purposes therein indicated, and the same have been paid, without a suggestion from any source that the money was not devoted to a public use. Section 16 of the same article and chapter authorizes a county, under certain restrictions, to appropriate and pay to the county agricultural society not exceeding $100 for every thousand inhabitants in the county, "to be expended by such society in fitting up such fair grounds, but for no other purpose." This section has never been assailed as being invalid, although it has remained upon the statute books for nearly twenty years. Section 12, article 1, of said chapter 2, authorizes the payment by county boards, to agricultural societies complying with the provisions thereof, of a sum equal to three cents for each inhabitant in the county from the county general fund. In *State v. Robinson*, 35 Neb. 401, it was ruled that this section authorized the appropriation of money for a public purpose, and the expenditure was permissible under the constitution. That case is not distinguishable in principle from the one at bar. The adjudication of other courts fully sustains the same doctrine.

The city of Philadelphia appropriated $50,000 to meet the official contingent expenses incidental to the Centennial Exposition. It was held that this appropriation was valid. (*Tatham v. City of Philadelphia*, 11 Phila. 276.)

An appropriation by a town made in pursuance of a statute to celebrate the centennial anniversary of its incorporation has been upheld. (*Hill v. Easthampton*, 140 Mass. 381.) Likewise an appropriation of money by a

city for the celebration of holidays is held to be for a public purpose. (*Hubbard v. City of Taunton*, 140 Mass. 467.)

The legislature of California made an appropriation of $300,000 for the purpose of making a state exhibit at the World's Fair Columbian Exposition. The supreme court of that state, in *Daggett v. Colgan*, 92 Cal. 53, held the appropriation was for public use, and was constitutional.

In *Norman v. Kentucky Board of Managers of World's Columbian Exposition*, 93 Ky. 537, it was decided that an appropriation of $100,000 to enable the state to participate in the World's Fair at Chicago was a valid exercise of legislative power under a constitution which provided that "taxes shall be levied and collected for public purposes only."

The legislature of the state of Tennessee, in 1895, passed an act authorizing the several counties of the state to appropriate money to provide for an exhibit of the resources at the Tennessee Centennial Exposition to be held at Nashville. The county of Shelby, in that state, appropriated $25,000 in pursuance of said act, but the proper county officer refused to issue a warrant against said appropriation, claiming that the act was invalid. On an application for a writ of mandamus the supreme court, in *Shelby County v. Exposition Co.*, 96 Tenn. 653, overruled the contention, saying: "To our minds it is entirely clear that an exhibition of the resources of Shelby county at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general

welfare of the people of the county making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county; thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will ensure increased intelligence, wealth, and happiness for her people, individually and collectively. Undeniably, that which promotes such an object and facilitates such a result in any county is, to that county, a county purpose in the truest sense."

No case in conflict with the foregoing has come under the observation of the writer. Decisions, however, are to be found in the books holding the appropriation of moneys for celebrations of public events to be invalid, but such decisions turn on the question of statutory authority rather than on the right of the legislature to confer such power. (See *Hood v. Mayor and Aldermen of Lynn*, 83 Mass. 103; *Tash v. Adams*, 64 Mass. 252; *City of New London v. Brainard*, 22 Conn. 552.)

In *Hayes v. Douglas County*, 92 Wis. 429, it was ruled that a county tax levied for the purpose of defraying the expenses of placing blocks of stones from the county in the Wisconsin state building at the Columbian World's Fair was unauthorized and void. The ground for this holding does not appear in the report of the case, as the only reference to the subject in the body of the opinion is in the language following: "The Columbian Fair stone tax was altogether unauthorized and void." We presume that the power to impose the tax in that case was not conferred by statute. Upon principle and authority we are constrained to hold that the bonds were voted for a public purpose, one for which the money of the county may be lawfully devoted.

Attention will now be given to the question whether the proposition to issue these bonds received the requisite number of affirmative votes. Sections 27 to 30, inclusive, of article 1, chapter 18, Compiled Statutes, relate

generally to the submission of questions to a vote of the electors of the county. Said section 30 declares: "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected." This section has been construed as requiring, to adopt a proposition involving the issuance of bonds, an affirmative vote of two-thirds of the electors participating at the election at which the same is submitted. (*State v. Anderson*, 26 Neb. 517; *Stenberg v. State*, 50 Neb. 127.) So that if the provisions of said section 30 apply to the bonds in question, they failed to carry, since they did not receive two-thirds of the votes cast at the election, although more than two-thirds of those voting on the proposition were in favor of the bonds. It is very evident that said section 30 cannot be invoked here, because it is embraced in the statute which provides generally for the submission of questions to a vote of the county, and must give way to any special act upon the same subject. The law under which the bonds in controversy were voted relates specifically to the subject of issuing bonds to enable counties to participate in interstate expositions, and the provision therein as to the vote necessary to carry that class of bonds governs and controls, for the obvious reason it is a special law in relation to a particular subject. This principle has been recognized by a long line of decisions in this state. (*McCann v. McLennan*, 2 Neb. 286; *People v. Gosper*, 3 Neb. 310; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311; *Fenton v. Yule*, 27 Neb. 758; *State v. Benton*, 33 Neb. 823, 834; *Richards v. Clay County*, 40 Neb. 51; *Merrick v. Kennedy*, 46 Neb. 264; *Van Horn v. State*, 46 Neb. 62; *State v. Moore*, 48 Neb. 870.) It follows that these bonds were carried by the requisite vote, and no valid objection having been urged against

their registration, a peremptory writ of mandamus is ordered as prayed.

WRIT ALLOWED.

WYLER, ACKERLAND & COMPANY V. E. ROTHSCHILD & BROS. ET AL.

FILED FEBRUARY 2, 1898. No. 7726.

1. **Statute of Frauds:** ORAL CONTRACT OF SALE. To take an oral contract for the sale of personal property of over $50 in value out of the statute of frauds, when no part of the purchase-money has been paid, delivery and acceptance of the property, or some portion thereof, by the vendee are necessary.
2. ———: ———: DELIVERY TO CARRIER. A delivery of goods, under a verbal contract of sale, to a common carrier for transportation, the receipt and acceptance of the goods by the purchaser at the place of destination, and the payment of the freight charges thereon, operate to take the contract out of the statute of frauds.
3. **Sale:** ACCEPTANCE OF GOODS. The execution and delivery of a chattel mortgage on goods by a vendee shortly after their receipt by him are such an assertion of ownership as will constitute an acceptance of the goods.

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

A. D. Ranney and *J. S. Gilham*, for plaintiff in error.

James McNeny, contra.

NORVAL, J.

This was replevin for a lot of clothing. The verdict and judgment were against the plaintiffs. Wyler, Ackerland & Co., wholesale dealers in clothing, were the owners of goods in controversy. In the summer of 1893 they received through their traveling salesman an order, unsigned, from Louis Schumann, of Blue Hill, for a bill of clothing of the value of over $1,100, for fall delivery. In August of that year the goods replevied were shipped

by plaintiffs to Schumann at Blue Hill, who received the same, paid the freight charges thereon, and placed them in his store. His clerk, Mr. Lepin, opened one or more of the boxes, took out two suits of the clothing, one of which had been sent complimentary to Mr. Lepin, and then closed the boxes, as it was then too early to place the goods on the shelves for the winter trade. Three days after the receipt of the goods by Schumann he executed a mortgage to E. Rothschild & Bros. for $200 and another mortgage for $3,500 to State Bank of Blue Hill on the mortgagor's entire stock of goods and fixtures, "and all kinds of merchandise and chattels of every kind and description now contained and being in my clothing store in Blue Hill." These mortgages were given to secure *bona fide* debts, and when they were executed and delivered the clothing in controversy was in the store. Possession of the property was taken by mortgagees, whereupon plaintiffs instituted this suit.

The contention of plaintiffs is that the title to the replevied property had not passed to Schumann prior to the making of the mortgages, but that the clothing was shipped by the plaintiffs to the mortgagor subject to his approval, and that he never accepted the same. Edward Weinstein, plaintiffs' traveling salesman, who took the order for the clothing, testified that he sold Mr. Schumann the goods with the privilege of acceptance or refusal on their arrival at Blue Hill, and that the consignee declined to accept them. This is positively contradicted both by Mr. Schumann and Lepin, his clerk, and the conflict in the testimony was resolved by the jury against the contention of plaintiffs. Paying the freight on the goods, opening the boxes in which they were shipped and taking therefrom two suits of clothing, and the execution of the mortgages on the goods constituted a full and unqualified acceptance thereof by Mr. Schumann. That the order given for the clothing was unsigned by Schumann does not render the sale void under the statute of frauds, since there was a delivery and acceptance of the goods. (*Leg-*

gett & Myer Tobacco Co. v. Collier, 89 Ia. 144; *Sullivan v. Sullivan*, 70 Mich. 583.)

It is urged that the court erred in not permitting A. D. Ranney to testify that Mr. Schumann had informed witness he had not accepted the goods and had no intention of mortgaging them. Mr. Schumann was not a party to this suit; therefore the testimony was admissible only for the purpose of impeachment, and the proper foundation was not laid for the introduction of the excluded testimony.

Complaint is made of the giving of the instruction following: "If the jury find from the evidence that Schumann did accept the goods in controversy, prior to making the mortgage, then you should find for defendant." It is urged that it requires more than the mere acceptance of goods to take the sale out of the statute of frauds. It is true, delivery and acceptance both were indispensable. (*Powder River Live-Stock Co. v. Lamb*, 38 Neb. 339.) The undisputed testimony shows that the clothing was delivered to Schumann; hence it was unnecessary for the court to submit to the jury the question of delivery of the goods. There was no error in the two other instructions criticised by counsel. The judgment is

AFFIRMED.

MARY R. HARRIS V. JOHN BARTON.

FILED FEBRUARY 2, 1898. No. 7816.

1. **Bill of Exceptions:** AUTHENTICATION. A bill of exceptions will not be considered unless authenticated by the clerk of the trial court.
2. ———: ———: REVIEW. Assignments of error which are unavailing without a bill of exceptions will be disregarded where such bill is not authenticated according to the statute.

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

Smith & McCreary and *J. D. Pope*, for plaintiff in error.

Charles H. Sloan, contra.

NORVAL, J.

This was an action of replevin by Mary R. Harris against John Barton to recover a number of buggies and wagons. From a verdict and judgment for the defendant the plaintiff prosecutes this proceeding.

The petition in error contained nine assignments. Three relate to rulings on the evidence, five are based on the giving and refusing of instructions, and one relates to the overruling of the motion for a new trial. These assignments are unavailing, for the reason their consideration involves an examination of the bill of exceptions, and the document attached to the transcript purporting to be the bill of exceptions is not authenticated by any certificate of the clerk of the trial court, as either the original bill or a copy thereof. (*Moore v. Waterman*, 40 Neb. 498; *Wax v. State*, 43 Neb. 18; *Yenny v. Central City Bank*, 44 Neb. 402; *Martin v. Fillmore County*, 44 Neb. 719; *Union P. R. Co. v. Kinney*, 47 Neb. 393; *Romberg v. Fokken*, 47 Neb. 198; *Derse v. Straus*, 49 Neb. 665.) For the reason stated the judgment is

AFFIRMED.

DAVID VAN ETTEN ET AL. V. WILLIAM MEDLAND ET AL.

FILED FEBRUARY 2, 1898. No. 7712.

1. **Taxation:** ACTION TO ENFORCE LIEN: NOTICE TO REDEEM. It is the settled rule in this state that a purchaser at a tax sale is not required to give the notice to redeem mentioned in section 3, article 9, of the constitution, to maintain an action to enforce a tax lien.

2. **Pleading:** DEFINITENESS: WAIVER. The filing of a demurrer to a petition is a waiver of the right to insist that the allegations of the pleading shall be made more definite and certain.

3. **New Trial:** EXCEPTIONS: REVIEW. An exception in the trial court to an order denying a motion for a new trial is necessary to obtain a review in this court of questions properly included in such motion.

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

David Van Etten, for plaintiffs in error.

Henry W. Pennock, A. C. Troup, Francis A. Brogan, Switzler & McIntosh, and *B. F. Cochran, contra.*

NORVAL, J.

This is a proceeding to review the decree of the district court foreclosing a tax lien.

The first assignment is that the trial court erred in overruling the demurrer to the petition. It is insisted that the petition is fatally defective, inasmuch as it is not alleged therein that notice to redeem from the tax sale had been served upon the occupants of the land. Section 3, article 9, of the constitution is invoked to sustain the contention, which provides: "The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof; *Provided*, That occupants shall in all cases be served with personal notice before the time of redemption expires." The foregoing provision has been frequently under consideration by this court, and it has been uniformly ruled that the redemption notice is essential only where a tax deed is sought, and that service of such notice is unnecessary to maintain an action to enforce a tax lien. (*Bryant v. Estabrook*, 16 Neb. 217; *Lammers v. Comstock*, 20 Neb. 341; *McClure v. Lavender*, 21 Neb. 181; *Helphrey v. Redick*, 21 Neb. 80.) This construction of the constitution has been adhered to so long as to now become a rule of property, and we do not feel at liberty to investigate the question anew.

After the demurrer was overruled, the defendants assailed the petition by a motion to make the pleading more definite and specific by attaching copies of the receipts for taxes paid. The motion was denied, and the ruling is urged as a ground for reversal. The motion was made too late to be of any avail. It should have been presented prior to the filing of the demurrer. (*Fritz v. Grosnicklaus*, 20 Neb. 413.)

Another contention is that plaintiff permitted the real estate to be sold for taxes before the expiration of the last day of the second annual sale occurring after the date of plaintiff's purchase, and therefore section 120, article 1, chapter 77, of the Compiled Statutes should control the case. The record discloses that plaintiff's purchase was on October 17, 1888, and that the real estate was again sold to one Pilot on November 10, 1891, which was during the third annual sale after the one at which plaintiff bid in the land at tax sale. The section of the statute invoked by the defendant, therefore, has no application here.

It is finally insisted that there was error in the assessment in the amount of recovery. This question was raised by the motion for a new trial, but it is unavailing in this court, for the reason no exception was taken in the court below to the overruling of such motion. (*Lowrie v. France*, 7 Neb. 191; *Murray v. School District*, 11 Neb. 436; *Burke v. Pepper*, 29 Neb. 320.) The decree is

AFFIRMED.

STATE OF NEBRASKA, EX REL. WILLIAM MEDLAND, V. CUNNINGHAM R. SCOTT.

FILED FEBRUARY 2, 1898. No. 9538.

1. **Time to Present Bill of Exceptions for Allowance.** When forty days are given to prepare and serve a bill of exceptions, the draft of the bill and proposed amendments are submitted to the trial judge in time, if presented to him within sixty days after

the final adjournment of the term at which the decision was rendered.

2. ———. The third division of the syllabus in *Schields v. Horbach*, 40 Neb. 103, disapproved.

ORIGINAL application for a writ of mandamus to compel the respondent, as one of the judges of the district court of Douglas county, to sign a bill of exceptions. *Writ allowed.*

Henry W. Pennock, for relator.

Connell & Ives, contra.

NORVAL, J.

This is an original application for a peremptory writ of mandamus to compel the respondent, one of the judges of the district court of Douglas county, to sign and settle a bill of exceptions in a cause tried before him wherein relator was plaintiff and Henry Schlueter and others were defendants. The respondent insists that the proposed bill of exceptions was not presented to him for allowance within the time prescribed by law, and his refusal to allow the bill is placed upon that ground alone. The decree in the cause in which the bill of exceptions is sought was entered at the February term, 1897, of the district court, and which term adjourned *sine die* on April 10, 1897. Forty days from such final adjournment were allowed relator by the court within which to prepare and serve a bill of exceptions. The proposed bill was served upon counsel for the defendants in said cause on May 19, 1897, who returned the same to plaintiff's counsel on the 29th day of the same month with one proposed amendment. On June 4, 1897, relator served notice upon defendants' counsel that on the 9th day of said month the draft of the bill would be submitted to respondent for settlement and allowance, and it was presented to him at the time and place designated in said notice. Whereupon counsel for defendants objected and protested

against the settling of said bill on the ground that it had not been submitted to the respondent within the period fixed by statute.

It will be observed that the proposed bill was not submitted to the respondent for allowance within ten days from the time it had been returned to relator's counsel with the proposed amendment thereto, but was presented to the trial judge within sixty days from the final adjournment of the term at which the decree was rendered. It is argued by counsel for respondent that the law requires a proposed bill of exceptions to be submitted to the trial judge for his signature within ten days from the time the draft is returned to the party seeking the allowance of the bill. *Schields v. Horbach*, 40 Neb. 103, supports this contention, but such holding is in direct conflict with the earlier and later decisions of this court construing section 311 of the Code of Civil Procedure. In *First Nat. Bank v. Bartlett*, 8 Neb. 321, the court says: "The party excepting has fifteen days from the rising of the court in which to reduce his exceptions to writing, and submit the same to the adverse party without an order of the court. If he desires a longer period of time in which to prepare and submit the same to the adverse party, the court may extend the time not to exceed forty days from the rising of the court. In such case, the bill must be submitted to the adverse party within the period prescribed in the order. The adverse party then has ten days in which to propose amendments and return the bill to the party excepting. The party seeking the settlement of the bill has ten days after the time limited for the return of the bill to him, with the proposed amendments, in which to present the same to the judge for his signature, making sixty days in all from the rising of the court. But where a shorter period is fixed upon, when the bill must be prepared and presented to the adverse party for examination and amendment, the twenty days within which the bill must be signed by the judge dates from that period and cannot be extended beyond. * *

The design of the law evidently is to allow a fixed period for the presentation of a bill to the adverse party for the proposal of amendments, and for presenting the amended bill to the judge for his approval and signature, being analogous, in that regard, to the return and answer day of a summons." This case has been cited with approval and followed in *Sherwin v. O'Connor*, 23 Neb. 221; *State v. Gaslin*, 25 Neb. 71. Those decisions were not referred to or commented upon in *Schields v. Horbach*, *supra;* and in *Conway v. Grimes*, 46 Neb. 288, the doctrine announced in *First Nat. Bank v. Bartlett* and the cases following it was reaffirmed. My associates are of the opinion that where forty days are allowed to prepare and serve a bill of exceptions, the draft and proposed amendments may be presented to the trial judge for his signature upon proper notice at any time within sixty days from the final adjournment of the term of court at which the decision was rendered, while the writer adheres to the rule stated in the third division of the syllabus in *Schields v. Horbach*, 40 Neb. 103. It follows that the proposed bill was submitted to the respondent within the statutory period, and should be allowed by him as the bill of exceptions in the case. As the respondent was induced to withhold his signature from the bill by reason of the decision in *Schields v. Horbach*, *supra*, the writ will be allowed without costs.

WRIT ALLOWED.

GRAND ISLAND BANKING COMPANY ET AL., APPELLANTS, V. MARY E. WRIGHT ET AL., APPELLEES.

FILED FEBRUARY 2, 1898. No. 6538.

1. **Married Women:** CONTRACTS. The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute.

2. ———: ———: SEPARATE ESTATE. She may make contracts only

in reference to her separate property, trade or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate.

3. ———: ———: ———. Whether a contract of a married woman was so made is a question of fact.

4. ———: ———: ———: ACTION ON NOTE: BURDEN OF PROOF. When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate, but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same.

5. ———: SURETYSHIP: MORTGAGES: DEFICIENCY JUDGMENT. Where a husband gives a note for his own indebtedness, and the wife signs the same as surety merely and executes a mortgage to secure the payment thereof upon her own real estate, a personal judgment cannot be rendered against her on foreclosure for any deficiency after sale of the premises, where it is not disclosed that in executing the note and mortgage it was the intention to bind her property generally.

APPEAL from the district court of Hall county. Heard below before HARRISON, J. *Affirmed.*

Charles G. Ryan, for appellants.

W. H. Thompson, contra.

NORVAL, J.

The Grand Island Banking Company and John Lang each brought a separate action in the district court of Hall county against Mary E. Wright and Frederick Wright, wife and husband, to foreclose two real estate mortgages upon the same property, given by the defendants to secure promissory notes executed by them. Subsequently the suits were consolidated by consent of parties, a decree of foreclosure was entered, and the mortgaged premises were sold thereunder; but the proceeds were insufficient to pay the amount due upon the mortgages. Applications for deficiency judgments were made by the plaintiffs, which were denied as to the defendant Mary E. Wright, but such judgment was rendered against

the said Frederick Wright in favor of each of the plaintiffs for the full amount due them respectively, after applying the proceeds arising from the sale of the mortgaged property. Plaintiffs appeal from the decision denying their applications for judgments in deficiency against Mary E. Wright. The sole question in the case is whether she was liable to a personal judgment upon either of the notes secured by the mortgages. It is undisputed that the notes and mortgages were signed by both defendants, that the real estate covered by the mortgages at the time they were executed was owned by Mary E. Wright, who was then a married woman living with her husband, and that in neither of the notes or mortgages is there any stipulation to the effect that they were given with reference to her separate property, or that her estate generally should be bound for the payment of the debts secured by said mortgages. There is to be found in the bill of exceptions evidence tending to establish that the notes were executed to obtain loans made to the husband alone for his individual use and benefit; that no part of the debts was contracted by the wife, or in her behalf; that she signed the notes as surety merely for Mr. Wright, there being no agreement or understanding of any kind, nor any fact or circumstances proven, from which an inference can be drawn that her property, other than that covered by the mortgages, if any she possessed, which is not shown, should be liable for the payment of the notes. We are persuaded that the evidence adduced was sufficient to authorize the trial court in finding that the notes were not made with reference to Mrs. Wright's separate estate, or that she agreed or intended to bind the same, except to the extent of the property actually pledged by the mortgages. Under the facts disclosed by this record was either of the plaintiffs entitled to a deficiency judgment against Mrs. Wright?

The important question that confronts us in this case is the liability of a married woman on her contracts of suretyship. The solution of this question depends upon

the extent of the power conferred upon her by the legislature to create debts to be paid out of her separate property, since, at common law, a married woman is wholly incompetent to contract in her own name, and this rule is in force in this state unless it has been abrogated in whole or in part by statute. By section 1, chapter 53, Compiled Statutes, the property which a woman may own at the time of her marriage, and the rents, issues, and profits, or proceeds thereof, as well as any property subsequently acquired by descent, devise, or the gift from any person except her husband, are her sole and separate property, and not subject to the disposal of her husband or liable for his debts, except for necessaries furnished the family, and not then until execution against the husband for such indebtedness has been returned unsatisfied for want of property whereon to make a levy. Section 2 declares: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Section 3 provides: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." Section 4 is in this language: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

Thus it will be observed the legislature has to some extent removed the common-law disability of a married woman. In this state she may acquire and hold property in her own right, and may engage in business on her separate account, and her earnings derived either from such trade or business or from her labor or services she owns in her own right. The implied power of a *feme covert* to contract is given by the last section quoted; but this only

extends to her separate trade or business and to contracts with reference to her personal services. The express authority conferred upon married women to enter into contracts is to be found in section 2 copied above. But this statute does not expressly, nor by implication, enlarge a wife's capacity to contract generally. She can buy and sell property in her own name and upon her own account, and enter into valid contracts with reference to her separate estate the same as if she were a *feme sole*, or as a married man may in relation to his property. The statute does not undertake to confer upon a married woman an unrestricted power to make contracts, but such right is limited to contracts made with reference to, and upon the faith and credit of, her separate property or estate. Upon such contract she is liable, but all her other engagements and obligations are void as at common law. To hold unqualifiedly that a married woman has the same right to enter into contracts, and to the same extent, as a man would be to disregard the qualifying clause of said section 2, which confers upon her the authority to "enter into any contract with reference to the same [her property] in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." If the legislature had intended to wholly remove the common-law disabilities of a married woman, and give her general power to make contracts of all kinds, this intention, doubtless, would have been expressed in apt and appropriate language. It would have expressly enacted that she could bind herself and her property by her general engagements whether made or entered into for the benefit, or on account of, her separate property or not, instead of empowering her to contract alone with reference to her own property, trade, and business. In construing this statute it is important to bear in mind that the legislature was not attempting to impose disabilities upon married women, but was engaged in removing some of those already existing. She can contract only so far as her disabilities have been so

removed by the legislature. The statute requires that contracts, to be valid, must be entered into with reference to her separate property, and it is for the courts to so construe this enactment as to carry out the legislative will. It is true section 3 permits a married woman to sue and be sued, but this does not authorize the recovery of a judgment against her when no cause of action exists, nor does it attempt to declare what contracts of hers will support an action; what are valid or what are nugatory. The construction we have given the statute is in accord with numerous decisions of this court. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb. 242; *Hale v. Christy*, 8 Neb. 264; *Spaun v. Mercer*, 8 Neb. 357; *State Savings Bank v. Scott*, 10 Neb. 83; *Barnum v. Young*, 10 Neb. 309; *Gillespie v. Smith*, 20 Neb. 455; *Eckman v. Scott*, 34 Neb. 817; *Godfrey v. Megahan*, 38 Neb. 748; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; *McKinney v. Hopwood*, 46 Neb. 871.)

Hale v. Christy, cited above, was an action to foreclose a mortgage given by the defendants, husband and wife, to secure their promissory note. The trial court found that the wife was personally liable for the debt. This court held she incurred no personal obligation by executing the note. The third paragraph of the syllabus reads as follows: "Under sections 42 and 43, chapter 61, General Statutes, a married woman may sell and convey real estate, or any interest she may have therein, the same as if she were single. As to her other contracts she is liable only to the extent that they are made with reference to, and on the faith and credit of, her separate estate." It is suggested that the holding in that case as to the personal liability of Mrs. Christy was mere *obiter* for the reason the question did not then arise, and could not until the court came to render a deficiency judgment. The finding in the decree of foreclosure that Mrs. Christy was personally liable for the debt would have bound her, unless set aside, so that the decision on that proposition was not *obiter*. This is the effect of the decision in *Stover v. Tompkins*, 34 Neb. 465. We quote the first clause of

the syllabus of the case: "Where a grantee of real estate has assumed in the deed of conveyance a certain mortgage as part of the consideration, and in an action to foreclose had been made a defendant and a decree rendered against him that he should be liable in case of deficiency, which decree remained unreversed and without modification, he will not be permitted, when judgment for deficiency is sought, to set up facts which existed when the original decree was obtained and should have been pleaded to show that he was not liable."

State Savings Bank v. Scott, 10 Neb. 83, was an action upon a joint and several promissory note signed by W. D. Scott and S. A. Scott, husband and wife. The coverture of Mrs. Scott was pleaded. The trial court found that she executed the note as surety for her husband, and was not liable for its payment. This court affirmed the judgment, the last clause of the syllabus being in the following language: "A wife is bound by her contracts when made with reference to or upon the faith and credit of her separate estate, but she is not bound as surety upon a promissory note unless it appears that she intended thereby to bind her separate estate." The same doctrine was again stated in *Eckman v. Scott*, 34 Neb. 817.

Barnum v. Young, 10 Neb. 309, was a suit against a married woman upon her promissory note, the sole question involved being whether her coverture relieved her from liability for its payment. From a verdict in her favor the plaintiff prosecuted error. This court affirmed the judgment, and approved, as containing a fair expression of the law, the following instructions given upon the trial:

"1. The defendant being a married woman at the time she signed the note 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.

"2. You are instructed by the court that under the law and evidence of this case the material question for you to

settle from the evidence is, Did the defendant, at the time she gave the note to John G. Compton, contract with reference to and upon the faith and credit of her separate estate? If she did so contract, then she would, under the law of this case, be liable for the full amount of the note. But if from the evidence you find that she did not so contract with reference to, and upon the faith and credit of, her separate estate, then you must find for the defendant."

Godfrey v. Megahan, 38 Neb. 748, was a suit against a husband and wife upon a promissory note executed by them for a pre-existing debt of the husband, the wife signing the same as surety merely. She pleaded her coverture, and that the note was not executed with reference to her separate property, trade, or business, but at the request of her husband as surety for him. Upon a trial to the court this defense was sustained and the action dismissed as to Mrs. Megahan, which judgment was sustained upon a review of the record by this court. The propositions decided in that case are clearly stated in the syllabus of the opinion prepared by RAGAN, C., as follows:

"1. The disability of a married woman to make a valid contract remains the same as at common law, except in so far as such disability has been removed by our statutes.

"2. The statute has removed the common law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made upon the faith and credit thereof, and with intent on her part to thereby bind her separate property.

"3. Whether a contract of a married woman was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with intent on her part to thereby bind her separate property, is always a question of fact."

In *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, it

was held that where a married woman executes a mortgage on her real estate to secure the debt of her husband, her separate estate to the extent of the property mortgaged is bound for the payment of such debt. Of the same purport is the case of *Watts v. Gantt*, 42 Neb. 869.

In *Smith v. Spaulding*, 40 Neb. 339, it was decided that a married woman may contract as surety for her husband, but that decision did not overrule or modify the prior adjudications of this court relative to the liabilities of married women on their contracts, as an examination of the opinion will disclose. This court held that the trial court in that case erred in refusing an instruction embodying the proposition enunciated in the syllabus in *Barnum v. Young*, 10 Neb. 309.

In *Briggs v. First Nat. Bank of Beatrice*, 41 Neb. 17, it was ruled that a married woman is liable on a note which she signed as surety, when the note contained a clause pledging her separate estate for its payment.

This court has not in any instance decided that a married woman is personally liable on her general engagements, or that all the common-law disabilities of a *feme covert* have been abrogated in this state. On the contrary, the rule has been steadfastly adhered to that her contracts to be valid must be made with reference to, and upon the faith and credit of, her separate property. Her intention to charge such estate must be disclosed. If the rule laid down in the decisions mentioned above so long adhered to is to be abrogated, it should be by legislative enactment.

There is much confusion and conflict in the decisions of the courts of the different states upon the proposition whether the intention to charge the separate estate by the giving of a promissory note must be expressed on the face of the instrument, or whether it may be established by parol evidence. It is not necessary in this case that we should decide between the two rules, since it does not appear from the note itself, nor was it established by other testimony, that it was her intention to bind

her own property, other than that covered by the mortgage.

It is claimed that when a *feme covert* executes a note the presumption arises that she intended thereby to charge her separate estate or property. To this doctrine we cannot assent. A married woman cannot contract generally, and the burden is cast upon the one seeking to enforce a contract against her to show that it is an obligation she was authorized to make under the statute. An infant is not liable on his contract as a general rule, except for necessaries, but in an action against him on a contract, it is a good defense to establish his minority, unless the plaintiff shows the debt was for necessaries furnished the minor. The burden is not upon the infant to show that the indebtedness was not incurred for necessaries. (*Wood v. Losey*, 15 N. W. Rep. [Mich.] 557.) So in a suit against a married woman when her coverture is pleaded and proven, it devolves upon the plaintiff to show that the contract was made with reference to and upon the credit of her separate estate. (*Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Jouchert v. Johnson*, 108 Ind. 436; *Stillwell v. Adams*, 29 Ark. 346; *Fisk v. Mills*, 62 N. W. Rep. [Mich.] 559; *Fechheimer v. Peirce*, 70 Mich. 440, 38 N. W. Rep. 325; *Kenton Ins. Co. of Kentucky v. McClellan*, 43 Mich. 564, 6 N. W. Rep. 88; *Schmidt v. Spencer*, 87 Mich. 121, 49 N. W. Rep. 479; *Haydock Carriage Co. v. Pier*, 74 Wis. 582, 43 N. W. Rep. 502; *Buhler v. Jennings*, 49 Mich. 538, 14 N. W. Rep. 488; *Menard v. Sydnor*, 29 Tex. 257; *Trimble v. Miller*, 24 Tex. 215; *Haynes v. Storall*, 23 Tex. 625; *Covington v. Burleson*, 28 Tex. 368; *Baird v. Patillo*, 24 S. W. Rep. [Tex.] 813; *Early v. Lax*, 20 S. E. Rep. [S. Car.] 136; *Litton v. Baldwin*, 8 Humph. [Tenn.] 209; *Hughes v. Peters*, 1 Cold. [Tenn.] 67; *Lane v. Traders Deposit Bank*, 21 S. W. Rep. [Ky.] 756; *Habenicht v. Rawls*, 24 S. Car. 461; *West v. Laraway*, 28 Mich. 464.)

Fechheimer v. Peirce, 70 Mich. 440, was an action upon a promissory note, signed by Ella G. Peirce and Grand

Peirce, husband and wife. The instrument purported to be signed by the husband as surety. It was shown on the trial that the note was given for a loan of money made to the husband. The check for the money was delivered to him, although it was payable to the order of his wife. The jury returned a verdict against both makers, and a judgment rendered thereon was reversed by the supreme court. Campbell, J., in delivering the opinion of the court, said: "We think there was nothing to go to the jury against defendant. It is the law of this state that a married woman can make no obligation except on account of her own separate property, and that anyone seeking to hold her must make out an affirmative case. * * * The signing of a note by a married woman creates no presumption of consideration, but it must be proved."

While there are authorities which hold that when a married woman signs a note, the presumption arises that she intended thereby to charge her separate property, it is believed that the rule we have adopted is more consistent with sound principle and the weight of authority.

It is argued that if Mrs. Wright is not liable in this case for the deficiency remaining after the sale of the property, because of her coverture, the entire debt was void as to her, and the mortgages upon her real estate given to secure the same indebtedness were not enforceable. The argument is fallacious. She pledged certain of her separate estate to the payment of this indebtedness, and for that reason, to the extent of the proceeds of such property, her separate estate was bound. Further than that she never agreed nor was it her intention that her property should stand as security for the debts of her husband. A wife may make a valid mortgage upon her real estate to secure a note executed by the husband, for his indebtedness, since the intention to charge her own property is manifest. (*Nelson v. Bevins*, 19 Neb. 715; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; *Watts v. Gantt*, 42 Neb. 869.) But it does not follow

that she is liable on the contract of suretyship where such contract was not made upon the faith and credit of her separate estate, and where she did not intend that such estate should be bound for the payment of the debt. Plaintiffs were not entitled to a personal judgment against Mrs. Wright. (*Gaynor v. Blewett*, 86 Wis. 399; *Johnson Co. v. Rugg*, 18 Ia. 137; *Rogers v. Weil*, 12 Wis. 741; *Wolff v. Van Metre*, 19 Ia. 134; *Salinas v. Turner*, 33 S. Car. 231; *Greig v. Smith*, 29 S. Car. 426; *American Mortgage Co. of Scotland v. Owens*, 72 Fed. Rep. 219, 18 C. C. A. 513.)

AFFIRMED.

HARRISON, C. J., having presided in the trial court, took no part in the above opinion.

SULLIVAN, J., and RAGAN, C., concurring.

RYAN, C., dissenting.

In the opinion prepared by NORVAL, J., it is said that it is undisputed that the notes and mortgage securing said notes were signed by both Mary E. Wright and her husband Frederick Wright, and that in neither is there a stipulation that said instruments were given with reference to the wife's separate property, or, that her estate generally should be bound for the payment of the debts secured by said mortgage. It is also stated that there was evidence tending to establish the fact that the notes were executed to obtain a loan made to the husband alone for his individual benefit, and that the wife signed the said notes solely as surety for Mr. Wright. The notes signed by Mrs. Wright were in the following language:

"$115.00. GRAND ISLAND, NEB., August 1, 1889.

"February 1st, 1891, after date, for value received, we, or either of us, promise to pay to the order of the Grand Island Banking Company one hundred and fifteen and no 100 dollars at the bank in Grand Island, Nebraska,

with interest at ten per cent per annum payable from maturity. It is expressly understood that all the makers of this note are principals thereon. The indorsers severally waive presentment for payment, protest, and notice of protest and notice of non-payment of this note and all defense on the ground of any extension of the time of its payment, or any part thereof, that may be given to the holder or holders to them or either of them. Secured by mortgage of even date herewith on lots 7 and 8, block 98, in Railroad Addition to Grand Island, recorded in Hall county, Nebraska.

"MARY E. WRIGHT.
"FREDERICK WRIGHT."

The only note made to John Lang was in the following language:

"$2,300.00.

"GRAND ISLAND, NEBRASKA, August 1st, 1889.

"On the first day of August, 1894, I promise to pay John Lang, or order, twenty-three hundred and no 100 dollars, with interest from this date until paid at the rate of 7 per cent per annum, payable semi-annually as per coupon attached. Value received. Principal and interest payable at the office of the Grand Island Banking Company in Grand Island, Nebr. Should any of the said interest be not paid when due, it shall bear interest at the rate of ten per cent per annum from the time same becomes due, and upon failure to pay any of said interest within thirty days after due, the holder may elect to consider the whole note due and it may be collected at once. It is expressly agreed and declared that these notes are made and executed under, and are in all respects to be construed by, the laws of the state of Nebraska.

MARY E. WRIGHT.
"FREDERICK WRIGHT."

In respect to the mortgages to secure the notes it was stipulated that the legal title of the mortgaged property was, when the mortgages were made, held by Mary E. Wright.

Section 2, chapter 53, Compiled Statutes, is in this language: "A married woman while the married relation subsists may bargain, sell, or convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Section 3 of the same chapter provides: "A woman may, while married, sue and be sued in the same manner as if she were unmarried." By section 1 of the aforesaid chapter it is provided that any property that a woman in this state may own at the time of her marriage and any property that she may afterwards acquire from any person, except her husband, shall be her separate property. The provisions of these sections are supplemented by those of section 4, which section is in this language: "Any married woman may carry on trade, or business, and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name."

The power of a married woman to bind her estate in the same manner as a man might do, would, under the above provisions, exist without room for any question whatever, but for the supposed limitations found embodied in section 2 in this language, "and enter into any contract with reference to the same." One view, and that adopted in the aforesaid opinion, as I understand it, is that by reason of these qualifying words there should be contained in every contract made by a married woman express words to the effect that by her said contract she intends to bind her separate estate. In view of our statutes I shall now consider the cases cited in support of this proposition and such other decisions of this court as bear upon this subject. It is not questioned that the statute under consideration was enacted to relieve married women of their common-law disabilities. The

words of limitation found in section 2 might, therefore, be held necessary because in the statute the status of married women's property alone was under consideration. If from section 2 there should be dropped the words "and enter into any contract with reference to the same" and the corresponding words "in relation to," it would read thus: "A married woman, while the marriage relation subsists, may bargain, sell, or convey her real or personal property in the same manner, to the same extent, and with the same effect as a married man may his real and personal property." This would empower her only to bargain, sell, or convey her property. She could make no other contract with reference to it. To avoid this result the general enabling clause, "and enter into any contract with reference to the same," was inserted. Let us now consider section 2 simply with reference to this clause. For this the parts involved are as follows: "A married woman * * * may * * * enter into any contract with reference to the same (her real and personal property) in the same manner, to the same extent, and with like effect, as a married man may in relation to his real and personal property." If the limitation under consideration requires that a married woman, in order to contract with reference to her real and personal property must, in such contract, expressly so recite, what shall be said of the language "may * * * contract with reference to the same in the same manner * * * as a married man, in relation to his real and personal property"? No one would claim that a married man could render liable to his debts his real and personal property only by expressly stating in his promissory note that he intended thereby to bind such separate real and personal property. This, however, must be the logical effect of the above provision, if it is so construed as to make this requirement in relation to the property of married women, for, by statute, the property, real and personal, of each is to be bound in the same way as is the like property of the other. The

fact that the legislature intended in the chapter to confine its effects to the contractual capacities of a married woman and used the guarded language which it did with regard to the rights of a married woman to contract with reference to her property, so that it would not be misunderstood as changing her marital status and duties toward her husband, is manifested from the consideration that her right to contract is the same as the right of a married man, that is to say, such duties and liabilities as the marriage relation implies between the parties thereto, remain unaffected by this chapter. By virtue of section 2, chapter 53, Compiled Statutes, there exists such a correlation between the contractual powers of a married woman and those of a married man, with respect to their property rights, that, unless we are willing to say that married men do not contract with reference to their separate property unless their promissory notes or other evidences of indebtedness so state in express language, we cannot consistently insist upon that requirement in relation to the contracts of a married woman. Notwithstanding the confident language to the contrary in the opinion filed as to the construction which should be placed upon this chapter of the Compiled Statutes defining the contractual rights of married women, I think we are not enlightened by a clear uniformity in the adjudications of this court.

In *Webb v. Hoselton*, 4 Neb. 308, MAXWELL, J., said in effect that, at common law, the husband and wife were treated as one person, and that during coverture her legal relation and existence were treated as though suspended, but that, in equity, a married woman, as to contracts with reference to her separate property, was regarded as *feme sole*. Following this observation there occurred in the opinion this language: "And the fact that a debt has been contracted during coverture either as principal or as surety for herself or husband or jointly with him, seems ordinarily to be held *prima facie* evidence of an intention to charge her separate estate

without any proof of a positive agreement or intention to do so. (*Bullpin v. Clarke*, 17 Ves. [Eng.] 365; Story, Equity Jurisprudence 1400; *Murry v. Barlee*, 4 Sim. [Eng.] 82; *Owens v. Dickerson*, 1 Craig & Ph. [Eng.] 48; *Norton v. Turvill*, 2 P. Wm. [Eng.] 144.) Our statutes provide that 'a married woman, while the marriage relation subsists, may bargain, sell, or convey her real and personal property and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property. A married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, labor, business, or services shall be her sole and separate property and may be used and invested by her in her name.' In the case of *Yale v. Dederer*, 22 N. Y. 450, where a wife signed a note with her husband as surety, she having a separate estate, the court held that unless the consideration of the contract was one going to the direct benefit of the estate the intention to charge the separate estate must be stated in, and be a part of, the contract. And the court refused to permit parol proof to establish that intention. That decision, in our opinion, cannot be sustained on either principle or authority." There was more than one proposition discussed in *Webb v. Hoselton*, and GANTT, J., dissented as to the result, without giving his reasons or directing attention to the particular branch of the discussion which met his disapproval of the holding of the court in *Yale v. Dederer*, 22 N. Y. 450.

In *Davis v. First Nat. Bank of Cheyenne*, 5 Neb. 242, the opinion was by Judge GANTT, who, after a brief reference to the scope of the act under consideration, said: "It is not necessary now to inquire into the wisdom of the act in regard to the extent it goes in legalizing the contracts of married women, or in regard to the right of action by or against her, as though she were a *feme sole*.

The statute confers upon her the right and power to make legal and binding contracts; it gives her the legal right to sue, and makes her legally liable to be sued on her contracts, in the same manner as if she were unmarried, and the court must expound the law as it finds it made by the constitutional lawmaking power. But the rule must be observed that all such contracts of a *feme covert* must be with reference to, and upon the faith and credit of, her separate estate." The above quotation contains the entire discussion in which was formulated the proposition that a contract which would bind a married woman must be one with reference to, and upon the faith of, her separate estate.

In *Hale v. Christy*, 8 Neb. 264, the language of Judge LAKE upon this proposition was as follows: "It is urged by counsel for Mrs. Christy that owing to her coverture she incurred no personal liability by signing said note. This, no doubt, is true, and the finding of the court below that she was liable cannot be upheld. Even under the very liberal provisions of our more recent legislation respecting the rights of married women, this court has already held that to bind her the contract must be made with reference to, and upon the faith and credit of, her separate estate. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb. 242.) She was not liable on the note. But while the finding of the court that Mrs. Christy was indebted on the note cannot be upheld, inasmuch as the decree does not go to the extent of adjudging that she shall pay it, no injury was done." Following the above language it was said that as Mrs. Christy could not be held liable at law, her property could not be taken to satisfy a deficiency judgment if the mortgaged property should not thereafter sell for enough to satisfy fully the amount thereby secured. The language quoted, therefore, amounts to mere *obiter*, for it touched no proposition involving the liability of Mrs. Christy as presented in the case as it stood at the time the above opinion was delivered.

In *State Savings Bank v. Scott*, 10 Neb. 83, MAXWELL, then chief justice, quoted from *Davis v. First Nat. Bank of Cheyenne* this language of GANTT, J.: "But the rule must be observed, that all such contracts of the *feme covert* must be with reference to, and upon the faith and credit of, her separate estate." Following the above quotation the chief justice said: "And the same doctrine is affirmed in *Hale v. Christy*, 8 Neb. 264. This being the construction given to this statute more than three years ago, it has become a rule affecting the rights and liabilities of individuals, and, if unsatisfactory, should be changed by the legislature and not by the court."

In *Barnum v. Young*, 10 Neb. 309, COBB, J., while intimating that his views might be different if the question was an open one, declared that he felt bound by the case of *State Savings Bank v. Scott, supra*, and the two cases which it followed.

In *Gillespie v. Smith*, 20 Neb. 455, it was held that a married woman, by limiting her defense to the allegation that the notes she signed were not a charge upon her separate estate, too much restricted it to avoid liability, for the reason that the negative pleaded did not amount to the allegation that her contract did not concern her separate property, trade, or business. In the language of the opinion: "The reason is, that her non-liability can only arise from her inability to contract, and this she must clearly allege."

In the case of *Bowen v. Foss*, 28 Neb. 373, the action had been brought and a recovery had against E. A. Bowen, the wife of D. Bowen, upon their promissory note of which the following is a copy:

"$100. CRETE, NEB., Nov. 27, 1882.

"On or before the 27th day of Nov., 1883, for value received in one spring buggy, we promise to pay F. I. Foss, or order, one hundred dollars, with interest at ten per cent from date, payable at the State Bank in Crete. The express condition of the sale and purchase of the above property is such that the ownership does not pass

from said —— until this note and interest are paid in full; that the said —— has full power to declare this note due, and to take possession of said property at any time that they may deem themselves insecure, even before the maturity of the note. D. BOWEN.
"E. A. BOWEN."

The defense was that Mrs. Bowen was a married woman living with her husband, D. Bowen, and was sick at the time, and that she signed said note as surety for her husband. Upon these issues there had been judgment against Mrs. Bowen. The discussion of the facts is in the following language of MAXWELL, J., who delivered the opinion of this court: "The testimony of the defendant in error tends to show that the indebtedness in question was incurred for a new buggy; that at the time of the purchase the plaintiff in error was in ill health and could not bear the fatigue of riding in a lumber wagon; that the defendant in error had in his hands for collection certain debts due her in Ohio amounting to about $400; that the husband of the plaintiff in error was not in a condition, financially, to pay the debt, and therefore the credit was not given to him, but to his wife. This testimony is denied by the plaintiff in error and her husband, but we find no denial of the charge in substance, that the husband had no means to pay a debt of this kind. This, we think, is a material circumstance in the case in considering to whom the credit was given, as Mr. Foss testifies that he knew that the wife was abundantly able, while the husband was not. There are other circumstances tending to corroborate the testimony of Foss and the verdict seems to be in accord with the justice of the case."

In *Godfrey v. Megahan*, 38 Neb. 748, the general proposition is again stated, that a married woman's disability to contract has been removed only in cases where her contract has reference to her separate property, trade, or business or was made upon the faith and the credit thereof and with intent on her part thereby to bind her

separate property. The third paragraph of the syllabus of the case last referred to would seem amply sustained by the reasoning in *Bowen v. Foss, supra.* This paragraph is as follows: "Whether a contract of a married woman was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with the intent on her part to thereby bind her separate property, is always a question of fact."

In *Davis v. First Nat. Bank of Cheyenne, supra,* GANTT, J., speaking of the enactments above referred to, said: "These statutes have legalized the contracts of married women, and, so far as her separate property is concerned, she is *feme sole,* and can legally contract and deal with her property as she pleases. She can bind it by general engagements; but 'it should appear that the engagement is made with reference to, and upon the faith and credit of, her estate; and the question, whether it is so or not, is to be judged by the court.' (Perry, Trusts sec. 659; *Frary v. Booth,* 37 Vt. 78; *Todd v. Lee,* 15 Wis. 400; *Same v. Same,* 16 Wis. 506.)"

It would seem from this language that the proposition that the determination of the intention of the wife in making her contracts was one to be determined by the courts—that is, that it is a question of law—must have been lost sight of in *Bowen v. Foss, supra,* and has met with direct disapproval in *Godfrey v. Megahan, supra.* With reference to this proposition it is difficult to classify *Eckman v. Scott,* 34 Neb. 817, for in that case the language of MAXWELL, C. J., is as follows: "The testimony shows that M. A. Scott is the wife of W. T. Scott; that the debt in this case was that of the husband and did not in any manner relate to the business of the wife, and that she signed the note as surety for him. In a number of cases this court has held that where the contract did not relate to her separate business or estate, a married woman was not bound as surety on a promissory note unless it appeared that she thereby intended to bind her separate estate. (*State Savings Bank v. Scott,* 10 Neb. 84; *Hale v.*

Christy, 8 Neb. 265; *Barnum v. Young*, 10 Neb. 309; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb. 242; *Payne v. Burnham*, 62 N. Y. 74.) The wife, therefore, was not liable on the note."

It will hereafter be shown that whether or not a married woman's contract is with reference to, or upon the faith and credit of, her separate property is a question of law or of fact depends upon circumstances; that sometimes it is one, and sometimes it is the other, or, possibly, sometimes both. In *Smith v. Spaulding*, 40 Neb. 339, it was held that a married woman in this state may contract as surety for her husband (citing *Stevenson v. Craig*, 12 Neb. 464), and that the extension of the time of payment of her husband's past due indebtedness is a sufficient consideration to support her contract as his surety for such debt. In *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, it was held that where the consideration was as in the case last cited, and the security for her husband's debt by way of a mortgage on the wife's property, that the consideration was sufficient and that the property mortgaged was duly bound for the payment of the debt secured. This case was approved and followed in *Watts v. Gantt*, 42 Neb. 869. The doctrine of *Smith v. Spaulding* was restated and followed in *Johnson v. Guss*, 41 Neb. 19, and it was held, furthermore, that the cases cited had established in this state the rule that the wife is not liable on her contracts unless they are made with reference to her separate estate, or an intention is shown to bind such separate estate.

While it may be possible that we have not reviewed all the cases cited by this court with relation to the liability of a married woman upon her contracts, it is believed that there is no case omitted which could do more than restate one, or perhaps more, propositions noted already. It can scarcely escape observation that there has never been any attempt to analyze section 2, chapter 53, of the Compiled Statutes. The first attempt to state its scope was this remark of GANTT, J.: "But the

rule must be observed, that all such contracts of the *feme covert* must be with reference to, and upon the faith and credit of, her separate estate." (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb. 242.) In the next case in point of time (*Hale v. Christy, supra*) this remark was approvingly quoted, but immediately afterwards it was disclosed that in the case under consideration it had no practical application. In *State Savings Bank v. Scott* and in *Barnum v. Young*, both reported in the 10th Nebraska, the remark of GANTT, J., was not only approved in the abstract as correct, but was declared to have stood as the law of the state so long that it would be improper for the courts to change it. Cases which followed the four last referred to simply reiterated the same remark as though it had been made independently of the general proposition which immediately preceded it, which was to the effect that the statute had conferred upon a married woman the right and power to make legal and binding contracts and had given her the right to sue, and had made her liable to be sued, in the same manner as though she was unmarried, and that the court must expound the law as it finds it made by the constitutional law-making power. It has the sound of a legal proposition pregnant with meaning to say that all contracts of the *feme covert* must be with reference to, and upon the faith and credit of, her separate estate, but under our statute what is meant by it? In *Davis v. First Nat. Bank of Cheyenne, supra*, GANTT, J., said: "But the settled doctrine of the common law is that the general engagements of a married woman, in respect to her separate property, could only be enforced in equity; and this, not upon the ground that she could make valid contracts in law or equity, but because her honest engagements ought to be answered; and hence it is said that 'intimately connected with the right of a married woman to dispose of her separate property is the right or power of such *feme covert* to contract debts and charge her separate estate, either by special agreements in relation to it, or by general engagements * *

and her separate estate will be bound to make good her contracts, and it may be reached by proper proceedings, though she is not personally liable.' (Perry, Trusts secs. 596, 657, 662; *Pentz v. Simonson*, 2 Beas. [N. J. Eq.] 232; *Glass v. Warwick*, 40 Pa. St. 140.)"

Already there has been quoted from *Webb v. Hoselton*, *supra*, language to the same effect as the above with regard to the equitable liabilities of a married woman's property, upon her contracts with reference to it. If, by our statute, the property of a *feme covert* can be subjected only by pleading and proving as an independent substantive fact that the owner contracted with reference to, or upon the faith and credit of, it, in what respect or to what extent have these statutory enactments changed the status of a married woman's property? In both *Webb v. Hoselton* and *Davis v. First Nat. Bank of Cheyenne*, connected with the statement of the rule in equity with reference to the power to subject the property of married women, there was an epitome of the provisions of chapter 53, Compiled Statutes, from which it might be inferred that in the mind of the writer of each of those opinions there existed a sense of close relationship of some kind between the equitable rule as it was and the statutory rule as it is. From the rule of the statute that "A woman may, while married, sue and be sued in the same manner as if she were unmarried" (Compiled Statutes, ch. 53, sec. 3), it seems open to no question that the intention of the law-makers was, at law, to hold personally liable a married woman upon her contracts, instead of compelling a resort to equitable proceedings to subject her separate property. The general rules of pleading are to such an action applicable, for a married woman may be sued during coverture as though she were unmarried. The fact that a married woman has contracted with reference to her separate property, or upon the faith and credit of it, is by no express provision required to receive more attention in the petition against her than though the suit was one against

her husband to charge him in respect to his separate property. In practice, however, the difficult question, and one which there seems never to have been any attempt to meet in this state and the one upon which I cannot agree with the views of NORVAL, J., is, as to the manner in which proof shall be made as to how the wife contracted on the faith and credit of her separate estate. In *Coquillard v. Hovey*, 23 Neb. 622, occurs this language: "As we understand the rule for the construction of contracts, it is that, if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon the proof of other and extrinsic facts, then these questions of fact should be submitted to the jury, under proper instructions from the court. (*Begg v. Forbes*, 30 Eng. Law & Eq. 508; *Etting v. United States Bank*, 11 Wheat. [U. S.] 74; *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 108; *Edelman v. Yeakel*, 27 Pa. St. 26.)" Ordinarily the question, whether a contract is with reference to a married woman's separate estate or employment, would probably be a question of fact dependent, for instance, upon the circumstances that goods were purchased for her original stock, or afterward to replenish it, or that clerks or other employés were hired to assist her in conducting her business. But there might be such circumstances surrounding the making of a contract by her upon the faith and credit of her separate property, but not with reference to it, that, as a question of fact, it should be submitted to the jury. In either of these two cases, where there is no writing, the contentions are liable, in a pre-eminent degree, to be dependent upon questions of fact. But where the contract of a married woman is in writing, how are we to ascertain and enforce her liability? There has been no change in the rules of construction or evidence on account of the act in relation to married women. Whenever to the legislature there has appeared a necessity of

a change of rules of evidence in any class of cases that its provisions may be rendered effective, there has been no hesitancy in that respect, as has been instanced by the proviso in section 5, chapter 44, Compiled Statutes, that the agent who acts for the borrower shall also be deemed the agent of the loaner, and the enactment as to the presumption of the value of the real property insured under the provisions of our valued policy law. Indeed, it may be said that all statutory provisions which provide for constructive notice and defines its effect are of this nature. It is therefore worthy of note that in the act relating to married women there is no provision by which is changed the existing rules of evidence and construction, for thereby is evidenced an intention that they shall be given their ordinary meaning and force.

The supreme court of Ohio, in the very instructive case of *Williams v. Urmston*, 35 O. St. 296, had under consideration an appeal from a decree which independently of statute subjected the separate estate of a married woman who had signed an ordinary promissory note with her husband. In respect to the correct deductions to be drawn from the fact that a married woman had signed a note with her husband there was used the following apposite language: "What inference is to be drawn from the act of a married woman, having an estate to her sole and separate use, in signing the promissory note of another, as surety, as respects her intention or purpose in so doing? In view of the fact that in the act of signing she incurs no legal liability, the question admits of but one rational answer, and that is, in the absence of proof showing fraud or imposition, that she intended thereby to make the debt a charge upon her separate estate. Unless this inference is drawn, her act becomes wholly vain and frivolous and entirely destitute of a purpose or a meaning. That such is the natural implication from the act of signing has been distinctly affirmed in numerous cases. In *Bell v. Kellar*, 3 B. Mon. [Ky.] 381, the rule was stated as follows: 'If a *feme covert*,

having a separate estate, make or indorse a note, the presumption is that it was the intention, and the effect is, to charge her separate estate.' In *Cowles v. Morgan*, 34 Ala. 535, it was held that 'a promissory note executed by the wife during coverture, jointly with her husband, is a charge upon her separate estate created by contract.' So in *Burnett v. Hawpe*, 25 Gratt. [Va.] 481, it was held that 'if the wife contracts a debt for herself or for her husband, or jointly with him, the instrument executed by her is sufficient to charge her separate estate without any proof of a positive intention to do so or even a reference to such estate contained in the writing.' In *Metropolitan Bank v. Taylor*, 62 Mo. 338, it was held that 'in reference to her separate estate a married woman is to be treated as a *feme sole*, and the giving of a note, or making of a written contract by her, raises the presumption that she intends to bind her separate estate.' This case was on a note executed by the wife as surety for her husband. The same rule prevails in Kansas. (*Deering v. Boyle*, 8 Kan. 523; *Wicks v. Mitchell*, 9 Kan. 80.) Judge Story, in commenting on the subject, says: 'Indeed it does seem difficult to make any sound or satisfactory distinction on the subject as to any particular class of debts, since the natural implication is, that if a married woman contracts a debt she means to pay it, and if she means to pay it, and she has a separate estate, that seems to be the natural fund which both parties contemplated as furnishing the means of payment.' (2 Story, Equity Jurisprudence sec. 1400. See also to the same effect 1 Bishop, Married Women sec. 873.) In *Avery v. Van Sickle*, *ante* 270, we held, that where a married woman executed a promissory note for property acquired by her an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment. If she executed the note upon the understanding that her separate estate was not to be bound for its payment, its enforcement against her would operate a fraud upon her.

No one would pretend that this could be done. But when she executes a note, either as principal, maker, or surety, and has not been deceived in so doing, nor subjected to any undue influence, we think a just inference arises that she thereby intended to deal on account of her estate, and to bind the same in equity for the payment of the note; and that, as a necessary result, a court of equity will give effect to such intention by subjecting the estate to the payment of the note in the mode prescribed by the statute for enforcing claims against the separate estate of a married woman. Her liability, or rather that of her estate, does not depend on whether or not the debt incurred on its account is beneficial to her or otherwise. If made, and no fraud or imposition is shown, the court cannot refuse relief from the mere fact that the engagement entered into proves unprofitable or injurious."

In the foregoing case, in which there were satisfactory citations of authorities as to the presumption which should be held naturally to arise upon proof that a married woman had signed a promissory note, either as principal or otherwise, are clearly, forcibly, and, I believe, correctly stated, not only as applying in an action in equity to subject a married woman's separate property as that was, but as well in an action at law, under our statute, in fixing her personal liability.

IRVINE, C., concurs in the foregoing opinion of RYAN, C.

BEALS, TORREY & COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

FILED FEBRUARY 2, 1898. No. 7706.

Right to Dismiss Action. A plaintiff has an absolute right to dismiss his action at any time before the final submission of the cause, subject alone to compliance with conditions precedent, such as the payment of costs, etc., as may be imposed by the court.

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

J. C. McNerny and *Macfarland & Altschuler*, for plaintiff in error.

Estabrook & Davis, contra.

NORVAL, J.

This action was for the recovery of damages sustained by the plaintiff for the failure of the defendant to correctly transmit and deliver a message. Before the final submission of the cause plaintiff asked leave to withdraw a juror, which motion was denied by the court, as was likewise overruled the application of plaintiff for leave to dismiss the cause without prejudice to a future action. A verdict, under a peremptory instruction of the court, was returned for the defendant, and the judgment entered thereon is before us for review.

It appears from the record that before the final submission of the cause to the jury plaintiff asked permission to dismiss the action without prejudice, which application the court denied. This ruling was clearly erroneous. By section 430 of the Code of Civil Procedure the right is given a plaintiff to dismiss his action without prejudice to a future suit at any time prior to final submission, upon such equitable terms as the court may impose. (*Sheedy v. McMurtry*, 44 Neb. 499; *Dayton & W. R. Co. v. Marshall*, 11 O. St. 502; *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.) There was an abuse of discretion under the circumstances in refusing to allow plaintiff to discontinue his action. The judgment is accordingly reversed, with directions to the court below to enter an order of dismissal without prejudice to the right of plaintiff to institute another action for the same cause.

REVERSED.

STATE INSURANCE COMPANY OF DES MOINES V. LOLA M. HUNT.

FILED FEBRUARY 2, 1898. No. 7796.

Insurance: WITHDRAWAL OF DEFENSE FROM JURY. It is error to withdraw from the consideration of the jury any valid defense which the evidence tends to establish.

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

C. J. Garlow, for plaintiff in error.

Mell C. Jay and *Jay & Beck, contra.*

SULLIVAN, J.

On April 11, 1891, the State Insurance Company issued a policy of insurance to Lola M. Hunt for a term of five years on a dwelling-house located in South Sioux City, in this state. The premises were occupied by the assured when the policy was issued. Subsequently, however, she removed to Sioux City, Iowa, and one O. A. Anderson, with his family, entered into possession of the property and continued to occupy it until August 23, 1893. On the morning of the following day it was entirely destroyed by fire. In an action brought to recover for the loss sustained the company alleged and relied on a violation of the following provisions of the policy: "Or if without written consent hereon * * * the risk be increased by any means; or if there is any change in the occupant or occupancy of the premises insured; or if the buildings or either of them become vacant, * * * then in every such case this policy shall be void." There was a verdict and judgment in favor of Hunt, and the insurance company has brought the case here for review by petition in error.

On the trial the company offered to prove that when Hunt vacated the property it remained unoccupied for

a period of ten days or more. This offer was refused and the defendant excepted. In stating the issues the court instructed the jury that "Defendant, the insurance company, answering, admits that the policy was issued; that the premium was paid, and that the dwelling-house was destroyed by fire while such policy was in force, and that proof of loss was duly made, resting its defense upon the alleged fact that the plaintiff procured or caused the fire that destroyed the dwelling-house to be set for the purpose of securing the insurance money from this and other companies, and also, that the hazard to the building had been increased by the act of the plaintiff by leaving said house vacant at the time it was burned." Upon the giving of this instruction as well as upon the rejection of the offer above mentioned error is assigned. That the instruction complained of withdrew from the consideration of the jury the defenses based on change of occupants and non-occupancy must be conceded, and the action of the court in this regard cannot be justified on the assumption that there was no evidence tending to establish these defenses or either of them. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES BEST, APPELLANT, V. GEORGE C. ZUTAVERN ET AL., APPELLEES.

FILED FEBRUARY 2, 1898. No. 7788.

1. **Alimony:** LIEN ON HOMESTEAD: HUSBAND AND WIFE. A judgment for alimony in favor of a wife, rendered in an action for divorce, is a lien on the family homestead, the title whereof is in the husband.

2. **Real Estate:** POSSESSION. Actual possession of land is notice to the world of the possessor's ownership or interest therein.

3. **Executions:** PURCHASE BY APPRAISER OF LAND: SHERIFF'S DEED.

In an action to quiet title, a sheriff's deed made in pursuance of an execution sale will not be canceled merely because the purchaser was one of the appraisers of the land for the purpose of sale, neither actual fraud being charged nor offer made to reimburse such purchaser.

4. **Limitation of Actions:** DEMURRER. It is ground for demurrer that an action is barred by the statute of limitations only when it affirmatively so appears on the face of the petition.

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

Davidson & Giffen, for appellant.

T. Appelget, J. Hall Hitchcock, Griggs, Rinaker & Bibb, and *L. C. Chapman, contra.*

SULLIVAN, J.

From the petition filed in the district court it appears that Best was the patentee of 160 acres of land in Johnson county, which he occupied with his wife and children from 1863 till 1887. In the latter year his wife sued him for a divorce, which she obtained, together with a judgment for $1,250 alimony, which was made a specific lien on the family homestead and ordered to be paid in installments. Best continued to occupy the land with his minor son, who was dependent upon him for support. When the first installment of alimony became due an execution was issued and forty acres of the homestead sold for its satisfaction. At this sale Zutavern, who had acted as one of the appraisers, became the purchaser. The bid, however, was made by the defendant Shaw, and the title first taken in his name. On the maturity of the second installment of alimony a second execution was issued and another forty of the land sold to satisfy it. Zutavern was also the purchaser of this forty. Afterwards, and while Best was still in possession, Zutavern mortgaged the land to the Smith Bros. Loan & Trust Company and conveyed it by deed to Appelget. Watrous is an assignee of part of the debt secured by the mortgage

to the loan and trust company. The defendants, except Appelget, severally demurred to the petition on the ground that it did not state a cause of action and because the action attempted to be stated was barred by limitation. The demurrers were sustained and, from a judgment dismissing the petition, the plaintiff appeals.

Upon the record two questions are presented for consideration: (1.) Were the execution sales void? (2.) Was the action to quiet title barred by the statute of limitations? Best's possession of the land was constructive notice to the world of his interests therein. (*Uhl v. May*, 5 Neb. 157; *Kahre v. Rundle*, 38 Neb. 315; *Pleasants v. Blodgett*, 39 Neb. 741; *Monroe v. Hanson*, 47 Neb. 30.) Therefore, the other appellees acquired no better title than Zutavern had. By section 26 of the divorce act it is provided that "judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered." (Compiled Statutes, ch. 25, sec. 26.) So, if the judgment for alimony was a lien, the procedure to collect it was authorized and regular. We think it was a lien because the court, having jurisdiction of the parties and authority to adjust their rights growing out of the marital relation, made it so. This action of the court may have been irregular, but it was not void. We think it was a lien for another reason, and that is, that the land was not exempt to Best under the provisions of the homestead law. The husband's right to an exempt homestead cannot, we think, be asserted against the wife who has been forced by his aggression to leave his domicile, and who, in an action for divorce, has obtained a judgment for alimony against him. The homestead law is a family shield and cannot be employed by either spouse to wrong the other. The supreme court of Kansas, under a statute which authorized the court upon granting a divorce to award the wife such share of the husband's real or personal estate as shall be just and reasonable, held that

the court has power to award the wife possession of the family homestead, the title to which is in him. (*Brandon v. Brandon*, 14 Kan. 342.) And, in a later case, it was decided by the same court that a decree which was declared to be a lien on all the husband's realty was a valid lien on the family homestead. (*Blankenship v. Blankenship*, 19 Kan. 159.) The logic of these decisions is that exemption statutes are not designed to protect the husband against the wife's claim for alimony. To the same effect are the cases of *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. Rep. 334, and *Daniels v. Morris*, 54 Ia. 369. From these considerations it results that the sale on the second execution was clearly valid. But the other sale was void. It was made so by the express terms of section 503 of the Code of Civil Procedure, which reads in part as follows: "No sheriff or other officer making the sale of property, either personal or real, or any appraiser of such property, shall, either directly or indirectly, purchase the same; and every purchase so made shall be considered fraudulent and void."

Assuming that the sale of the first tract was void, Best contends that the court should have cleared his title from the cloud created by such sale. In this he is wrong. There is no charge in the petition that the appraisement was fraudulent in fact or even that the valuation fixed was too low. It is not claimed that Zutavern made the appraisement in contemplation of becoming a purchaser, or that he was guilty of any wrongful conduct whatever touching the appraisement or sale. There was no offer to reimburse him; and for this reason the petition fails to present a case for equitable relief. True, in the case of *Goble v. O'Connor*, 43 Neb. 49, it was held that a purchaser at a judicial sale who has chilled bids is not entitled in an action to cancel his deed to the benefit of the rule that "he who seeks equity must do equity." It was there said—and it is the rule everywhere—that the maxim quoted cannot be invoked to protect one from the consequences of his own fraudulent conduct. While this is

the settled rule in cases of actual fraud, it has no application to cases of constructive fraud. (*Ex parte James*, 8 Ves. [Eng.] 351; *White v. Trotter*, 14 S. & M. [Miss.] 30, 53 Am. Dec. 112.) On grounds of public policy, the statute has disqualified appraisers of real estate taken on execution from becoming purchasers at the sale; and one who becomes such purchaser in disregard of this statutory prohibition is guilty of a constructive fraud and can acquire no title. He has no standing in a court of law. But, if he be innocent of actual fraud, the owner of the land cannot invoke the aid of a court of equity to cancel his deed without offering to reimburse him. (*McCaskey v. Graff*, 23 Pa. St. 321.)

Upon the question of the statute of limitations little need be said. More than four years intervened between the execution sales and the commencement of this action. Consequently, the claim for relief, so far as it pertained to the land last sold, was barred. When Best discovered the fraud in the first sale of which he complains does not appear. That an action is barred by limitation is ground for demurrer only when it affirmatively so appears on the face of the petition. (*Peters v. Dunnells*, 5 Neb. 460; *Hurley v. Estes*, 6 Neb. 386; *Hurley v. Cox*, 9 Neb. 230.) The judgment of the district court was right and is

AFFIRMED.

BANK OF BLADEN, APPELLANT, V. ISAAC DAVID ET AL., APPELLEES.

FILED FEBRUARY 2, 1898. No. 7808.

1. **Homestead.** A homestead whose value, after deducting incumbrances, does not exceed $2,000, is exempt from seizure and sale for the satisfaction of its owner's ordinary debts.

2. ———: CONVEYANCE FROM HUSBAND TO WIFE. Land constituting a statutory homestead when conveyed by a husband to his wife

does not become liable for his then existing debts by subsequently losing its homestead character, even when the transfer was voluntary.

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

A. M. Walters, for appellant.

Case & McNitt, contra.

SULLIVAN, J.

This was a creditor's bill, filed in the district court of Webster county, to subject certain real estate owned by Mary J. David to the payment of a judgment recovered by the Bank of Bladen against her husband, Isaac David. There was a general finding and judgment in favor of the defendant, and the plaintiff brings the case to this court by appeal.

The land in question was occupied by the Davids as a family homestead for several years prior to the fall of 1890, when they removed from Webster county to Galesburg, Illinois. In August, 1890, David conveyed the homestead to his wife through one Sheen, who served as a conduit for the title. The consideration for the conveyance to Mrs. David was an agreement on her part to support the family and pay her husband's debts, including a mortgage on the land in question amounting to $1,000. The debt, upon which the bank's judgment is based, existed, but had not matured, at the time of the conveyance of the homestead to Mrs. David.

It is contended that the consideration for the conveyance is not sufficient to sustain it against the claims of creditors. Conceding the point without discussion, we are still constrained to hold that the judgment of the district court was the only one that could rightfully have been rendered in the case. The land was a homestead, and, after deducting the indebtedness secured by mortgage thereon, its actual value at the time of its convey-

ance was less than $2,000. It was exempt from levy and sale for the satisfaction of David's debts. (*Munson v. Carter*, 40 Neb. 417; *Hoy v. Anderson*, 39 Neb. 385; *Roberts v. Robinson*, 49 Neb. 717; *Mundt v. Hagedorn*, 49 Neb. 409.) It, therefore, did not concern the appellant whether David retained the title or transferred it to his wife. It was not injured by the transfer and has no grievance even if such transfer was without consideration and made to defraud creditors. (*Smith v. Rumsey*, 33 Mich. 183; *Vaughan v. Thompson*, 17 Ill. 78; *Vogler v. Montgomery*, 54 Mo. 577; *Wood v. Chambers*, 20 Tex. 247; *Butler v. Nelson*, 72 Ia. 732.)

But it is contended that, when the land lost its homestead character, it became liable for the satisfaction of the bank's judgment. A sufficient answer to that contention is that it was not then the property of the judgment debtor. The conveyance which vested the title in Mrs. David infringed none of the legal rights of David's creditors. It was valid when made. It was not vitiated by Mrs. David's subsequent change of domicile. It is valid still. Even Jove himself could not change the nature of a past transaction. Whether Mrs. David agreed to pay the bank's claim is quite immaterial. That question is not an issue in this case. If she has so contracted there is an obvious and adequate remedy at law. When her liability shall be judicially ascertained, the appellant will be able to reach this land without the aid of a court of equity. The judgment of the district court was manifestly right and is

AFFIRMED.

SYLVIA ELVA PALMER, BY HER GUARDIAN AND NEXT FRIEND, EMMA D. PALMER, V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 2, 1898. No. 7818.

Railroads: HIGHWAY-SIGNALS: INJURY TO INFANT: INSTRUCTIONS. In an action for personal injuries inflicted by a passing locomotive at a railway crossing it is error to instruct the jury that the question of whether the bell was rung or the whistle sounded is immaterial in case they find that the injured party by reason of her tender age could not understand the meaning of such signals.

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

A. H. Bowen, for plaintiff in error.

W. P. McCreary, J. C. Watson, J. W. Orr, and *B. P. Waggener, contra.*

SULLIVAN, J.

This action was brought in the district court of Adams county on behalf of the plaintiff, an infant then about two years old, by her next friend to recover for injuries received by her at a crossing on the defendant's line of road in said county from a locomotive passing along and over the same. Among other alleged negligent omissions of the defendant to which the plaintiff attributes her injury, she avers that the employés of the defendant in charge of the locomotive failed to ring the bell or sound the whistle on approaching the crossing in question. This was denied by the defendant, and upon this issue, among others, the cause was submitted to the jury, who returned a verdict for the defendant. There was judgment on the verdict and the plaintiff prosecutes error to this court.

One of the grounds relied upon for a reversal of the judgment of the district court is the giving of the following instruction at the request of the defendant:

"If you find from the evidence that at the time of the alleged injury the plaintiff, by reason of her tender age, could not understand the meaning of the warning of danger if given by the ringing of the bell or the blowing of the whistle, then you are instructed that it is immaterial in this case whether or not the bell was rung or the whistle blown and in such case you are instructed to disregard any evidence on that point."

This instruction is erroneous. It is not always essential to the effectiveness of such warnings that they be given to those of sufficient intelligence to understand their meaning. They are usually held to be for the protection of domestic animals as well as men. (*Chicago, R. I. & P. R. Co. v. Reid*, 24 Ill. 144; 4 Am. & Eng. Ency. Law [1st ed.] 925.) Such warnings are not given to domestic animals upon the theory that they understand their meaning, but upon the theory that their attention will be arrested, their fears aroused thereby, and that their natural instincts will urge them to seek safety in flight. The attention of children is as quickly arrested, their fears as easily aroused, and their instinct of self-preservation as strong as those of domestic animals. With respect to children of tender years and immature judgment, a railroad corporation, to say the least, owes the duty which the law exacts from it in respect to domestic animals straying upon its track. (*Gunn v. Ohio River R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842.) But it is urged that the evidence upon this point on behalf of the plaintiff was insufficient to warrant its submission to the jury and that the giving of this instruction, if error, was error without prejudice. It is sufficient to say that we have examined the evidence and are satisfied that the question should have been submitted to the jury. For the error mentioned the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GENEVA NATIONAL BANK V. RICHARD DONOVAN ET AL.

FILED FEBRUARY 2, 1898. No. 7813.

1. **Transcript of Journal Entry: REVIEW.** Where there is expressly excepted from the certificate of a clerk of the district court authenticating a transcript the journal entry of that court on the motion for a new trial, such entry must be treated as though not appearing in the transcript.
2. **Ruling on Motion for New Trial: REVIEW.** On a petition in error in this court alleged errors of the district court committed during the progress of the trial, or in the rendition of its judgment, cannot be considered when in the district court there appears to have been no ruling on the motion for a new trial.

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

F. B. Donisthorpe, for plaintiff in error.

Ong & Wilson, contra.

RYAN, C.

The Geneva National Bank brought this action in the district court of Fillmore county for the foreclosure of a mortgage securing payment of a note made by Richard Donovan and Catherine Donovan. The defendants interposed the defense of usury, which, upon a trial, was sustained to the amount of $275.40, which sum was accordingly credited upon the principal, and for the balance a decree was entered. By its petition in error the bank seeks to set aside the finding of the existence of usury.

The certificate of the clerk of the district court attached to the transcript is in this language: "I, H. F. Putlitz, clerk of the district court within and for the county of Fillmore, state of Nebraska, do hereby certify that the above and foregoing is a true and correct transcript of the plaintiff's petition, answer of Richard Donovan and Catherine Donovan, reply of plaintiff herein,

journal entries, except on demurrer and motion for a new trial, as the same appear on file and of record in the office of said clerk in the within entitled action. Witness my hand," etc. Since there is expressly excepted from this certificate the journal entry on the motion for a new trial, the transcript must be considered as though, therein, that ruling did not appear. Under such circumstances the errors alleged to have occurred on the trial, or in the rendition of the judgment, cannot be reviewed in this court. (*Leach v. Renwald*, 45 Neb. 207, and authorities therein cited.) The judgment of the district court is therefore

AFFIRMED.

JOSEPH H. NASH V. JAMES A. COSTELLO.

FILED FEBRUARY 2, 1898. No. 7784.

Fraudulent Conveyances: EVIDENCE. The evidence in this case examined and *held* insufficient to sustain the verdict of the jury.

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

W. T. Thompson, O. A. Abbott, and *Abbott & Caldwell,* for plaintiff in error.

W. H. Thompson, Charles B. Keller, and *W. A. Prince, contra.*

RYAN, C.

The sheriff of Hall county levied several writs of attachment issued out of the district court of said county on a stock of goods in the possession of Joseph H. Nash. As the owner of said goods, Nash, in the same court, replevied them from the sheriff. A trial to a jury resulted in a verdict in favor of the sheriff, upon which a

judgment was rendered, of which Nash, upon proceeding in error in this court, seeks a reversal.

On the trial of this cause in the district court Nash introduced in evidence the following written memorandum:

"In consideration of eight thousand three hundred dollars to us in hand paid, the receipt of which is hereby acknowledged, we, each for ourselves individually, and jointly and separately, do hereby sell and convey unto Joseph H. Nash our entire stock of general merchandise, together with all furniture and fixtures, also all notes due to us and all book accounts and other bills receivable due to us, said goods, chattels, and merchandise now in the storeroom situated upon lot numbered six (6), in block numbered five (5), in the town of Mason City, county of Custer, state of Nebraska, and the title to the same we will, and our heirs and assigns shall, defend against all lawful claims of any nature whatever. In witness whereof, we have hereunto set our hands at Mason City, Nebraska, this 3d day of November, A. D. 1892. J. M. PERSINGER.

"A. B. WARRELL & CO."

"In presence of

"DENNIS RUNYON."

N. R. Persinger, on behalf of plaintiff, testified that during 1892 he was the president of the Central City Bank, of Central City, Nebraska, and was acquainted with certain obligations held by the bank against A. B. Warrell, John M. Persinger, and the Merrick County Mercantile Company. One of these he identified and it is of the descriptions following, to-wit: A promissory note dated September 22, 1892, payable ninety days after date to the Central City Bank of Central City, for $4,000, with ten per cent per annum interest after maturity, made by the Merrick County Mercantile Company, per J. M. Persinger. Another obligation which was held by Joseph H. Nash was identified by this witness, of which the description was as follows: A promissory note dated

June 30, 1892, executed by the Merrick County Mercantile Company to Joseph H. Nash, for $1,075, drawing ten per cent interest per annum from date, due by its terms six months after date. The third obligation identified by this witness was a promissory note of date September 22, 1892, due ninety days after date to the aforesaid Central City Bank, for $3,300, drawing ten per cent per annum interest from maturity, executed by A. B. Warrell. These three notes, N. R. Persinger testified, constituted the consideration named in the above memorandum. There was no effort made to show that these notes evidenced an indebtedness which had no real existence. N. R. Persinger further testified that on the date of the above memorandum, at the request of Mr. Nash, he took the above described promissory notes to Mason City, where A. B. Warrell was running a store, and induced him to execute the above memorandum and transfer the possession of the personal property therein described to a person sent by Mr. Nash to take possession thereof immediately upon Mr. Nash being notified that the memorandum had been signed. This witness testified that the notes due the bank were transferred to Mr. Nash, by whom, soon after the date of the memorandum, all three notes were delivered to A. B. Warrell as having been paid. He also testified that the note made to Mr. Nash was for money individually loaned by Mr. Nash, independently of the bank or of his relationship thereto as its cashier, and there was no evidence offered contradictory of this statement.

The fraud sufficient to vitiate the transfer to Mr. Nash, of which the attaching creditors asserted the existence, was based upon the alleged identity of A. B. Warrell, A. B. Warrell & Co., and the Merrick County Mercantile Company with the Central City Bank and its cashier, Mr. Nash. To an understanding of this contention it is necessary that a short history of certain transactions be given in this connection. The predecessor of the Central City Bank held notes made by John M. Persinger,

by his wife, by his wife's father, and by A. B. Warrell, aggregating in amount $6,500. These, it seems, had been given for an indebtedness really owing by John M. Persinger. Immediately after N. R. Persinger had organized the Central City Bank there was organized the Merrick County Mercantile Company as a corporation. To this corporation the cashier of Central City Bank loaned $1,000 to enable it to effect an exchange of some real property for a stock of goods. The Merrick County Mercantile Company, it seems, succeeded John M. Persinger in business, and at its organization he was made its president and A. B. Warrell its secretary and treasurer. These official relations, so far as the record discloses, have never ceased. About September 15, 1891, A. B. Warrell, with the knowledge and assent of the Central City Bank, took a portion of the goods of the Merrick County Mercantile Company of about the value of $3,800 to Mason City and there opened a store in his own name and proceeded to dispose of the goods with which he had been entrusted. For a fair proportion of the indebtedness of the Merrick County Mercantile Company Mr. Warrell, when he had selected the goods he was to take with him, made his own promissory note to the Central City Bank,—the mercantile company gave its note to the bank for the balance. In August the remainder of the stock of the Merrick County Mercantile Company was removed to Mason City. This portion, together with what had been previously under the management of A. B. Warrell, from this time forward constituted a single stock, which was managed under the name of A. B. Warrell & Co. As we understand the evidence, the note hereinbefore described as being for $3,300 was a renewal of the proportion for which A. B. Warrell gave his promissory note in 1891, and the notes for $4,000 and $1,075 were for the amounts due the bank and Mr. Nash respectively from the Merrick County Mercantile Company. It is urged by the defendant that the capital stock of the Merrick County Mercantile Company was

never disposed of, but was held almost exclusively by the Central City Bank. We understand from the evidence that there were issued at least five and perhaps fifteen shares of this stock of the par value of $10 per share to parties outside the bank and the president and secretary of the mercantile company. The certificates for the remainder of the capital stock, the secretary testified, were signed up in blank and left with the Central City Bank. N. R. Persinger testified that the certificates were left with the bank, but not as collateral. This is all the light we have on this subject, and while it shows a very loose mode of doing business, we have not been able to see how the bank, by acting as custodian of the certificates of stock, is chargeable with a fraudulent intent towards creditors of the mercantile company or towards A. B. Warrell or A. B. Warrell & Co., even if the individual and firm last indicated should be regarded as entities distinct from the mercantile company. In argument, however, the relations between the bank on the one hand and the mercantile company, A. B. Warrell, or A. B. Warrell & Co. on the other hand, it was insisted, showed that the bank was in fact the owner of the goods at every stage of the proceedings, and that when the bill of sale was made to Nash the transaction was merely an open assumption by the bank of a secret ownership it all along had held of the goods in question. There is in the record no evidence which justifies this contention. The removal of the goods from Central City, it was testified, without contradiction, was to find a market in which such goods would meet with a readier sale than at that place. Under the management of Mr. Warrell this expectation, to some extent, seems to have been realized. It is not disclosed why this condition did not continue after a large addition had been made to the stock and the management had become that of A. B. Warrell & Co. The credits given by the bank and Mr. Nash seem, from the first, to have been injudicious, but we can find no evidence that these credits were fraudulently extended.

The bank or its cashier had the same right that any other creditor had to obtain satisfaction of the indebtedness owing to it or to him and this right seems not to have been fraudulently exercised. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

HARRISON, C. J., not sitting.

CHARLES BEST V. GEORGE C. ZUTAVERN.

FILED FEBRUARY 2, 1898. NO. 7799.

1. **Executions:** OBJECTIONS TO CONFIRMATION OF SALE. An objection to a confirmation of a sale on execution, on the ground of a mere irregularity in the appraisement, comes too late when first urged after the return of such completed sale by the officer conducting the same.
2. ———: SALE OF HOMESTEAD. The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.
3. ———: CONFIRMATION OF SALE. The only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making, and returning of said sale. In so far as the principle thus stated in *Schribar v. Platt*, 19 Neb. 625, is in conflict with the reasoning in *Berkley v. Lamb*, 8 Neb. 392, the later case considered is *held*, in effect, to have overruled the earlier case.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J. *Affirmed.*

Davidson & Giffen, for plaintiff in error.

J. Hall Hitchcock and *L. C. Chapman, contra.*

RYAN, C.

By his petition in error Charles Best questions, in this court, the correctness of the order of the district court of

Johnson county whereby were overruled his two objections to the confirmation of a sale of certain of his real property. These objections were not filed until after the sale had been made and returned for confirmation.

The first objection urged no fraud, but merely an alleged irregularity in the appraisement and was properly overruled. (*Vought v. Foxworthy*, 38 Neb. 214; *Burkett v. Clark*, 46 Neb. 466; *Overall v. McShane*, 49 Neb. 64; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601; *McMurtry v. Columbia Nat. Bank*, 53 Neb. 21; *Ecklund v. Willis*, 44 Neb. 129.)

The second objection, briefly stated, was that the property sold by the sheriff was the homestead of Charles Best, and, therefore, being exempt from sale on execution, a confirmation of such sale should have been denied. In *Schribar v. Platt*, 19 Neb. 625, among other questions, there was determined the effect of a confirmation of a sale on execution over the objections of the execution defendant that the property sold was his homestead and as such was exempt from sale on judicial process. With respect to the contention of the adverse party that the confirmation of the sale was conclusive in a collateral proceeding, COBB, J., in the delivery of the opinion of this court, said: "The learned district court seemed to be of the opinion, and so found, that the question of title was involved in and settled by the proceedings for the confirmation of the said execution sale. In that, I think, the court erred; and that the only thing settled or adjudicated in the proceedings and order of confirmation, so called, was as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making, and returning of said sale." It is true this view is hardly reconcilable with the reasoning in *Berkley v. Lamb*, 8 Neb. 392, but as it is the later and has been acquiesced in for several years it must prevail and *Berkley v. Lamb, supra*, to that extent must be deemed overruled. On principle the holding in *Schribar v. Platt, supra*, is evidently correct, for this court has held that,

at chambers, a judge may confirm a judicial sale (*Brice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *McMurtry v. Tuttle*, 13 Neb. 232), and this is hardly consistent with the idea that at such a hearing there may be an adjudication of rights ordinarily determinable only by courts in the exercise of their jurisdiction as such. On principle the language above quoted from *Schriber v. Platt, supra*, finds direct support in the reasoning in *Quigley v. McEvony*, 41 Neb. 73. (See also *Baumann v. Franse*, 37 Neb. 807.) The ruling of the district court, we therefore conclude, was right, and accordingly it is

AFFIRMED.

JOHANNA OLSEN V. MARY JACOBSON ET AL.

FILED FEBRUARY 2, 1898. NO. 7806.

Affirmance where all the questions presented are based on an unauthenticated bill of exceptions.

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

W. S. Cook, *D. Z. Mummert*, and *Frick & Dolezal*, for plaintiff in error.

Davis & Howell and *E. R. Duffie, contra.*

RYAN, C.

All the questions presented by the petition in error in this case depend upon the contents of an alleged bill of exceptions, and as it is not authenticated, the judgment of the district court is

AFFIRMED.

GEORGE E. COON ET AL. V. HUGH M. MCCLURE.

FILED FEBRUARY 2, 1898. No. 7761.

1. **Witnesses:** INSTRUCTIONS. An erroneous instruction that where a party litigant offers in evidence the testimony of a witness he is bound by such testimony, *held* not justified by the alleged fact that there was no testimony on the trial differing from that of said witness.
2. **Attachment:** GROUNDS: INSTRUCTIONS. An instruction which required the concurrence of an intent to hinder, delay, and defraud creditors, to render void transfers of a certain class, *held* erroneous where the provision of the statute is that the intent may be either to hinder, delay, or defraud.
3. ———: ———. The mere fact that in justifying the levy of an attachment in a replevin action the defendants in their answer alleged that the transfer, under which the plaintiff claimed title, was made with intent to hinder, delay, and defraud creditors did not vary the provisions of the statute.

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

Warren Switzler, for plaintiff in error.

M. A. Hartigan, contra.

RYAN, C.

This was an action of replevin for certain goods brought in the district court of Webster county, in which action there was a judgment in favor of the plaintiff. The defendants prosecute this error proceeding.

The possession of the defendants, a sheriff and his deputy, before the institution of this action was by virtue of a writ of attachment under which a levy had been made in an action wherein the Nebraska Moline Plow Company was plaintiff and O. C. Clingman & Co., a partnership firm, was defendant. The question was whether or not the transfer of the replevied property from Clingman & Co. to Hugh M. McClure was fraudulent as against the Nebraska Moline Plow Company, a creditor of O. C. Clingman & Co. The evidence relied upon to sustain

the charge that the goods had been transferred in fraud of the said rights of a creditor was largely circumstantial in its nature. Mr. McClure was a witness in his own behalf and from him were elicited admissions tending to cast doubt upon the good faith of the transfer under and by virtue of which he claimed title. The plaintiffs in error called as their own witness O. C. Clingman, a member of the firm of O. C. Clingman & Co., and examined him with reference to the financial condition of the firm of which he was a member when the aforesaid transfer was made, the disposition of its assets, and other circumstances tending to cast discredit upon the claim that such transfer was in good faith. On rebuttal defendant in error examined A. D. McNeer, another member of the firm of O. C. Clingman & Co., for the purpose of explaining why he had drawn certain sums from the partnership funds, how he had replaced them, and the part he had taken with reference to the transfer to McClure. The following instructions were given to the jury:

"8. The court instructs the jury that when a party to an action calls a witness, they indorse such witness before the court and jury as a truthful person and entitled to credit, and they are bound by the evidence of such witness."

"5. The court instructs the jury that before the defendant in this action can question the act of the plaintiff McClure in purchasing the stock of goods it must not only appear from a preponderance of the testimony that the firm of O. C. Clingman & Co. was insolvent and that it sold its stock of goods to the plaintiff McClure with the fraudulent purpose of cheating, defrauding, and delaying its creditors, and it must further appear by the preponderance of the testimony that McClure not only knew these facts and, knowing them, he deliberately and willfully entered into the contract of purchase of the stock of goods with the purpose to aid and assist the firm of O. C. Clingman & Co. to cheat and defraud and delay its creditors."

The proposition that a party by offering the testimony of a witness vouches for his credibility has been approved by this court in *Blackwell v. Wright*, 27 Neb. 269, and in *Nathan v. Sands*, 52 Neb. 660. The proposition that such party is bound by the evidence of such witness is defended on the theory that there was no other evidence than that to the same effect as was the testimony of Clingman. We have carefully considered the bill of exceptions and find that there were circumstances shown by the testimony of witnesses called by the defendant in error from which the jury properly might have drawn inferences unfavorable to the good faith of the transfer by virtue of which McClure claimed title. That part of the instruction which assumed to tell the jury what effect must be given the evidence of Clingman was erroneous. (*Murphey v. Virgin*, 47 Neb. 692.)

Section 17, chapter 32, Compiled Statutes, is in this language: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the person so hindered, delayed, or defrauded, shall be void." The fifth instruction required that the jury must find the intent to hinder, delay, and defraud creditors was entertained by Clingman & Co. to render the transfer void. This was more than the statute required, for, under its provisions above quoted, it was sufficient if there existed an intent to hinder, delay, or defraud. Defendant in error seeks to justify this departure from statutory requirements by the fact that in the answer filed by plaintiff in error the justification of the attachment was that there had been a transfer with intent to hinder, delay,

and defraud, and hence, it is argued, it was not erroneous in the instruction to adopt the same phraseology. If the averments of the answer had been of an intent to hinder, delay, or defraud, that pleading would have been faulty. The proper language is given by the statute and it should have been followed by the court in its instruction. For the errors indicated the judgment of the district court is reversed.

REVERSED AND REMANDED.

J. ABBOTT THOMPSON, APPELLEE, V. S. H. KYNER ET AL., APPELLANTS.

ELIZABETH P. AVERY, APPELLEE, V. S. H. KYNER ET AL., APPELLANTS.

WATSON GIBBONS, APPELLEE, V. S. H. KYNER ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. NOS. 7715, 7716, 7717.

Payment of Mortgage to Mortgagee's Agent Not Made: EVIDENCE. The evidence in the case of Thompson against Kyner examined, and *held* to sustain the judgment of the district court; and upon stipulation of the respective parties interested the judgment in each of the three cases is affirmed.

APPEALS from the district court of Brown county. Heard below before BARTOW, J. *Affirmed.*

J. S. Davisson and *W. J. Courtright,* for appellants.

C. C. Flansburg, contra.

OPINION by RYAN, C., in the case next following.

WATSON GIBBONS ET AL. V. S. H. KYNER ET AL.

FILED FEBRUARY 2, 1898. No. 8312.

New Trial: EVIDENCE. The evidence on which a petition for a new trial was granted examined and *held* insufficient.

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

C. C. Flansburg, for plaintiffs in error.

J. S. Davisson and *W. J. Courtright, contra.*

RYAN, C.

In the district court of Brown county, J. Abbott Thompson filed his petition for the foreclosure of a certain mortgage and note securing payment of the same, both of which were executed to him by Harvey McMunn on May 20, 1885. The loan thus evidenced and secured was for the term of five years. The mortgaged premises were purchased on November 3, 1885, by Kyner. The principal defense pleaded by Kyner was the payment of said note in the year 1890. On the issues joined there was decreed a foreclosure as prayed. There were two other cases tried in the same court, to-wit, Gibbons against Kyner, No. 7717, and Avery against Kyner, No. 7716, on the same issues and with the same result reached in the case of Thompson against Kyner, and by appeal all three are now pending in this court. (See *ante*, p. 625.) In effect the parties have stipulated that the same judgment shall be rendered in this court in each of these cases; hence, Gibbons against Kyner and Avery against Kyner need receive no further notice in this case than is necessary to carry into effect this stipulation.

Mr. Kyner's testimony was to the effect that when the interest became due he paid it to the Farmers & Merchants National Bank at Fremont until the Nebraska Mortgage & Investment Company notified him, after

which time he paid the interest to the company last named. The notices sent by the Farmers & Merchants Bank were signed by C. H. Toncray, cashier, and recited that the interest was due and payable at that bank. As a matter of fact the note given by McMunn, as well as each of the coupons, recited that it was payable at the First National Bank of Hartford, Conn. In such notices as were sent by the Nebraska Mortgage & Investment Company there was no statement with reference to the place at which either principal or interest was required to be paid. In his testimony Mr. Kyner identified a postal card sent to him by the said investment company whereby was acknowledged the receipt of $44 in which was included the amount of interest paid on this loan at or about that time, which was November 27, 1889. In this communication Mr. Kyner was informed that the coupons paid by the $44, above mentioned, would later be sent to him, and they were, ordinarily, within from eight to thirty days after payment. The principal sum was paid to the Nebraska Mortgage & Investment Company soon after it fell due and was never remitted to Mr. Thompson. The testimony of Mr. Thompson and C. H. Smith was taken by deposition and offered by Mr. Kyner. In his deposition Mr. Thompson stated that an application for a loan was submitted to him by Tiffany & Smith, that on this application he advanced the money to be loaned Mr. McMunn, and in due time received back the note and mortgage sued on. He further testified that after the receipt of the principal note and coupons in connection therewith he retained the same in his possession in his safe, and if the money was sent to Tiffany & Smith or their successor, C. H. Smith & Co., he would bring the coupon down, and that he knew nothing of a claim of payment of the principal until about the month of March, 1893. He furthermore testified that he did not object to receiving payment of coupons through Tiffany and C. H. Smith & Co., and did not know whether they had a western agency or not, and he thought that most

of the coupons were paid to him through the First National Bank of Hartford, Connecticut, though of this he was not certain. On his cross-examination Mr. Thompson testified that he never gave C. H. Smith & Co., C. H. Smith, senior, or C. H. Smith, junior, any authority concerning the collection of moneys on account of the McMunn loan, and never authorized any person to represent him in Nebraska in connection with this loan. The testimony of C. H. Smith was consistent with that of Mr. Thompson. He explained that for fifteen years preceding January 1, 1887, he had been engaged in business under the name of E. D. Tiffany, and since that date as a member of the firm of C. H. Smith & Co. He testified that this business was dealing in investment securities, including western loans; that he had never known Mr. Toncray personally until October, 1890, and had no business relations with him except receiving drafts for payments of interest on loans negotiated by the Farmers & Merchants National Bank. He further testified that the firms of which he was a member never made any western farm loans, but sold applications made by correspondents for which the firm of which he was a member received a commission. In such cases when the papers were completed and delivered there was no obligation to render further services for any one, though, if applied to by customers the firms of which he was a member would attend to making collections of interest. When such collections were made at Fremont, Nebraska, they were received by C. H. Smith & Co. and E. D. Tiffany through the Farmers & Mechants National Bank of that place, until the date of the organization of the Nebraska Mortgage & Investment Company, after which time they were received through the last named company. At the request of customers the firm of C. H. Smith & Co. would write to correspondents with reference to the probability of payments of principal or interest already in default. but Mr. Smith testified that he did not think these customers knew anything about these correspondents.

There was a large number of letters introduced in evidence in the deposition of Mr. Smith. These were written by the firm of which he was a member to its correspondent in Fremont, but they were entirely consistent with the testimony above quoted. We are clearly of the opinion that the judgment of the district court was in harmony with the views of this court expressed in the following cases: *First Nat. Bank of Omaha v. Chilson*, 45 Neb. 257; *South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606; *Bull v. Mitchell*, 47 Neb. 647; *Richards v. Waller*, 49 Neb. 639; *Thomson v. Shelton*, 49 Neb. 644; *City Missionary Society v. Reams*, 51 Neb. 225.

There was, however, filed subsequently to the rendition of said judgment a petition for a new trial on the ground of newly-discovered evidence material to the issues which had been determined by such judgment; and, on a hearing, the prayer of this petition was granted and a new trial was awarded. To test the correctness of this ruling a petition in error has been filed in this court wherein the case was docketed as "Gibbons et al. v. Kyner et al. No. 8312." The evidence claimed to be material was contained in an affidavit made by George W. E. Dorsey, in which, in substance, he stated that he had been the president of the Nebraska Mortgage & Investment Company from its organization in 1888 until some time in 1891; and that, while acting as such president prior to June 1, 1890, affiant had a conversation with Charles H. Smith, of the firm of C. H. Smith & Co., in regard to the manner of doing business between that firm and the Nebraska Mortgage & Investment Company. The portion of this affidavit claimed to be material is probably to be found within the following quotation, but just where the writer hereof is unable to determine: "The manner of doing business between said C. H. Smith & Co. and the Nebraska Mortgage & Investment Company was all discussed and the manner of doing business between other people under like circumstances was fully discussed and compared. By other people doing a like

business I refer to the business of making and collecting real estate loans where the western correspondent deals with the borrower, and the eastern correspondent deals directly with the lender, and where the money in making the loan passes from the lender to the eastern correspondent, thence to the western correspondent, thence to the borrower, and where, when collections are made, the money passes from the mortgagor to the western correspondent, thence to the eastern correspondent, thence to the mortgagee or lender. And the manner of making collections by such western correspondent was also discussed, and the trouble and expense that the Nebraska Mortgage & Investment Company was to in sending out notices to the borrowers from time to time, and that the principal and interest was about to mature and requests for prompt remittances of same in loans negotiated by it and its predecessor through Smith & Co., and in the collection and remittance of such interest and principal by said Nebraska Mortgage & Investment Company should thereafter be entitled to deduct exchange at the time of making such remittances as compensation to said Nebraska Mortgage & Investment Company for its work and expense in making such collections. And Mr. Smith expressed himself as a part of said conversation to the effect that, everything considered, other western correspondents did not deduct such exchange at the time of remitting, and that the Nebraska Mortgage & Investment Company should conform to the general custom and not deduct any such exchange, and it was agreed, as a part of said conversation between Mr. Smith as a member of the firm of C. H. Smith & Co. and myself acting as president of the Nebraska Mortgage & Investment Company, that said Nebraska Mortgage & Investment Company should look after the collection and remittance of the principal and interest of the loans negotiated through said Nebraska Mortgage & Investment Company and its predecessor and C. H. Smith & Co. without any charge therefor for exchange or otherwise."

The weak point in the defense of Mr. Kyner, originally, was the failure to show that C. H. Smith & Co. or the Nebraska Mortgage & Investment Company was the mortgagee's agent for receiving and paying interest or principal to such mortgagee. The mortgagee held in his possession the note and each coupon until some one was ready to pay them to him, and when one was paid he merely surrendered it as being paid. The inconsequential talk preceding the agreement of Mr. Dorsey to forbear exacting exchange was irrelevant to this question of agency. If it was intended to contradict C. H. Smith merely for the purpose of discrediting him it was likewise inadmissible, under the ruling of this court in *Nathan v. Sands*, 52 Neb. 660. In any view, the proposed testimony of Mr. Dorsey could not in the least strengthen the weak point in Mr. Kyner's defense; hence the petition for a new trial should have been denied and the order of the district court on this branch of the case is therefore reversed. It was in effect stipulated that on this branch the same judgment should be rendered in Avery against Kyner, No. 7716, and in Gibbons against Kyner, No. 7717, as in this case in this court. It is accordingly ordered that the judgments sought to be reviewed by Mr. Kyner as appellant be affirmed and that the orders granting new trials in such cases be reversed and that these cases be remanded to the district court for the entry of these judgments and orders.

JUDGMENTS ACCORDINGLY.

MINNIE L. JAYNES V. OMAHA STREET RAILWAY COMPANY.

FILED FEBRUARY 2, 1898. No. 5370.

1. **Dedication:** TITLE TO STREETS. Where land is conveyed and platted into an addition to a city in pursuance of the statute the fee-simple title to the streets and alleys of such addition thereby vests in the public.
2. ———: ———. But the public holds the title to such streets and alleys in trust for the use for which they were dedicated.

3. ———: ———. Such a grant construed, and *held* that it contemplated the right of the public to use the streets for the purpose of passage by such means as it might see fit to employ; but the grant did not contemplate that any person should exclusively and permanently appropriate any portion of a street to his own use to the continued exclusion of the remainder of the public therefrom.

4. **Eminent Domain:** ADDITIONAL BURDEN. Whether the use made of a street is an additional burden upon the easement does not depend upon the motive power which moves the vehicles employed in such use, but depends upon whether the vehicle and appliances used in and necessary to effectuate the purpose permanently and exclusively occupy a portion of the street to the continued exclusion of the rest of the public therefrom.

5. ———: ———: ELECTRIC RAILWAYS: DAMAGES. A corporation constructed in a street its railway tracks and set poles, at stated distances apart, on either side of said tracks near the margin of said streets; on these poles it placed wires and used these poles and wires for the moving of its cars on said tracks by electricity. An abutting lot-owner sued the railway company for damages, alleging in his petition that the continued existence in the street opposite his property of the poles and wires interfered with his ingress to, and egress from, his premises and depreciated them in value. *Held*, That the petition stated a cause of action.

6. ———: ———: ———: ———. What acts, omissions, facts, and circumstances are competent evidence of damages to be considered by a jury are questions of law for the court; but whether such acts, omissions, facts, or circumstances affect an owner's property and damage it, and the amount of such damages, are for the jury.

7. ———: ———: ———: ———. It seems that, by reason of article 1, section 21, of our constitution, it is not absolutely essential that the poles and wires of an electric street railway company should be held, as a matter of law, to be an additional burden upon the easement, in order to entitle the abutting lot-owner to compensation for the depreciation to his real estate, caused by the permanent and continued presence in the street in front thereof of such poles and wires.

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

The opinion contains a statement of the case.

H. C. Brome and *Brome, Andrews & Sheean*, for plaintiff in error:

Whenever the location, construction, and use of a public improvement occasion a direct disturbance of a

physical right which the owner enjoys in connection with his property, and the result of such interference is to lessen the market value of the property, then that property is damaged within the meaning of our constitution and the owner entitled to compensation commensurate with the injury sustained. (*Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550; *Rigney v. City of Chicago*, 102 Ill. 64; *City of Pekin v. Winkel*, 77 Ill. 56; *City of Pekin v. Brereton*, 67 Ill. 477; *City of Elgin v. Eaton*, 83 Ill. 535; *City of Shawneetown v. Mason*, 82 Ill. 337; *Stock v. City of East St. Louis*, 85 Ill. 377; *Chamberlain v. West End of London & C. P. R. Co.*, 2 Best & S. [Eng.] 605; *Beckett v. Midland R. Co.*, 3 Common Pleas L. R. [Eng.] 81; *Mollandin v. Union P. R. Co.*, 14 Fed. Rep. 394; *Republican V. R. Co. v. Fellers*, 16 Neb. 169; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276; *Reardon v. City and County of San Francisco*, 66 Cal. 492; *City of Denver v. Bayer*, 7 Colo. 113; *City of Montgomery v. Maddox*, 89 Ala. 181; *Omaha H. R. Co. v. Cable Tram-Way Co.*, 32 Fed. Rep. 727; *City of East St. Louis v. O'Flynn*, 119 Ill. 200; *City of Denver v. Vernia*, 8 Colo. 399; *Hogan v. Central P. R. Co.*, 71 Cal. 83; *Town of Longmont v. Parker*, 14 Colo. 386; *Gainesville, H. & W. R. Co. v. Hall*, 14 S. W. Rep. [Tex.] 259.)

Use and occupation of a public street or highway by an electric street railway with its poles, wires, and tracks were not contemplated or authorized by the original dedication of the street to the public, and if such use and occupation decrease the market value of adjacent lots by a physical interference with the use and enjoyment of the streets by the owner in connection with his property, then his property is "damaged" within the meaning of that word in our constitution, and he is entitled to compensation. (*Southern P. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union B. R. Co.*, 26 Conn. 249; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Phipps v. Western M. R. Co.*, 66 Md. 319; *Grand*

Rapids & I. R. Co. v. Heisel, 47 Mich. 393; *Chamberlain v. Elizabeth Cordage Co.*, 41 N. J. Eq. 43; *Lawrence R. Co. v. Williams*, 35 O. St. 168; *Carl v. Sheboygan & F. DuL. R. Co.*, 46 Wis. 625; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279.)

John L. Webster, contra:

The construction or operation of a street railway along the streets cannot be made the foundation of an action for damages by an abutting property owner. (*Taggart v. Newport S. R. Co.*, 19 Atl. Rep. [R. I.] 326, 7 L. R. A. 205; *Williams v. City Electric Street R. Co.*, 41 Fed. Rep. 556; *Halsey v. Rapid Transit S. R. Co.*, 20 Atl. Rep. [N. J.] 859; *Koch v. North Avenue R. Co.*, 15 L. R. A. [Md.] 377; *Texas & P. R. Co. v. Rosedale Street R. Co.*, 64 Tex. 80.)

The construction and operation of a street railway do not cast any additional servitude upon the street, and a railway company is not liable to the abutting property owner for damages arising from the construction and operation of the road. (*Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Fulton v. Short Route Railway Transfer Co.*, 85 Ky. 640; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Briggs v. Lewiston & A. H. R. Co.*, 79 Me. 363; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579; *Citizens Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Carson v. Central R. Co.*, 35 Cal. 325; *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112; *Kellinger v. Forty-second Street & G. S. F. R. Co.*, 50 N. Y. 206; *Finch v. Riverside & A. R. Co.*, 25 Pac. Rep. [Cal.] 765.)

RAGAN, C.

Minnie L. Jaynes brought this suit in the district court of Douglas county against the Omaha Street Railway Company, hereinafter called the railway company, a corporation organized under the laws of the state and owning and operating an electric street railway in the streets of the city of Omaha by permission of the city's authority.

Jaynes in her petition alleged, among other things, that she was the owner of lot 8, in block 15, in R. V. Smith's Addition to the city of Omaha; that said lot was a tract of land 243 feet in length east and west and 66 feet in width north and south; that it was bounded on the east by Sixteenth street and on the south by Clarke street; that the railway company had constructed its railway over and upon and along the surface of said Sixteenth and Clarke streets in front of her property, and was operating its cars thereon, the motive power being electricity; that the railway company, for the purpose of so operating its cars, had erected poles on either side of said streets adjacent to her premises, and placed a wire upon said poles parallel to the railway track, and had strung wires across said streets on said poles; that by reason of such construction and operation of said railway on said tracks adjacent to said premises the value of the latter had been greatly depreciated; that the location of the poles and wires of the railway company in said streets interfered with Jaynes' ingress to and from her property, and thereby depreciated its value. There was a prayer for a judgment for damages. To this petition the railway company filed a general demurrer, based on its contention that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer and dismissed the petition and Jaynes brings that judgment here for review on error.

1. By sections 104, 105, and 106, article 1, chapter 14, Compiled Statutes 1897, it is made the duty of every original owner or proprietor of any tract of land who shall subdivide the same for the purpose of laying it out in an addition to a city to cause a plat of such subdivision to be made with reference to known or permanent monuments, and in such plat give the dimensions and the courses of all streets and alleys established thereby, and to execute and acknowledge this plat before some officer authorized to take acknowledgments of deeds, and when so executed, to file such plat for record in the office of

the register of deeds of the proper county. The acknowledgment and record of such an instrument are equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public purposes. Assuming that Smith was the original owner of the lands out of which the lots of Jaynes were carved, that he complied with the statute just quoted and thereby dedicated these streets to the public and thereby conveyed the fee-simple title of these streets to the city of Omaha, we have the question, for what purpose was this dedication or grant made? The particular purposes which were in the mind of the owner at the time he made this dedication or grant are not expressed therein; and the question therefore is, for what purpose does the law imply or presume the owner granted these streets to the public? Is the construction and operation of such an electric railway as the one here on the surface of these streets embraced in the purposes for which the original owner dedicated these streets to the public? Or, in the language of the law books, is the construction and operation of this street railway an additional burden or servitude on the easement granted?

It is said by Booth, in section 83 of his work on Street Railways, that the courts of last resort of the country to which the question has been presented have all decided that the construction and operation of such a street railway as the one in question here was not an additional servitude to those embraced in the original grant. The courts referred to by this author are Kentucky, Michigan, Maryland, New Jersey, Pennsylvania, Rhode Island, Utah, and the United States circuit court for the district of Arkansas. We shall briefly examine these cases.

The Kentucky case was decided in 1893 and is the *Louisville Bagging Mfg. Co. v. Central P. R. Co.*, 95 Ky. 50, 4 Am. Electrical Cases 202. It was an application for an injunction by the owner of a lot fronting on a street to enjoin the construction and maintenance of an electric street railway on two grounds: (1) That it would inter-

fere with the lot owner's accustomed use of the street for backing vehicles up to his warehouse; (2) would be dangerous to those residing or doing business on the street. The *nisi prius* court denied the application for injunction, and its judgment was affirmed by the court of appeals; but the question as to whether the construction and operation of the street railway was an additional burden is not mentioned in the case; nor is the question as to whether the street railway company would be liable to damages for the injury done to the lot owner's property by the construction and operation of the railway either argued or discussed in the opinion; and though the question as to whether electric street railways were additional burdens had prior to that date been presented to several courts of last resort, no case of any court is cited in the opinion.

The case from the United States circuit court for the district of Arkansas is *Williams v. City Electric Street R. Co.*, 41 Fed. Rep. 556. In that case the United States circuit court held that the construction and operation of a street railway on the streets of a city was not an additinal burden simply because of the fact the cars were moved by steam. That was the only point in the case. No such question as the one here was involved in the Arkansas case.

The Utah case referred to is *Ogden City R. Co. v. Ogden City*, 26 Pac. Rep. 288. This case was decided in 1891 and was an application for an injunction by the Ogden City Railway Company against Ogden City and another railway company to enjoin Ogden City from carrying into effect an ordinance granting to this other railway company permission to lay a double-tracked street railway in a certain street of Ogden City; the contention of the Ogden City Railway Company being that in 1883 Ogden City, by ordinance, had granted it permission to lay down a double-tracked street railway in said streets, that it had already constructed a single track with turnouts in that street, and that if the other railway com-

pany was granted permission to construct another double-track railway in the same street, the streets would be so obstructed by the four tracks as to interfere with other modes of travel; and that if the defendant street railway company, in constructing its track, should use poles and wires, the plaintiff street railway's property would be greatly damaged thereby. The injunction was denied. The court said: "The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendant's railway would damage the abutting property by materially interfering with rights appurtenant thereto." We do not think this is an adjudication that the construction and operation of an electric street railway in the streets of a city is not an additional burden; and though that question had prior to that time been before the courts of Rhode Island and New Jersey, the opinions in those cases are not referred to, nor is there an opinion of any other court mentioned.

The earliest case that we have been able to find in which the question under consideration was decided is *Taggart v. Newport Street R. Co.*, 19 Atl. Rep. [R. I.] 326, decided in January, 1890. This was an application for an injunction by abutting property owners to enjoin the street railway company from erecting poles and wires as concomitants of their street railway in front of the complainants' property. It appears that prior to the time the suit was brought the street railway company had been using horses to move their cars and were about to substitute electricity as a motive power. In the opinion the court enumerates the grounds upon which the injunction was asked, as (1) that the street railway company had not given certain notices required by the law of its incorporation; (2) that the use of electricity was illegal, as the statute creating the street railway company authorized it to use as a motive power "steam, horses, or other power as the city councils of said city and towns may from time to time direct;" (3) that the erection of the poles was prohibited by the act incor-

porating the street railway company, as that act provided that the street railway should be used, constructed, and operated so that "such corporation shall not incumber any portion of the streets occupied by such tracks." The court held that the company had given the notice required by statute; that the use of electricity as a motive power was expressed within the law creating the corporation; and that the poles in the street were not an incumbrance within the meaning of the act creating the corporation, taking Webster's definition of the word "incumber." The court denied the injunction and said, in the fifth point of the syllabus: "The change of the power by which a street railway is operated from horse-power to electricity, and the erection of poles necessary for its operation, does not impose an additional burden on the abutting property owners." The court reached this conclusion, that the street railway with its poles and wires was not an additional burden, by finding that the electric street railway company did not occupy the streets any more exclusively than it would if operated by horse-power. There is no question that the law of the case was correctly laid down, if the evidence, or the record on its face, sustains the finding of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway.

The Rhode Island case just noticed was quoted as an authority for the proposition that an electric street railway is not an additional burden, by the supreme court of New Jersey in December, 1890, in *Halsey v. Rapid Transit Street R. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859. In this case an abutting lot owner sought to enjoin a street railway company from building its track in a street opposite his premises and from erecting certain iron poles in the center of the street to be used in the operation of its cars. The court denied the injunction and held that the placing of the poles in the middle of the street for the purpose of using electricity for street car propulsion did not impose a new servitude on the land

in the street. But it would seem from a reading of the opinion that the complainant's application for an injunction was denied on the ground of the court's doubt as to whether the complainant's property had been or would be damaged by the erection of these poles in the center of the street opposite his property. The court said: "It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but it may pass on either side. Besides the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street to the entrance, would, if there was no pole there, pass over this space one time in fifty. Certain it is that, even if it be true that the pole diminishes the complainant's means of access to the entrance, the diminution is so insignificant as to lay no ground for relief in equity. A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public has no right to use it will, at this stage of the cause, be fatal to his claim to an injunction. * * * 'It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where the injury, which may result from the invasion of that right, is not irreparable.'"

The supreme court of Pennsylvania, in January, 1891, in *Lockhart v. Craig Street R. Co.*, 21 Atl. Rep. 26, referred to the Rhode Island case as being directly in point, and, if good law, controlling the case under consideration. The Pennsylvania case was an application for an injunction by abutting property owners to restrain the street railway company from constructing and operating its road in a street in front of the complainant's property. The court denied the injunction and stated the question to be whether the construction of the street railway with its poles and wires amounted to a taking of the property

of the complainant without compensation. The court said: "The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to public use, and he has certain special rights as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or destroying his property. But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. * * * And it may be now taken as settled that the owner's rights of abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, as the public may from time to time require. * * * The case of *Taggart v. Railway Co.*, 19 Atl. Rep. 326, is directly in point, and, if good law, covers the case in hand. My own impression is that the use of poles, wires, and other necessary appliances, such as proposed being used by defendants, is not, in any respect, a greater interference with the ownership of the adjoining property owner on a street than the use of streets for fire-plugs, horse-troughs, etc. * * * To my mind the power in the Craig Street Railway Company to construct and maintain a railroad in compliance with the terms of the act under which it was incorporated is clear, and that these defendants have shown a legal right to proceed and construct the railway contemplated by them, unless the failure to provide means by which the plaintiffs may have such damages as they may sustain assessed and paid or secured in advance renders the act unconstitutional. Upon this question I am not free from doubt, but the decided inclination of my mind is that the act is not unconstitutional for that reason, because the use of the streets for the purpose of applying motive power in the manner proposed is not such a new use as in cities should be treated as outside the proper use for which streets will be held to have been originally

dedicated to the public use. *Taggart v. Railway Co.*, before cited, is exactly in point. The case presented by plaintiffs is certainly not so clear from doubt that a chancellor should grant an injunction summarily stopping a great public improvement before final hearing, more particularly if the position taken by plaintiffs is correct, and defendants have no legal right to take possession of the streets, as they are about to do, a common law action will compel them to pay all damages arising to plaintiffs and thereafter equity would probably afford a complete remedy by which the wrong done them could be fully corrected." It seems from this that the supreme court of Pennsylvania did not decide, at least in this case, that an abutting property owner was remediless if the construction of the street railway in front of his property damaged it, but denied the abutting property owner an injunction to restrain the erection of the improvement, leaving the question as to whether he was damaged, and if so, how much, to the law courts.

In *Detroit City Railway v. Mills*, decided in May, 1891, 48 N. W. Rep. [Mich.] 1007, the street railway company was erecting its poles and constructing its track in a street in front of a lot owner's property. The lot owner cut the poles down and threatened to continue to do so as long as they were erected, and thereupon the railway company enjoined the lot owner from interfering with its construction of its railway. The *nisi prius* court made the injunction perpetual. The property owner appealed and the supreme court affirmed the judgment. The question as to whether the proposed erection of the poles and wires and tracks on the street constituted an additional burden upon the easement seems to have been much discussed in the case. In the syllabus the court said: "The use of the street for street railways in such a way as not to interfere with the right of a lot-owner as one of the public to pass and repass thereon, or with the right of ingress or egress to and from his lot, does not impose a new burden and servitude, addi-

tional to what was implied by the dedication, which it is beyond the power of the city to authorize without additional compensation to the abutting lot-owners." The court was composed of five judges. Two of these judges seem to have been of opinion that the street railway involved in the action, as it was proposed to be constructed, was not or would not be an additional burden upon the easement. Two of the judges dissented from that opinion and the third concurred in affirming the judgment of the lower court, but said: "I am not prepared to say that the construction of a street railroad track in a street is of itself no additional burden or servitude upon the street. I think it is, but to what extent depends upon all the facts and circumstances under which it is imposed." The cases heretofore alluded to from Kentucky, New Jersey, and Pennsylvania are referred to in the majority opinion as authorities for the proposition that an electric street railway track with its wires and poles is not an additional burden. But the most that can be said for the Michigan case is that whether such a street railway is or is not an additional burden is a question of fact depending upon whether or not it is so operated and constructed as to interfere with the lot-owner's right of ingress and egress to and from his property and his free use of the street.

The Maryland case referred to by Booth is *Koch v. North A. R. Co.*, 23 Atl. Rep. 463, decided in January, 1892. It was an application by abutting lot owners to enjoin a street railway company from constructing its road in a certain street in front of their property. The application was based upon four grounds: (1) that the defendant was not lawfully incorporated; (2) that it had no right to lay tracks of its own outside of tracks already laid in the street by street railway companies; (3) that the city of Baltimore had no authority to authorize the railway company to use electricity as a motive power; (4) that the road proposed to be built was an elevated road within the meaning of the statute which provided

that no elevated roads should be built in that street. The court overruled each of these contentions and denied the injunction. The cases already alluded to from Rhode Island, New Jersey, Pennsylvania, and the federal district of Arkansas are referred to in the opinion, and it is said of them that "they proceed on the principle that a street is a way set apart for public travel and that the use of electricity for propelling street cars is but a new and improved motive power in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel;" and the court decides that the use of electricity as a motive power for street cars does not impose a new servitude upon the streets so as to entitle the abutting owner to compensation. But the question as to whether poles and wires placed in a street in front of an abutting owner's premises constituted an additional servitude entitling him to compensation was neither presented to nor decided by the court.

In *Limburger v. San Antonio Rapid-Transit Street R. Co.*, 30 So. Rep. 533, the supreme court of Texas held that "the use of a street for an electric railway does not impose an additional burden or servitude to that implied by the dedication." That was an action by an abutting property owner against a street railway company to recover damages which he alleged his property had sustained by the construction of a street railway track between the curb of the street and another railway track in the street. The cases hereinbefore referred to were cited by the supreme court of Texas as authorities for the conclusion reached by it. But it is to be noticed that in the Texas case there is not one word on the subject of poles and wires. It does not appear whether or not this street railway company used any poles and wires for the operation of its road. So far as the opinion discloses the whole complaint of the abutting property owner was the presence in the street in front of his property of the tracks and the cars thereon.

These are all the cases which I have been able to find which hold, if they do, that an electric street railway with its concomitants of poles and wires is not an additional burden, and if the abutting owner's property is damaged by the use of the streets for such poles and wires that he has no remedy for such damages. The leading case is the Rhode Island case, and the conclusion reached there was predicated upon the court's finding that the electric street railway did not occupy any more exclusively any portion of the street than an ordinary horse railway would. If all the other cases follow the Rhode Island case, and if it can be said that these cases are authority for the proposition contended for here, that an electric street railway with its wires and poles is not an additional burden, then it is worth while to observe that the principle upon which the cases rest is the one mentioned by the Rhode Island court, namely, not an exclusive and continued occupation of a part of a street to the exclusion of the rest of the public. That principle is sound. But in the case at bar there is no room for the conclusion that the street railway company by the poles and wires which it has placed in the street does not exclusively occupy a portion of that street to the exclusion of the rest of the public. Looking at the original platting of Jaynes' property and the dedication made by the then owner of the lots of a part of it for a street, we think the true construction of the grant made is this: that the grantor intended that the street should be used for the purpose of enabling the public to pass and repass thereon; that it might pass on foot, on horseback, or in vehicles, and that whether the motive power of the vehicles should be steam, electricity, horse-power, compressed air, or any other power. The grant contemplated the right of the public to temporarily use any part and all of these streets for the purpose of passing over them in any manner that it might choose and by such means as it might see fit to employ. But the grant did not contemplate that any

person or corporation might exclusively and permanently appropriate any part of these streets to its use to the continued exclusion of the rest of the public. In the case at bar the railway company with its poles and wires has exclusively appropriated a portion of these streets to its own use to the exclusion of the rest of the public. If the railway company were moving its cars on the surface of these streets by electric power without so permanently and exclusively occupying any portion of the street, we do not think the mere fact that the motive power used was electricity would take the use out of the purpose contemplated by the original grant. The use made of these streets by the railway company is not one common with that of the public generally; its poles and wires remain and must remain and exclusively occupy particular portions of the street and continuously exclude the public from such portions. Whether a use made of a street is an additional burden upon the easement we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose permanently and exclusively occupy all or a portion of the street to the continued exclusion of the rest of the public. If they do not, then it is not an additional burden. If they do, it is.

It has been almost universally held, we think, that an ordinary street railway whose cars were moved by horses was not an additional burden. See, among others, the following authorities: *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Citizens Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; *Texas & P. R. Co. v. Rosedale Street R. Co.*, 64 Tex. 80; *Elliot v. Fair Haven & W. R. Co.*, 32 Conn. 579. These decisions rest upon the principle that the street was originally dedicated to the public for the purposes of travel thereon; that a car is a vehicle, the same as a coach or a wagon, and that the

track of a street railway company is laid upon a level with the surface of the street and in such manner as not to obstruct the street and prevent people from freely passing and repassing thereon. In other words, the horse-car and its track is not a continued exclusive appropriation of any part of the street to the continued exclusion of the rest of the public from that part of the street.

The city of Shawneetown, Illinois, built a levee in a street of that city for the purpose of protecting it against the overflow waters of the Ohio river. The levee was some ten feet high, but so constructed that the top thereof could be used as the street had been. An abutting lot owner sued the city for damages, claiming that his lot had been depreciated in value by the presence in front of it of this levee, as it hindered his free ingress and egress to and from his property, and the supreme court of Illinois, in *City of Shawneetown v. Mason*, 82 Ill. 337, held that the levee was an additional burden and the city liable.

The city authorities of East St. Louis, Illinois, authorized a bridge company which owned a bridge across the Mississippi river at that point to construct an approach to this bridge in a public street. An abutting lot owner sued the city for damages, claiming that the approach to the bridge interfered with his free ingress and egress to and from his property and depreciated it in value, and the supreme court of Illinois, in *Stack v. City of East St. Louis*, 85 Ill. 377, held that the approach to the bridge was an additional burden and the city liable for damages which its presence caused the abutting lot owner.

The city of New York, prior to May, 1773, caused one of its engineers to survey and lay out into lots certain territory. Upon the plat the engineer left a space for streets. The conveyance made of these surveyed lots to the grantors of one Story contained a covenant that the grantee in such deed would "build and erect" at his own expense certain streets, among others the streets on

which Story's property fronted. The deed also declared that the streets marked on the survey or plat "shall forever thereafter continue and be for the free and common passage of and as public streets and ways for the inhabitants of the said city and all others passing and returning through or by the same in like manner as the other streets of the same city now are or lawfully ought to be." Story became the owner of one of the lots so surveyed and marked out on said plat. The New York Elevated Railroad Company was about to construct in this street, under proper municipal and legislative authority, a trestle-work fifteen feet high. On this they were intending to lay tracks and on these tracks operate passenger cars. Story sought to enjoin the railroad company from such use of the street until he should be awarded the damages which his property would sustain thereby. The case went to the court of appeals of New York and is reported in *Story v. New York E. R. Co.*, 90 N. Y. 122. It was insisted by counsel for the railroad company that the construction and operation of the railroad as contemplated was within the purpose of the original grant or dedication of the land for the street; but the court of appeals held that the proposed railroad would impose an additional burden upon the easement, and the principle upon which it based its decision is that the trestle-work would amount to a permanent and exclusive occupation of a portion of the street to the continued exclusion of the public from such portion. To the same effect see *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 288.

It is quite generally held that an ordinary steam railroad in a city street or country highway constitutes an additional burden, and this is because the track of a steam railroad is of such a nature and so constructed that it exclusively and continuously occupies a portion of the street or highway to the continuous exclusion of the rest of the public from such part of said street or highway. See, among others, *Hastings & G. I. R. Co. v.*

Ingalls, 15 Neb. 123; *Indiana, B. & W. R. Co. v. Hartley*, 67 Ill. 439, and cases there cited. Railroad cars are as much vehicles for the transportation of passengers enabling the public to pass and repass from one part of the city or country to another as are horse-cars or carriages and buggies; but the rails of an ordinary railroad are laid upon ties, and these rest upon an elevation, and the road-bed is of such a nature and construction that it obstructs the street or highway in which it is placed and debars the rest of the public from the use of that part of the street or highway occupied by its track.

It is also very generally held that telegraph and telephone poles in city streets or rural highways constitute additional burdens entitling the abutting property owner to compensation. See, among others, the following cases so holding: *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; *Chesapeake & P. Telegraph Co. v. Mackenzie*, 21 Atl. Rep. [Md.] 690; *American Telephone & Telegraph Co. v. Smith*, 18 Atl. Rep. [Md.] 910; *Western Union Telegraph Co. v. Williams*, 11 S. E. Rep. [Va.] 106; *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133. The principle upon which all these cases rest is the sound one that the highway or street is dedicated to the public for the purpose of enabling the public to pass and repass thereon, and that the erection of the poles in the streets by the telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies to the continued exclusion of the remainder of the public, and in that sense the poles are a continued obstruction in the streets.

The supreme court of Pennsylvania, in *Pennsylvania R. Co. v. Montgomery County P. R. Co.*, 167 Pa. 62, held that an electric street railway, such as the one involved in this case, built in a public highway outside of the city was an additional burden entitling the adjacent land owner to damages. We think that the poles and wires of the electric railway company are an additional servitude or constitute an additional burden upon the streets

in which they are placed, and that the abutting lot owners of such streets are entitled to whatever damages their property has sustained by reason thereof.

2. Thus far we have considered this case with reference to the question as to whether the original dedication made of the street contemplated that the city might use or authorize the use of the streets for the purpose of placing poles and wires therein in connection with the operation of a railway. But our constitution, article 1, section 21, provides that the property of no person shall be taken or damaged for public use without just compensation. The writer is of opinion that if it be assumed that the original owner of this street in dedicating it to the public contemplated that it might be used for the erection of poles and wires therein in connection with the operation of a passenger street railway, nevertheless if the city, in applying the street to that use, or authorizing it to be so applied, damages the property of the adjacent owner, he is by virtue of the constitution entitled to damages. This court, with nearly all other courts in which the state constitution is like ours, has held that an abutting lot owner is entitled to compensation if his lot is depreciated in value by reason of the changing of the grade of the street in front of it. Now, when the land owner plats it into an addition to a city, leaves a space for a street, he not only dedicates that space to the public for the purpose of a street, but he knows, or must know, that the municipality may work such street, keep it in repair, pave it, grade it, curb it, and may change the grade. And where the courts have awarded damages to abutting lot owners because of a change in the grade of a street, it has not been upon the principle that such a change of grade was not contemplated at the time the grant was made; but it has been because of the constitutional inhibition that the public for its use shall not damage the citizen's property without compensation. Such is the *City of Elgin v. Eaton*, 83 Ill. 535. Most of the old constitutions contained a provision that private prop-

erty should not be taken for public use without just compensation, and it was quite generally held by the courts that this provision of the constitution did not entitle an abutting lot owner to compensation for damages which his property had sustained by reason of a change of grade in the street. These cases rest upon the principle that a change of grade of a street was within the purview of the original grant of the land for the street. Suppose that A, owning a block in a city, shall deed one-half of it to that city for any public purpose. By such a grant the city may devote that to any city purpose it may choose, and A could not be heard to say that the purpose to which the city had devoted the grant was not within it; but nevertheless, if the city, in the use it makes of the granted property, shall injure the remainder of A's property, it would be liable for the damages, because in accepting the grant it did so subject to the constitutional provision, and though it might devote it to any public purpose it chose, yet if in so doing it damages A's property, or any other citizen's property, it must make good such damages. It seems to me, therefore, that in order to enable the plaintiff in error in this case to recover damages from the street railway company, it is not absolutely essential that the poles and wires of the street railway company should be held, as a matter of law, to be an additional burden upon the easement.

3. The petition in this case alleges that the permanent existence in the street opposite this property of the poles and wires of the railway company interferes with the plaintiff's ingress and egress to and from her property and have depreciated its value. Are these facts evidence competent to go to the jury for the determination of the question as to whether the plaintiff's property has been damaged within the meaning of the constitution just quoted?

In *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550, the railroad company constructed its tracks in an alley with

the consent of the city authorities. The owner of the abutting lot sued the company for damages. The court, in speaking of the constitutional provision in reference to damage to property for public use, said: "The constitutional provision, therefore, is that private property shall not be taken or injuriously affected without just compensation therefor. The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. To this extent the property owner is entitled to recover. It is not necessary to entitle a party to recover, that there should be a direct physical injury to his property if he has sustained damages in respect to the property itself whereby its value has been permanently impaired and diminished."

In *City of Omaha v. Kramer*, 25 Neb. 489, it is said: "The words 'or damaged' in section 21, article 1, of the constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property."

In *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, the railway company took no part of Hazels' property and no part of the street in front of his lot was occupied by the railway company's track, and yet the court held that if Hazels' property was damaged because of the location of the tracks he was entitled to recover.

In *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276, Janecek sued the railroad company for damages which he alleged he had sustained by reason of the depreciation in value of his real estate as the result of the construction and operation of the railroad in front of his premises. Janecek owned block 16, and also a small tract of land

lying immediately south thereof. His residence was on the west end of this small tract of land. West of block 16 and the small tract of land was Atlantic street, and west of this was block 15. The railroad company constructed its road through this latter block. No part of the railroad was on any part of Janecek's property, nor was any part of the railroad's property in the street on which his, Janecek's, property abutted. The court, speaking through NORVAL, J., said: "The plaintiff's right to recover is based upon section 21, article 1, constitution of this state, which provides that 'The property of no person shall be taken or damaged for public use without just compensation therefor.' It has become the settled law of this state that under this provision of our constitution it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason of the public improvement, which the owner has specially sustained, and which is not common to the public at large, a recovery may be had." To the same effect is *City of Pekin v. Winkel*, 77 Ill. 56; *Stack v. City of East St. Louis*, 85 Ill. 377; *Rigney v. City of Chicago*, 102 Ill. 64. In this last case Rigney recovered damages from the city of Chicago because it had permitted the construction of a viaduct over the intersection of Kinzie and Halsted streets 220 feet west of Rigney's property. Rigney claimed that the construction of this viaduct cut off his communication with Halsted street, except by means of a pair of stairs at the intersection, and that because of this impairment of communication his real estate had been damaged. The supreme court said: "'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the constitution, as to the taking or damaging of private property

for the public use. But the word is often used to indicate the subject of the property or the thing owned. * * * The restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the constitution of 1848, which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The constitution of 1870, however, provides that 'private property shall not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally which by the common law would, in the absence of any constitutional or statutory provision, give a right of action."

Applying the principles enunciated in the foregoing cases to the facts of the case at bar, we are of opinion that if Jaynes' property is depreciated in value by reason of the exclusive use of a part of the streets in front thereof by the railway company's poles and wires and the continued presence in such streets of said poles and wires, she is entitled to compensation for such damages. As an abutting property owner she has the right to free ingress and egress to and from this property and to and from the street, a right to an unobstructed view of the property from the street and an unobstructed view of the street from the property, and if poles and wires of the railway company in the street in front of this property permanently and continuously infringe these rights, and she is damaged thereby, she is entitled to compensation therefor. If a railway company, without responsibility to the abutting lot owner, may build and maintain in the street one track, it may construct and maintain any number. If it may with impunity place and maintain in the street in front of the lot owner's property poles fifty

feet apart, it may place them five feet apart, or closer, until the premises, with poles and wires in front, will resemble the pictures one sees of the staked corral of the South African Zulu. Such a staking in of premises would, of course, impair their value; and yet the difference in the case supposed and the one under consideration is one of degree only. This difference does not affect the owner's right of action, but goes only to the *quantum* of his damages. What acts, omissions, facts, or circumstances are competent evidence of damages to be considered by a jury are questions of law for the court; but whether such acts, omissions, facts, and circumstances affect an owner's property and damage it and the amount of such damages are for the jury.

The judgment of the district court is reversed and the cause remanded with instructions to overrule the demurrer of the street railway company and permit it to answer.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

RYAN, C.

I desire to place my concurrence in the result in this case on grounds rather more limited than those above given. In this case a general demurrer was sustained to the petition, upon which, the plaintiff having elected to stand, there was a judgment for the defendant. The demurrer, for present purposes, must be assumed to have admitted such facts as were well pleaded, and it therefore is necessary that the averments of the petition should be stated with more than ordinary fulness. The defendant was described as a corporation engaged in the maintenance, construction, and operation of street railways in the city of Omaha, and was described as the successor of another street railway company in rights and liabilities with respect to the street railway along plaintiff's premises, hereinafter more particularly de-

scribed. The condition of the streets affected and their appropriation and use by the predecessor of the defendant, as well as by the defendant itself, were described in the petition in this language: "That said lot (owned by plaintiff) is a strip of ground 240 feet in length east and west and 60 feet in width north and south, bounded on the east by Sixteenth street, on the south by Clarke street, in the city of Omaha; said Sixteenth street east of said premises and Clarke street south of said premises, at the time of the happening of the grievances hereinafter complained of, were, and for a long time prior thereto had been, public streets of said city of Omaha, but not occupied, used, or obstructed by steam, electric, or horse railways in any manner whatever; that on or about the first day of September, 1889, a corporation known as the Omaha Motor Railway Company constructed a line of street railway over and upon Clarke street, immediately south of said premises, and over and upon Sixteenth street, immediately east of said premises, and commenced the operation of said line of railway over and upon said streets adjacent to said premises, the motive power used upon said street railway at the time of the construction thereof being electricity, poles for the purpose of supporting overhead wires being set in the ground along said streets and adjacent to said premises and overhead wires being attached thereto along said streets adjoining said premises. Plaintiff further says that ever since the construction of said street railway the same has been operated as an electric street railway, cars and motors passing over the line of said railway immediately adjacent to said premises and over Clarke street immediately south of said premises and Sixteenth street immediately east of said premises at intervals of about five minutes. Plaintiff further says that by reason of the location, construction, and operation of said line of street railway over and upon Clarke street immediately south of said premises and over and upon Sixteenth street immediately east of said premises and adjacent

thereto, said premises have been greatly depreciated, the location of the tracks, poles, and wires of said street railway upon said Clarke and Sixteenth streets, as hereinafter described, greatly interfering with the egress from, and ingress to, said premises from said streets and obstructing the view from said premises looking toward said streets, the passage of trains over said street railway upon said streets in front of and adjacent to said premises also greatly interfering with the ingress to and egress from said premises, rendering the same difficult and dangerous, and the noise and vibration incident to the use of said tracks by said defendant company greatly interfering with the comfort and convenience of persons occupying said premises, said premises having been lessened and depreciated in value, on account of the construction and operation of said street railway, in the sum of $20,000."

The facts upon which the plaintiff predicates his right of recovery are the taking possession of, and the using for, a street railway operated by electricity of two streets adjacent to his property. The first class of the elements of damages claimed refers to the effect of locating the tracks, poles, and wires as obstructions to ingress and egress and of the view from the premises of plaintiff looking toward the street. The other elements are the passage of trains over the track, interfering with, and rendering dangerous, egress from and ingress to plaintiff's premises, and the noise and vibration incident to the use of the tracks which interfere with the comfort and convenience of persons occupying said premises. In respect to the last two, it may be said that it is now the settled doctrine in this country that an ordinary street railway upon which cars are moved by horse-power is not an additional burden. (*Citizens Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; *Carson v. Central R. Co.*, 35 Cal. 325; *Texas & P. R. Co. v. Rosedale Street R. Co.*, 64 Tex. 80; *Elliott v. Fairhaven & W. R. Co.*, 32 Conn. 579; *Chicago, B.*

& *Q. R. Co. v. West Chicago S. R. Co.*, 40 N. E. Rep. [Ill.] 1008; *Merrick v. Intramontaine R. Co.*, 24 S. E. Rep. [N. Car.] 667.) For the occupation and use of the street for ordinary street railway purposes it must, I think, be conceded that the defendant was not liable to plaintiff in damages upon the authority of these cases, hence I omit the allegations as to the occupation and use of the street by a track, for it is common to all street railways, whether operated by horse-power or electricity.

I shall now consider the respects in which the petition charges that the defendant's use of the street differed from that of an ordinary street railway operated by horse-power and in what respects this different use has caused damage to be suffered by the plaintiff. These factors we have already grouped under the first class of elements of damages, and they are the locating of poles and wires which obstruct ingress and egress and interfere with view from plaintiff's premises across the street. The manner in which real property may be injuriously affected without being physically disturbed or entered upon is well illustrated by the following adjudicated cases: The city of Shawneetown, Illinois, built a levee in a street of that city for the purpose of protecting it against the overflow waters of the Ohio river. The levee was about ten feet high, but was so constructed that its upper surface could be used as the street had been before the construction of said levee. An abutting lot owner sued the city for damages, claiming that his lot had been depreciated in value by the presence in front of it of this levee, for the reason that it hindered his free ingress and egress to and from his property, and the supreme court of Illinois held the city liable. (*City of Shawneetown v. Mason*, 82 Ill. 337.) The construction of the approaches to a bridge in such a manner as to obstruct the ingress and egress of an owner to and from his property was held to be such an injury as entitled such owner to maintain an action for damages. (*Stack v. City of East St. Louis*, 85 Ill. 377.) In *Merrick v. Intramontaine R. Co., supra*, it

was said by Faircloth, C. J., delivering the opinion of the supreme court of North Carolina: "If the street railway should be so constructed—for instance, if it should shut out or shut off the abutter with embankments, and thus materially impair his rights—this would seem to be an additional burden and subject the company to damages." These adjudicated cases serve to illustrate the fact that in plaintiff's petition the averments that the location of the poles and wires of the street railway upon Clarke and Sixteenth streets in such a way as to interfere with plaintiff's ingress and egress and his view from his premises towards said streets, in connection with the allegation that thereby his real property had suffered depreciation in value, sufficiently stated a cause of action in view of section 21, article 1, of the constitution of this state, which is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor." As further illustrating the applicability and purpose of this constitutional provision, see also *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550; *City of Omaha v. Kramer*, 25 Neb. 489; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; and *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276. I have considered this case as it was presented by the averments of the petition which the demurrer admitted to be true, and, tested by the requirements of liberal construction laid down in *Roberts v. Samson*, 50 Neb. 745, there was stated a cause of action. If there exist facts which should serve to change or modify our views, these facts, I think, should be pleaded by the defendant, for we cannot assume their existence. For the reasons above stated I concur in the conclusion. The judgment of the district court should be reversed.

BANKERS LIFE INSURANCE COMPANY OF LINCOLN, NEBRASKA V. THOMAS L. STEPHENS.

FILED FEBRUARY 2, 1898. No. 7807.

Insurance: CONSTRUCTION OF CONTRACT FOR COMPENSATION OF AGENT. The contract between an insurance company and one Stephens provided for the appointment of the latter as the insurance company's agent for an indefinite time; that his compensation for services rendered as agent should be a certain per cent of the premiums collected and remitted on risks written by him. Further, the contract recited: "For the first fifteen months we will give you a salary of $200 per month, and should your income from the commission part of your contract run more than your salary, you shall be entitled to the benefit of the same. In consideration of the contract as a whole you agree to turn into the company of insurance accepted and paid for $200,000 the first fifteen months." *Held*, (1) That the agent was entitled to a salary of $200 per month and the stated per cent of premiums collected for the first fifteen months he served the company; (2) that the salary was payable monthly; (3) that the agent's writing $200,000 insurance during the first fifteen months of his employment was not a condition precedent to his right of $200 per month and the percentage on premiums collected during that time.

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

Ames & Pettis, for plaintiff in error.

John A. Davies, R. D. Stearns, and *E. C. Strode, contra.*

RAGAN, C.

January 20, 1892, the Bankers Life Insurance Company of Lincoln, Nebraska, and Thomas L. Stephens entered into a contract in writing in and by which Stephens was appointed agent of the insurance company for an indefinite time. The contract was in words and figures as follows:

"*Thomas L. Stephens, Glenwood, Iowa:* You are hereby appointed an agent of the Bankers Life Insurance Company of Nebraska, for field work under the management of said company, with authority to secure applications

for insurance, collect and remit first premiums, and to perform such other duties as may be required of you in this behalf, subject to all the rules and regulations of this company and such other instructions as shall be communicated to you from time to time by said company. It shall be your duty:

"First—To thoroughly inform yourself of the company's plans and advantages, and to make them publicly known throughout the limits of your agency.

"Second—To use your best efforts and your greatest skill in promoting the company's business by canvassing personally for acceptable applications for insurance in said company, and in guarding its interests generally.

"Third—To receive all moneys and other securities received by you on account of said company in a fiduciary trust, and transmit the same to the home office at once, together with a report in detail, embracing every item of business done by or through you not previously reported.

"Fourth—To execute and maintain in behalf of said company a bond in the sum of $500, with good and sufficient sureties, conditioned for the faithful performance of all your obligations under this appointment.

"You are not authorized to alter, make, or discharge contracts, or to bind the company in any way.

"The compensation to be allowed for services properly rendered under this appointment shall be a commission upon the premiums actually collected and remitted upon the policies secured by it through you as follows: Sixty per cent of the first year premiums on fifteen and twenty payment life, twenty year endowment, ordinary life, ten year renewal, and twenty year bond; fifty per cent on ten payment life and fifteen year endowment. Also a ten per cent annual renewal interest on each policy written by or through you for four years succeeding the first year, and this shall be construed to mean that a ten per cent renewal interest shall be paid each year for four years on all policies written by or through you when premi-

ums have been collected and paid for, said four years to commence one year from date of policy. (But all your interest under this contract shall cease at any time your connection with this company is severed, except that if such severance is made by the company you shall be entitled to, and the company hereby agrees to pay you, two annual renewals of ten per cent each on all premiums collected and paid for on all policies written by or through you or your sub-agents, such payment being in lieu of the four ten per cent annual renewals specified herein.) Neither sickness or death shall annul any of your interest under this contract.

"You are hereby authorized to hire sub-agents, and any difference between what you pay them and your contract will be credited to your account.

"This appointment may be revoked at any time upon one year's previous notice in writing, should you fail to comply with any of its conditions, or should the amount of new business secured by you not prove remunerative, or should the business not be conducted in a satisfactory manner.

"For the first fifteen months we will give you a salary of $200 per month, and should your income from the commission part of your contract run more than your salary, you shall be entitled to the benefit of the same. In consideration of the contract as a whole, you agree to turn into the company of insurance accepted and paid for $200,000 the first fifteen months in any or all of the following kinds of policies: Ten, fifteen, and twenty payment life; fifteen and twenty year endowment; twenty year bond; ten, fifteen, and twenty payment life, with extended insurance.

"I hereby accept the foregoing appointment and agree to comply with its terms and conditions."

In the district court of Lancaster county Stephens brought this suit against the insurance company, alleging that he entered upon the duties contracted to be performed by him by virtue of such contract and continued

in the performance of such duties for the insurance company for a period of ten months immediately after January 20, 1892; that at the end of that time the insurance company, having wholly failed to perform its part of the agreement, wrongfully discharged him from its employ, and then and thereafter refused to permit him to longer continue in its employ; that he was at all times during the fifteen months immediately following the date of such contract able, ready, and willing, and repeatedly offered and held himself out as being ready and willing, to do and perform all the duties and obligations required of him by said contract. By this action Stephens sought to recover from the insurance company fifteen months' salary at $200 per month. He had a verdict and judgment, and the insurance company brings the case here for review on error.

The only contention of the plaintiff in error, which we notice, is that the district court erred in the construction placed by it upon the contract between the parties. The insurance company's construction of the contract is that Stephens was to be paid for the first fifteen months of his employment a compensation at the rate of $200 per month, provided that during said time he wrote and turned into the insurance company risks accepted by the company, and on which the premiums had been paid, aggregating $200,000. On the other hand, Stephens' construction of the contract was and is that in any event he should be paid a compensation of $200 per month for the first fifteen months that he served the company and the commissions provided by the contract on all risks procured during that time. A further contention of Stephens was that this salary of $200 per month was payable monthly. The district court adopted the construction of the contract contended for by Stephens. We are of opinion that the construction placed upon the contract by the district court was the correct one, and its judgment is

AFFIRMED.

JOHN L. SCHIEK ET AL. V. NANCY SANDERS ET AL.

FILED FEBRUARY 2, 1898. No. 7827.

1. **Intoxicating Liquors:** ACTION AGAINST SALOON-KEEPER: DAMAGES. Damages awarded *held* not excessive under the evidence.
2. ———: EVIDENCE OF INTOXICATION: LICENSE. Evidence examined, and *held* to sustain the finding of the jury that the deceased, at the time he was injured, was intoxicated from drinking liquor furnished him by the plaintiff in error, and that plaintiff in error was a licensed saloon-keeper at the time of furnishing the deceased such liquor.
3. ———: EVIDENCE OF LICENSE. In a suit by a widow against a saloon-keeper to recover damages for loss of support resulting from her husband's death, alleged to have been caused by his intoxication from drinking liquors furnished by plaintiff in error, when the issue is whether the plaintiff in error was a licensed saloon-keeper, proceedings of the city council showing the granting of a liquor license to the plaintiff in error, and the record of liquor licenses kept by the city clerk, showing that a liquor license had been granted to the plaintiff in error, are competent and sufficient evidence to sustain a finding that the plaintiff in error was a licensed dealer in intoxicating liquors. To prove the affirmative of such an issue the production in evidence of the actual license issued is not essential.
4. ———: SALES: LIABILITY OF SALOON-KEEPER AND SURETIES. A licensed dealer in intoxicating liquors, and the sureties upon his bond, are liable for the loss of support sustained by the widow and children of a decedent, whose death was contributed to by intoxicating liquors drank by the deceased and which were furnished him by the liquor dealer.

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

Alfred Hazlett and *Fulton Jack*, for plaintiffs in error.

George Arthur Murphy and *William C. Le Hane, contra.*

RAGAN, C.

On the evening of April 14, 1893, E. J. Sanders boarded a passenger train of the Rock Island Railway Company at Beatrice, Nebraska, for the purpose of going to his

home at Harbine, a station near by, and while alighting or attempting to alight from the train at Harbine he was injured, from the effects of which he died on the 17th of the same month. His widow, Nancy Sanders, in behalf of herself and her four minor children, in the district court of Gage county, brought this suit against John L. Schiek and others, being licensed dealers in intoxicating liquors and the sureties on their bonds, for damages for loss of support and maintenance which she and her children had sustained by reason of the death of the husband and father, basing her action upon the ground that the saloon-keepers had sold or furnished to said Sanders at Beatrice, Nebraska, on the date of his injury, intoxicating liquors, which he there drank and which caused his intoxication, and that the injuries from which he died resulted from his being intoxicated by the liquors so sold and furnished him. Mrs. Sanders had a verdict and judgment, and the defendants below, who were held liable, have brought the same here for review on error.

1. The first argument is that the damages awarded Mrs. Sanders by the jury are excessive, appearing to have been given under the influence of passion or prejudice. The jury awarded Mrs. Sanders $850 damages. The amount prayed for in the petition was $5,000. The evidence shows, without conflict, that Sanders, prior to his injury, was a healthy man, thirty-eight years of age; that he was a mechanic capable of earning, and had been earning for some years immediately prior to the time of his injury, about $3 per day; that he devoted his earnings to the support and maintenance of his family, consisting of his wife and four minor children, the oldest being twelve years of age; that his death left his widow and children without means of support, except what the widow earned by washing. Sanders' expectancy of life at the time of his death was more than twenty-five years. We find nothing in the record which indicates that the jury was influenced by passion or prejudice, at least against these plaintiffs in error, in making this award.

The evidence would have sustained a verdict for all claimed in the petition.

2. A second argument is that the verdict is not sustained by sufficient evidence. One of the contentions on which this is based is that one Blanchard, a brother-in-law of the deceased, was a witness for the plaintiff below, and plaintiffs in error contend that they impeached his testimony. Blanchard testified on the trial in behalf of Mrs. Sanders to being in company with the deceased in Beatrice most of the day on which he was injured; that he was present with him in the saloons of the plaintiffs in error, and that Sanders drank from fifteen to twenty drinks of whisky and a number of drinks of beer; in short, that he was in the saloons of the plaintiffs in error on the day he was injured, drank intoxicating drinks therein which were furnished him by the plaintiffs in error, and was drunk from the effects of the liquor drank at the time he left Beatrice, about 8 o'clock in the evening, for his home at Harbine. Certain witnesses testified on behalf of the plaintiffs in error that Blanchard testified at the coroner's inquest held over the body of Sanders on April 17 to the effect that Sanders was not drunk in Beatrice on the 14th; or, in other words, witnesses testified to statements made by Blanchard on April 17 and other times which tended to contradict the testimony he gave on the trial of this case. But we cannot say that the verdict lacks evidence to support it because of this attack upon the credibility of Blanchard. Notwithstanding the attack upon his testimony the credibility of his evidence was still for the jury. Furthermore, if the entire evidence of Blanchard be eliminated from the record, the evidence still sustains the finding of the jury that the plaintiffs in error furnished Sanders liquor on April 14 from which he became intoxicated, and that his intoxication caused the injury from which he died. Various witnesses testified that Sanders and Blanchard were together in Beatrice on April 14; were in the saloons of plaintiffs in error drink-

ing intoxicants as late as 5 o'clock in the evening. Mrs. Blanchard testified that her husband and the deceased were at her house between 1 and 2 o'clock in the afternoon and that they were both drunk at that time; that they returned later in the evening, about 6 o'clock, and that Sanders was drunk at that time; that she tried to induce him to remain at her house over night because of his intoxicated condition. Other witnesses testified to Sanders being in a store in the afternoon and buying or negotiating for a jacket or blouse which he tried on; that he was then intoxicated and acted foolishly, and that he attracted the attention of the lady clerks to his intoxicated condition by remarking that he looked well enough in that jacket for a Sunday school superintendent. Another disinterested witness testified to meeting Sanders near 6 o'clock P. M. in the saloon of the plaintiffs in error; that Sanders drank intoxicants in the saloon at that time; that he was drunk, and though he was a stranger to the witness he shook hands with him and called his attention to the fighting qualities of a dog he had with him. This is not all the evidence, but it is sufficient to show that the finding of the jury that Sanders was drunk in Beatrice on the evening of April 14 from drinking liquors furnished him by the plaintiffs in error is sustained by the evidence.

A second argument under the contention that the verdict lacks evidence to sustain it is this: The petition alleges that the plaintiffs in error were licensed saloon-keepers. The answer denies this. The plaintiffs in error insist that the record contains no proof that they were licensed saloon-keepers on April 14, 1893. This contention is untenable. On the trial there were introduced in evidence the applications made by the plaintiffs in error for license to sell intoxicating liquors for the year ending May 1, 1893, the public notices given by them of such application as required by the statute, the bonds executed by the saloon-keepers in pursuance of the provisions of the statute, the proceedings of the city

council granting them licenses to sell intoxicating liquors for the ensuing year, and the "license book" kept by the city clerk which recited that licenses had been issued to the plaintiffs in error, the date thereof, the amount of the license fee, and when the license expired. It is true that the actual paper, certificate, or license, if one was actually issued by the city council or the clerk and delivered to the plaintiffs in error, was not produced in evidence; but if such a paper existed it did not belong in the office of the city clerk; if it had ever been issued, it was delivered to the plaintiffs in error and was presumably in their possession. The evidence offered by the plaintiffs below upon this subject was sufficient to sustain the jury's finding that the plaintiffs in error were on April 14, 1893, duly licensed saloon-keepers in the city of Beatrice.

3. The third argument is that the court erred in giving to the jury the following instruction: "The court instructs the jury that it is not necessary in order to warrant a recovery in this case that the intoxication of E. J. Sanders, deceased, by means of intoxicating liquors sold or given away by any of the defendants herein to him be the direct, natural, and proximate cause of the death of said E. J. Sanders; but if the jury shall find that the use of intoxicating liquors, directly or indirectly, contributed towards or assisted in producing the death of said E. J. Sanders, and that all or any part of the intoxicating liquors so used by the said E. J. Sanders were sold or given away to him by defendants, * * * or any of them, then your verdict shall be in favor of the plaintiffs and against the defendants, or such of them as were guilty of such wrongful act." The criticism upon this instruction is that it lays down the rule that a saloon-keeper and the sureties on his bond are liable to the widow and children of a decedent for their loss of support if the decedent's death was contributed to by intoxicating liquors drank by the decedent which were furnished him by the saloon-keeper. The contention of

the plaintiffs in error is that the liability of the saloon-keeper only attaches where it is shown that he furnished liquor to the decedent and his drinking of the same and his intoxication therefrom were the direct and proximate causes of his death. But by an unbroken line of decisions of this court in construing the liquor law of the state (Compiled Statutes, ch. 50) it is now established that a saloon-keeper and the sureties upon his bond are liable for the loss of support sustained by a widow and children of a decedent whose death was contributed to by intoxicating liquors drank by the deceased and which were furnished him by the saloon-keeper. The court did not err in giving this instruction. (See, among others, the following authorities: *Roose v. Perkins*, 9 Neb. 304; *Kerkow v. Bauer*, 15 Neb. 150; *Elshire v. Schuyler*, 15 Neb. 561; *McClay v. Worrall*, 18 Neb. 44; *Wardell v. McConnell*, 23 Neb. 152; *McManigal v. Seaton*, 23 Neb. 549; *Jones v. Bates*, 26 Neb. 693; *Sellars v. Foster*, 27 Neb. 118; *Uldrich v. Gilmore*, 35 Neb. 288; *Chaelir v. Sawyer*, 42 Neb. 362; *Cornelius v. Hultman*, 44 Neb. 441; *Gran v. Houston*, 45 Neb. 813.)

4. A final argument is that the court erred in refusing to instruct the jury that no evidence had been adduced before them showing that the plaintiffs in error were on April 14, 1893, licensed saloon-keepers in the city of Beatrice, and that they should therefore return a verdict in their favor. For reasons already stated the court did not err in refusing to so instruct the jury.

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

AFFIRMED.

A. U. WYMAN, RECEIVER, APPELLEE, V. L. B. WILLIAMS ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7634.

1. **Corporations:** INSOLVENCY: DIRECTORS. The directors of an insolvent corporation cannot lawfully appropriate its assets to the payment of debts due them from it to the entire exclusion of other corporate creditors.
2. ———: ACTION BY RECEIVER: SUBSCRIBERS TO STOCK. A suit by the receiver of a corporation against subscribers to its stock to recover their unpaid stock subscriptions will not lie until the amount justly due from the corporation has been ascertained and the corporate property exhausted.
3. ———: ———: ———. When the directory of a corporation, before it is put into the hands of a receiver, makes a call or assessment on the stock subscribers for all or a part of their unpaid stock subscriptions, such calls become at once corporate property or assets of the corporation and may be sued for and collected by a receiver subsequently appointed as any other asset of the corporation.
4. ———. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175, and *State v. German Savings Bank*, 50 Neb. 734, reaffirmed and distinguished.

MOTIONS for rehearing of case reported in 52 Neb. 833. *Overruled.*

Hall & McCulloch, *Warren Switzler*, and *J. W. West*, for the motion.

RAGAN, C.

This is a motion for rehearing of *Wyman v. Williams*, 52 Neb. 833. It is not necessary to state all the facts, as they are sufficiently stated in the former opinion.

The parties filing the motions for rehearing are S. R. Johnson, George F. Wright, and Henry W. Yates. These parties were subscribers to the stock of the Nebraska Insurance Company and paid in cash for the stock subscribed by them fifty per cent of its face value, and by the articles of incorporation the remainder of the

subscription was payable on the call of the directors. Some time after the corporation began business the directors of the corporation made a call or an assessment upon their stockholders of eighty-three and one-fourth per cent of the amount of the unpaid stock subscriptions for the purpose of raising money to pay the debts and expenses of the corporation. Subsequently the insurance company was placed in the hands of a receiver and he brought this action against the parties filing this motion, and the other stockholders of such insurance company, and sought to recover the full amount of their unpaid stock subscriptions. The decree of the district court, so far as it affects the parties moving here, resulted in a personal judgment against them in favor of the receiver for the amount of the assessment or call made against them by the stockholders. We will first dispose of Mr. Yates' motion. He was made a party defendant to the receiver's action, and it seems that he appeared therein, demurred to the petition, and that his demurrer was overruled. If he filed an answer in the case, the fact is not disclosed by the record. This being the case, he could only be heard on this appeal as to the correctness of the district court in overruling his demurrer; but a copy of this demurrer is not in the record, and we do not know upon what grounds the demurrer was urged below. We must therefore overrule the motion.

Johnson and Wright make three arguments in support of their motion for a rehearing. The first is that the district court, by its decree, found that prior to the time the call or assessment was made for unpaid subscriptions they had advanced to the insurance company a large sum of money, and they insist that these advancements were made by them under an agreement existing between them and the insurance company that the advancements made by each of them should be applied on their unpaid stock subscriptions. There is some evidence in the record on behalf of Johnson and Wright which tends to support this contention, but whether these

advancements of money made by them to the insurance company were made in pursuance of an agreement that they should be applied on their stock subscriptions and were as a matter of fact payments on their unpaid stock subscriptions was a question of fact for the district court. That tribunal has resolved that question of fact against these appellants and we cannot say that its conclusion is not supported by sufficient evidence.

The second argument is that the directors, among whom were Wright and Johnson, at the time they levied the assessment and made the call for the payment of part of the unpaid stock subscriptions, then and there agreed that the moneys which Johnson and Wright had before that time advanced or loaned to the insurance company, and which the insurance company was then owing them, should be set off against what would be due from them as stockholders of the corporation on the assessment levied upon their unpaid stock subscriptions. This argument is somewhat inconsistent with the contention of appellants that the moneys that they had prior to that time advanced to the insurance company were payments upon their stock subscriptions. But it is insisted that the receiver could not adopt that part of the action of the directors making the assessment or call without also adopting the disposition which the directors made of the assessment so far as appellants are concerned. The argument is this, as we understand it: That at the time the assessment was levied or the call made the insurance company was largely indebted to Johnson and Wright and that the directors had the right to apply or to cancel the assessment of Wright and Johnson to the extent the insurance company owed them; but, as already stated, Johnson and Wright were part of the directory of this corporation; it was at that time insolvent, and they could not take advantage of their position to obtain a preference of debts owing by the corporation to themselves. (See *Gordon v. Plattsmouth Canning Co.*, 36 Neb. 548; *Ingwersen v. Edgecombe*, 42 Neb. 740; *Tillson*

v. Downing, 45 Neb. 549.) If the insurance company was indebted to Johnson and Wright, they had the right, and perhaps have still, to file their claims with the receiver against the corporation and have them paid out of its assets, but they had no right, being directors of the corporation, to use its assets for the purpose of discharging the corporation's debt to themselves to the entire exclusion of other corporate creditors.

The third argument is that a suit by a receiver against the stock subscribers of a corporation to recover unpaid stock subscriptions will not lie until after the corporate property shall have been exhausted. This is true. (See Constitution, art. 11, sec. 4; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175; *State v. German Savings Bank*, 50 Neb. 734.) But this action of the receiver was brought for the very purpose of collecting in the assets of the corporation. After the directors had made the call or the assessment on the stockholders, such a call and assessment became an asset of the corporation, or, in the language of the constitution, became corporate property, and if the corporation had continued to exist and do business, it might have maintained an action in its own name against the stockholders for such assessment; and when it went out of business and was put into the hands of a receiver, he could sue to recover these calls or assessments because they were assets of the corporation, as much so as he could have sued upon a promissory note which the corporation owned. It is true that the receiver in this case by his petition sought to recover from the stockholders all their unpaid stock subscriptions, but by the decree of the district court his recovery was limited to the amount of the call or assessment made by the directors. The motions for rehearing are overruled.

REHEARING DENIED.

CITY OF FRIEND V. FRED N. BURLEIGH, EXECUTOR.

FILED FEBRUARY 2, 1898. No. 7777.

1. **Death by Wrongful Act:** PETITION. A petition in an action based on chapter 21, Compiled Statutes, which avers that the defendant by his wrongful act, neglect, or default caused the death of a person, that the plaintiff is such person's duly-appointed personal representative, and that the deceased left a widow and children, states a cause of action.
2. **Evidence:** DECLARATIONS. A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved; but such fact and the declaration concerning the same must be so clearly and closely connected that the declaration in the ordinary course of affairs can be regarded as the spontaneous explanation of the fact.
3. **Death by Wrongful Act:** EVIDENCE: DECLARATIONS. Where the negligence of a city causes the death of one, and his personal representative sues such city to recover for the benefit of the widow and next of kin of the deceased damages to compensate them for the pecuniary loss they have sustained by reason of his death, the exclusion from evidence of the declaration of the deceased that his injury was the result of his own carelessness, *held* not prejudicial.
4. ———: CARLISLE TABLES. In such suit the "Carlisle tables" are admissible in evidence for the purpose of showing the expectancy of life of the deceased and to admeasure the pecuniary loss to his widow or next of kin resulting from his death.
5. **Executors:** ASSETS OF ESTATE. Such a cause of action is not an asset of the estate of the decedent.
6. **Negligence.** The doctrine of comparative negligence is not in force in this state.

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

J. D. Pope, E. E. McGintie, F. I. Foss, and *W. R. Matson,* for plaintiff in error.

Charles O. Whedon and *J. Palmer, contra.*

RAGAN, C.

On the night of December 4, 1890, David B. Burleigh, while on his way to his residence in the city of Friend,

stepped or fell off a sidewalk in said city, at a point where the walk crossed a ravine some ten feet deep and fifty feet wide, receiving certain injuries from such fall from which he subsequently died. In the district court of Saline county his executor brought this suit against the said city of Friend to recover the pecuniary damages which, he alleged, the deceased's widow and next of kin had sustained by his death; the basis of the executor's action being that the proximate cause of Burleigh's death was the negligent failure of the city to provide the sidewalk, where it crossed said ravine, with railings, or to keep displayed at night on said walk at said place some light or signal. The executor had a verdict and judgment, and the city has brought the same here for review on error.

1. The first argument is that the petition does not state a cause of action. The gist of this contention is that the facts stated in the petition do not show that the widow and next of kin of the deceased have sustained any special pecuniary loss by reason of his death. The petition alleges that the deceased at the time of his death was fifty-eight years old; that he was before the injury a strong and vigorous man; that he was engaged in mercantile business, and that he left surviving him a widow and six children, to whom he devised his property. The action is brought under Compiled Statutes, chapter 21, corresponding to Lord Campbell's Act, and giving to a personal representative an action on behalf of the widow and next of kin for pecuniary injuries by them sustained through the death of the decedent where such death has been caused by the wrongful act, neglect, or default of another under such circumstances that the person injured might himself have maintained an action. In *Burlington & M. R. R. Co. v. Crockett*, 17 Neb. 570, it was held that in such cases the petition must allege that there survived a widow or next of kin. Clearly so, because if there were no persons entitled to the proceeds of the action there could be no such proceeds. There could

be no pecuniary loss unless there was some one within the designated class to sustain it. In *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, the question was one of evidence and not of pleading, and it was held that the jury was warranted in returning a verdict for an insignificant sum, as the evidence did not show a pecuniary loss. There the next of kin were adult brothers and sisters and the deceased was not shown to have so conducted himself as to warrant an inference that his continued existence would have been for their pecuniary advantage. There was no legal obligation in their favor. In *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, the petition alleged that the deceased left a widow and certain children and that they were wholly dependent upon him for support. This was held sufficient. In *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4, it was held that a petition must show that the beneficiaries sustained a pecuniary loss. There again the next of kin was one not legally dependent upon the deceased for support. On the contrary, the deceased was the daughter of the next of kin. The rule deducible from these cases, as well as from the weight of cases elsewhere, is that the petition must show facts from which a pecuniary loss is inferable. In the case of collaterals or others not legally dependent upon the deceased, at least where they are not heirs at law, facts must be pleaded showing an actual pecuniary interest in his life. Where, however, it is pleaded that the next of kin sustain such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary interest is pleaded. Its extent is a question for the jury. Here the allegations of good health of the deceased, that he was actually engaged in business, and that he left a widow and children, are sufficient to answer the requirements of any of the cases.

2. On the trial the city offered to prove that Burleigh, after his injury, stated that his injury was the result of

his own carelessness and that nobody was to blame for it but himself. The refusal of the district court to permit this evidence is the second assignment of error argued here. It is first insisted that the evidence offered was competent as part of the *res gestæ*. This term means a thing or things done in and about—as a part of—the transaction out of which the litigation in hand grew and on which transaction such litigation is based. (*Collins v. State*, 46 Neb. 37.) And in *Missouri P. R. Co. v. Baier*, 37 Neb. 235, it was held: "A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause." In this case the declarations of the decedent made a few moments after the accident and explanatory of it were held admissible as part of the *res gestæ*. In *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, the remarks of a brakeman on the train, made at the time an accident occurred, as to the cause of the accident, were held admissible as *res gestæ*. In *Collins v. State*, *supra*, the declarations of the deceased made two and one-half hours after he was shot, as to who shot him, were held not admissible as *res gestæ*. In the case at bar the deceased was injured on the night of December 4, 1890, and died on the 19th day of the following February. The witness by whom it was proposed to prove the declarations of the deceased visited him several times between the date of his injury and his death; spent four nights with him. At some of these visits the deceased made the declaration offered in evidence, but it does not appear how soon after the injury the declaration proposed to be proved was made. Under these circumstances we think that the injury sustained by the deceased and his declarations concerning the same were not so clearly and closely connected that the declarations, in the ordinary course of affairs, can be regarded as the unpremeditated explanation of the injury, and

therefore the declaration was not part of the *res gestæ* and on that ground was properly excluded. It is not necessary to determine whether this declaration of the deceased was admissible in evidence on any other principle, since the record discloses that the court permitted witnesses for the city to detail alleged conversations had with the deceased, in which he stated all the facts relating to his injury. The city, then, was not prejudiced by the exclusion from the jury of the alleged declaration of the deceased that his injury was the result of his own negligence.

3. A third argument is that the court erred in permitting to be introduced in evidence the Carlisle tables of expectancy of life. It is not claimed that these tables were not of themselves competent evidence, but it is insisted that there is no evidence to show that the benefit of the services or earnings of the deceased, had he lived, would have inured to his next of kin, and for that reason the tables were incompetent. The expectancy of the deceased at the time of his death was fifteen years. At that time he was engaged in mercantile business, which seemed to have been a prosperous one, his sales amounting to about $9,000 a year; and his expenses from $1,000 to $1,500 a year. His expenses included the support of his family. Prior to his death he lived with his family. If the family consisted of simply the husband and wife, then upon the death of the husband the widow was deprived of the profits and earnings which the husband made and which prior to his death he devoted to her support and maintenance. Of course the administrator was entitled to recover only the amount of the pecuniary loss which the widow and next of kin had sustained by reason of the death of the deceased, and these Carlisle tables were admissible in evidence for the purpose of showing the number of years which the deceased would probably have lived and to admeasure the loss to his widow and next of kin resulting from his death. If it were true that the next of kin of the deceased, before his

death, had married and moved away from the family and were supporting themselves, and all the earnings and profits of the deceased were devoted to his wife, then the administrator would recover for the benefit of the widow a sum which would recompense her for the pecuniary loss resulting to her from her husband's death, and this loss would be the support and maintenance measured in money furnished the wife by the husband. The fact, if it be a fact, that the next of kin were supporting themselves during the life of the deceased and that none of his earnings and profits were devoted to their support would not render the Carlisle tables incompetent evidence.

4. A fourth argument of the city is that the court erred in refusing to permit it to prove that prior to the accident to Burleigh the sidewalk in question was in constant use by the citizens of Friend both day and night and that no other accident was ever known to happen on that walk. We do not see how this evidence would have tended to prove or disprove any issue in the case.

5. A fifth argument of the city is that the district court erred in refusing to permit it to prove that the inventory of the property of the decedent filed in the county court of Saline county by the executor did not contain the claim sued for here. There was no error in this ruling of the court. This cause of action did not belong, and does not belong, to the estate of the decedent. It belongs to his widow and next of kin, and was not and is not, and can never become, an asset of his estate.

6. The city requested the court to instruct the jury as follows: "If the widow and children were as well off financially after the death of said Burleigh as before his death, then the plaintiff is not entitled to recover." The court added to this instruction the following: "On account of the death of David B. Burleigh." The city now complains that the court erred in modifying the instruction. The modification made by the court to the in-

struction did not change its force and effect. The instruction was substantially the same after it was modified as before. We doubt whether the city was entitled to such an instruction, but if there was any error in giving this instruction it was an error committed in favor of the city and of which it cannot complain.

7. Another argument of the city is that the court erred in refusing to give the following instruction to the jury: "You are further instructed that the deceased was bound to exercise ordinary care for his personal safety while passing along the streets of the defendant; and if the jury find from the evidence that plaintiff's slight negligence, if any, contributed directly to the alleged injury, then you will find for the defendant." The court did not err in refusing to give this instruction. Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions, as they tend to obscure and confuse what should be stated in plain and concise language. The doctrine of comparative negligence is not in force in this state. Our courts do not recognize degrees of negligence. The rule is that if a person himself in the exercise of ordinary care is injured through the negligence of another he may recover; but if his own negligence contributed to or was the proximate cause of the injury he cannot recover. (*Village of Culbertson v. Holliday*, 50 Neb. 229.)

The foregoing embrace all the assignments of error which we think it worth while to notice. There are other complaints about the action of the district court in giving and refusing to give certain instructions. We have examined carefully the entire record and it must suffice to say that we think the court committed no error of which the city can complain. The judgment of the district court is

AFFIRMED.

CLAUS MATTHEIS V. FREMONT, ELKHORN AND MISSOURI VALLEY RAILROAD COMPANY.

FILED FEBRUARY 2, 1898. No. 7760.

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: TRIBUNAL. The proceeding for condemning real estate for right of way of a railway company provided for by section 97, chapter 16, Compiled Statutes, is not instituted in nor conducted by the county court.

2. ———: ———: ———. Such a proceeding is conducted by the county judge, the sheriff, and the appraisers selected by the former. These constitute a tribunal not to try a civil action pending between the land-owner and the railway company, not to pronounce a judgment, but simply to assess the damages which the land-owner will sustain by reason of the appropriation of his land for the railroad's right of way.

3. ———: ———: ———. The powers conferred upon the county judge and the duties required of him by that act are not judicial powers and duties but purely ministerial ones.

4. ———: ———: VACATING AWARD. The county court has no jurisdiction of an action brought under section 602 of the Code of Civil Procedure to vacate such a condemnation proceeding on the ground that the award of damages made therein was procured by fraud.

5. ———: ———: ———: COUNTY COURT. The county court has no jurisdiction of a suit in equity to vacate such a condemnation proceeding.

6. ———: ———: ———: ———. Whether a county judge has jurisdiction to set aside an award of damages made in such a condemnation proceeding for any cause or at any time not decided.

7. ———: ———: ———: ———. But, if the county judge has such jurisdiction, an application to him to set aside an award of damages made in such a proceeding under such statute, solely on the grounds that the damages were inadequate, and the award procured by fraud of the railroad company, should not be entertained when the application was made more than five years after the condemnation proceeding occurred, the condemnation money awarded the applicant had all that time been in the hands of the county judge for the applicant's use, the railroad company had built and was operating its road on the easement condemned; the application not averring that the applicant had no legal notice of such condemnation proceeding whether he appealed or attempted to appeal from the award made, nor that he was deprived of his appeal by fraud, accident, or some circumstance beyond his control.

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

Warren Switzler, for plaintiff in error.

William B. Sterling, Benjamin T. White, and *James B. Sheean, contra.*

RAGAN, C.

In June, 1887, the county judge of Douglas county, at the request of the Fremont, Elkhorn & Missouri Valley Railroad Company, hereinafter called the railroad company, which desired to obtain a right of way across the land of Claus Mattheis, selected six disinterested freeholders of said county, caused them to be summoned by the sheriff thereof, and they made an assessment of the amount of damages which Mattheis would sustain by reason of the appropriation of a part of his land for right of way by the railroad company and duly reported their assessment to such county judge, who certified the same under his seal of office and transmitted it to the county clerk of said county for record. In October, 1894, Mattheis filed against said railroad company in the county court of Douglas county a petition praying the county court to set aside and vacate the condemnation proceeding upon the ground that the assessment of damages made by the appraisers in such proceeding was procured by the fraud of the railroad company. The county court sustained a general demurrer to this petition and dismissed the same, and Mattheis prosecuted a petition in error from that judgment to the district court of said county, which affirmed the judgment of the county court, and Mattheis has brought here for review on error the judgment of the district court.

1. As we understand from his argument counsel for the plaintiff in error insists that this action can be maintained upon one of three theories. The first theory is that the condemnation proceeding was had in the county

court and was a judicial proceeding; and that the condemnation proceeding which resulted in awarding damages to the plaintiff in error was a judgment or an order made by the county court; and under sections 602, 603, and 610 of the Code of Civil Procedure they are entitled to have that court set such condemnation proceeding aside, because procured by fraud of the railroad company. But was this condemnation proceeding had in the county court, and was the proceeding in any sense, a judicial one? Section 97, chapter 16, Compiled Statutes, provides that if a railroad company desires to locate its road across certain real estate, and the owner thereof refuses to grant the right of way, then, upon application of either the railroad company or the land-owner, the county judge shall select six disinterested freeholders and direct them to be summoned by the sheriff of the county; that these freeholders so selected shall inspect and view the real estate sought to be appropriated for the right of way by the railroad and assess the damages which the land owner will sustain by reason of the appropriation of his land for such right of way, and make a report of their assessment in writing to the county judge of said county; that he shall, after certifying such report under his seal of office, transmit the same to the county clerk of said county for record; that the clerk shall file and record said report, and it shall thereafter have the force and effect of a deed from the land owner to the railroad company for the easement appropriated. The section also provides that either party may have the right to appeal from the assessment of damages made by the freeholders to the district court of the county in which the lands are situate within sixty days after the date of the assessment, and in case such an appeal be taken, the finding and decision of the district court shall be transmitted by the clerk thereof, duly certified, to the county clerk, to be there filed and recorded. Section 97 of the chapter provides that in case of the default, absence, refusal, or neglect of any freeholder to act as a

commissioner or appraiser the sheriff shall, upon the selection of the county judge, summon other freeholders to complete the panel. It is to be observed that the county court has nothing whatever to do with this proceeding. It is not a proceeding instituted in the county court. The appraisers are not selected by the county court. The summons is not returnable to the county court, and with the report of the appraisers the county court has no concern whatever; and the statute does not even require that a report of the proceedings of the appraisers shall be kept in the county court. The entire proceeding is conducted by the county judge, the sheriff, and the appraisers selected by the former. These constitute a tribunal not to try a civil action pending between the land owner and a railroad company, not to pronounce a judgment, but simply to inquire and report to the county judge what damages the land owner will sustain by reason of the appropriation of his land for the railroad's right of way. The power conferred by the act upon the county judge and the duty required of him by that act are not judicial powers or duties, but purely ministerial powers and duties. (*Illinois C. R. Co. v. Rucker*, 14 Ill. 353; *Chicago, B. & Q. R. Co. v. Wilson*, 17 Ill. 123; *People v. McRoberts*, 62 Ill. 38, which were mandamus cases, one to compel the county judge to appoint the appraisers to assess the damages of the land owner which the railroad company desired for right of way, and the other two mandamus proceedings to compel circuit judges to appoint such appraisers.) Looking at the action in the case at bar as one brought under section 602 of the Code of Civil Procedure in the county court of Douglas county, invoking its powers to vacate and modify one of its own judgments or orders made by it because obtained by fraud, it cannot be maintained, for the simple reason that the condemnation proceeding which the action seeks to have the county court vacate and set aside did not occur in the county court; and if the result of the condemnation proceeding can in any sense be regarded as a judgment

or an order made, then the county court did not render such judgment or make such order.

2. A second theory upon which counsel for plaintiff in error seeks to maintain this action is that the county court is invested with equitable jurisdiction, and that this action is brought to that court, invoking its equity powers to set aside the condemnation proceeding because procured by fraud; but this theory, like the other, assumes that the condemnation proceeding occurred in the county court. It may be conceded that the county court, as a court of record, is invested with equitable powers and jurisdiction in any case before it when by the constitution or the laws of the state that court is invested with jurisdiction of the subject-matter out of which the case or proceeding in hand grows. But neither the constitution, nor any statute of this state, invests the county courts with general equitable jurisdiction; and if this condemnation proceeding was procured by fraud practiced upon the county judge and the appraisers, the county court is not invested with any equitable jurisdiction to vacate it. If in a suit brought before the county judge sitting as a justice of the peace one party by fraud should obtain a judgment, it certainly would not be contended that the county court was possessed with equitable jurisdiction to set that judgment aside. The county court, then, had no jurisdiction or authority to grant the relief prayed for in this action, viewing it as purely an equitable action invoking the equity powers of the county court.

3. We do not determine whether the county judge, because of the power conferred upon him and the duties required of him by the statute in the condemnation of real estate for railway purposes, is invested with the authority to set aside for any reason at any time an appraisement made in such a proceeding. Certainly the statute in express terms invests him with no such power; but assuming for the purposes of this case that the county judge has jurisdiction to set aside an appraise-

ment made because procured by fraud and that the proceeding at bar is an application addressed to him invoking his exercise of such power, we are of opinion that the application was by him properly denied. The record discloses that the plaintiff in error in this case had personal notice of the condemnation proceeding. For aught the record discloses he was present when the appraisement was returned, and the only injury which he claims to have sustained by the alleged fraud of the appraisers is that the damages awarded him were inadequate. The record does not disclose that he appealed from the award made, nor that he made any attempt to appeal, nor that he was prevented from appealing by any fraud, accident, casualty, or circumstance beyond his control—in other words, the application does not aver facts which show that the plight of the plaintiff in error is not the result of his own laches; and, conceding the authority of the county judge in the premises, we also think that this application was made too late. The record discloses that the railway company paid to the county judge for the use of the plaintiff in error the amount of damages awarded; that this money is still in the hands of the county judge. The railway company took possession of its right of way, constructed its road thereon, and has been operating the same over such right of way for years before this application was made. In any view, then, which we are able to take of this case the judgment of the district court is right and is

AFFIRMED.

NORVAL, J.

I concur in the judgment just entered on the sole ground that the county court had no jurisdiction of the subject-matter of the action.

WILLIAM A. CLEGHORN, EXECUTOR, APPELLEE, V. SIMON OBERNALTE ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7791.

1. **Husband and Wife**: TITLE TO REALTY: TRUSTS. A husband and his family resided on a rented farm. The husband worked at his trade of plasterer, was an habitual drunkard and squandered his earnings, devoting none of them to the support of his family. The wife and children conducted the farm, she doing the labor of a farm hand. During this time she purchased, on executory contract, a piece of land and made the first payment thereon out of the earnings of her labor. She and her husband then moved on the land purchased. The husband continued to conduct himself, and the wife to labor and manage the new farm, as before, and from her earnings thereon, with his consent, she made the deferred payments on the land purchased, when the vendor, by inadvertence or mistake, deeded the land to the husband. *Held*, (1) That the money earned by the wife was her property; (2) that the land purchased belonged to the wife; (3) that the husband held the legal title to said land in trust for her; (4) that said land was not liable for a debt of the husband contracted before the date of the conveyance to him.

2. ——: ——: ——: ESTOPPEL. Where land is paid for with a wife's money, but deeded to the husband, he will hold the title in trust for her; and she is not estopped from claiming the land as against her husband's creditors unless her conduct in the premises induced them to believe that the husband was the actual owner of the land and to extend credit to him on the strength thereof.

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

Byron Clark, for appellants.

Beeson & Root, contra.

RAGAN, C.

William A. Cleghorn, executor of Frank Stander, brought this suit in the district court of Cass county against Simon Obernalte, Lena Obernalte, his wife, and Simon Hansen, praying for a decree setting aside a conveyance of certain real estate made by Obernalte and

wife to Hansen, and another conveyance made by Hansen of the real estate to Obernalte's wife, and to subject said real estate to the payment of a judgment in favor of the executor against Simon Obernalte. The executor had a decree and the parties made defendants in the court below have appealed.

1. The petition in this case is one in the nature of a creditors' bill and is framed upon two theories, the first being that the real estate was the property of Simon Obernalte at the time he became indebted to the executor's testator, and that the conveyances were made for the purpose of placing the title to the real estate in Obernalte's wife and thus hindering and delaying Obernalte's creditors. But the evidence in the record will not sustain a decree based upon this theory of the petition. The evidence shows, without conflict, that at the time of the trial of this action, in 1894, Obernalte and his wife had been married some twenty-five years; that they then had seven children, the youngest of these being five years of age and the oldest twenty-four, and that some of these children were males; that Mrs. Obernalte, prior to her marriage, worked for wages as a domestic and saved her earnings and seems to have invested them in an acre tract of land in the city of Plattsmouth. Some years after their marriage Obernalte and his family moved upon a rented farm near Weeping Water, in Cass county, and remained there until about 1880. During this time Obernalte, who was a plasterer and brick mason, did little, if any, work upon the farm. When he did work he worked at his trade, and, being then and down until 1892 an habitual drunkard, squandered his earnings. During these years prior to 1880 Mrs. Obernalte and the children conducted the rented farm, she performing regular farm labor, such as caring for stock, harvesting, and husking corn and other such work as is usually done by men. In the meantime she sold the acre lot she owned in Plattsmouth for cash, and about 1880 she purchased from some person or corporation in the city of Lincoln the 160 acres

of land in controversy, receiving a contract for a deed, though this contract seems to have run to the husband. At the time of this purchase she made the first payment of $150 cash, and of this sum her husband contributed $25 only, and never at any time contributed any further sum towards the payment of the land. The Obernalte family then moved upon the land purchased. Obernalte continued to conduct himself as he had been doing up until 1892, when he seems to have reformed; but from the time of the purchase of this land until this trial Mrs. Obernalte and the children remained upon it and cultivated it, Mrs. Obernalte performing the labor usually performed by a man in the cultivation and conduct of the farm, and from the earnings and proceeds of this farm she made the annual payments upon the land purchased under contract, until in September, 1889, the vendor of the land conveyed it by deed to Simon Obernalte. In the same month he and his wife made the deed attacked in this action to Hansen, and in the following January Hansen conveyed to Mrs. Obernalte. The evidence shows that the deed of this land to Simon Obernalte was by mistake or inadvertence; that it should have been made to Mrs. Obernalte. The debt on which the judgment against Simon Obernalte is based was contracted on November 12, 1888. At that date Simon Obernalte signed a note to one Stander, as surety for some other parties. Mrs. Obernalte had no knowledge of the existence of this debt until the year 1892, about a year before judgment was rendered upon the note. It will thus be seen that on November 12, 1888, at the time Obernalte became surety on the note, he did not have even the legal title to the real estate in controversy, and he never at any time owned the equitable title to this real estate. The equitable title to this real estate was purchased and paid for by Mrs. Obernalte with her money, except the $25 furnished by the husband, and when Obernalte became possessed of the legal title to the land in September, 1889, he held the title in trust for his wife, and since he was never the

owner of the real estate it was never liable for his debts. This case falls within the principle of *Mosher v. Neff*, 33 Neb. 770. In that case Neff purchased certain land with money belonging to his wife, but took the deed therefor in his own name. Afterwards he signed a note as surety, on which judgment was rendered against him. After the recovery of the judgment Neff conveyed the land through a trustee to his wife, and the court held that the husband held the legal title of the land in trust for his wife and it was not liable for his debts, since the record showed that the debt upon which the judgment was rendered was not contracted by Neff upon the faith of his being the owner of the real estate. In *Hews v. Kenney*, 43 Neb. 815, it was held that where a husband uses the money of his wife in paying for land the title to which he takes in his own name, a trust will arise in favor of the wife which a court of equity will protect against the husband's creditors, unless it is made to appear that such creditors gave the husband credit on the faith of his being the actual owner of the property of the wife the title to which was in his own name. Neither of these cases, nor the conclusion which we reach here, that Simon Obernalte, while he held the legal title to this real estate held it in trust for his wife, are opposed to *Brownell v. Stoddard*, 42 Neb. 177. That was an action by judgment creditors to subject to the payment of their judgments lands conveyed by a debtor through a third party to the debtor's wife. The district court subjected the lands to the payment of the husband's debt; but in that case the husband acquired the title to the land in 1871 and the conveyance to his wife occurred in 1887; and at the time the land was purchased the wife had furnished her husband $1,000 of the purchase money, and the court allowed her a lien upon the land prior to the lien of the husband's creditors for this $1,000 and interest. This was the feature of the decree which was complained of, and the court held that the wife was not entitled to this lien, since there was no evidence to show that there was any agreement or inten-

tion between herself and husband at the time she furnished the money that he should repay it or she have an interest in or lien upon the land by reason thereof.

2. A second theory upon which the petition in this case is framed is that though Mrs. Obernalte was the equitable owner of this land, she has estopped herself from claiming the land as against her husband's creditors because of her conduct in allowing the title of the land to remain of record in her husband's name, and that he was enabled to contract the debt made the basis of this proceeding upon the belief of the creditor that he was the actual owner of the real estate. This theory has no support whatever in the record. In the first place there is not a particle of testimony to show that Stander extended credit to Obernalte because he believed him to be the owner of the real estate in controversy. In the second place, at the time the debt was contracted in November, 1888, the legal title to this land was of record in the name of the person who afterwards conveyed it to Obernalte, and this conveyance was not made until September, 1889.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOSEPH G. SLOAN, SHERIFF, V. REBECCA FIST.

FILED FEBRUARY 2, 1898. No. 7763.

1. **Evidence:** WRITINGS. In order to render written instruments admissible in evidence, their execution or genuineness, unless admitted, must be established by proof, except in cases within statutory exceptions.

2. ———: ———: EXCEPTIONS: ASSIGNMENTS OF ERROR. An exception taken or assignment in error against the admission in evidence of a group of documents, offered together, is not waived by confining the discussion in the briefs to a single document comprised within the group, the objections urged being good against all.

ERROR from the district court of Pawnee county. Tried below before BABCOCK, J. *Reversed.*

Story & Story and *Griggs, Rinaker & Bibb*, for plaintiff in error.

Francis Martin and *Lindsay & Raper, contra.*

IRVINE, C.

This action was replevin, by Rebecca Fist, claiming the chattels in controversy as vendee of Herman Fist, against the sheriff of Pawnee county, who had seized them under writs of attachment sued out against Herman Fist. The plaintiff prevailed in the district court.

We shall consider only one assignment of error, but in order to do so a brief outline of the facts is essential. Herman Fist was as early as 1889 engaged in the mercantile business at Pawnee City. His brother, Emanuel Fist, the husband of the plaintiff, resided in Hastings. Emanuel was for a time engaged there in mercantile pursuits, but in 1887, as the result of a fire, he ceased to transact business on his own behalf, and entered the treasurer's office as an employé, Rebecca becoming the capitalist of the family. The claim on the part of the plaintiff is that Herman, in 1889, began to appeal to his brother for financial assistance, which was afforded him out of plaintiff's means, and from time to time, until the debt reached the sum of $7,400. Then an arrangement was made, in October, 1893, whereby Herman transferred to Rebecca, in discharge of the debt, a half interest in his stock and business. The business was for some time thereafter conducted under the name of Herman Fist & Co., but Herman having largely overdrawn his account and having involved the firm in debt, Rebecca took the remaining half from him in satisfaction of her own claim and in consideration of her paying the partnership debts and another debt covered by a separate contract. Both these transfers are assailed as fraudulent. Their *bona*

fides was the issue on which the case really turned. A material inquiry was of course as to the advances made by Rebecca to Herman and the manner in which they had been made. Emanuel had conducted most of the business, and testified that the money was obtained by checks or drafts on banks in Hastings, some drawn by Rebecca herself, others by Herman directly on the banks, and paid out of the credits of Rebecca by her direction. After so testifying Emanuel was asked: "Have you checks showing the payment of these amounts?" He answered in the affirmative. He was then asked: "What are these papers here?" and answered, "These are checks." "Showing the payment of the amount you first named?" "Yes, sir." The checks, eleven in number, were then offered in evidence, with all the indorsements and canceling marks thereon, and without any further proof received, over defendant's objection that they were incompetent and that no foundation had been laid for their introduction. The indorsements were of a character to indicate that their proceeds had been obtained by Herman at Pawnee City, and that the checks had then passed through banks at St. Joseph, Omaha, and other points, finally reaching Hastings and being there paid. A portion of them appear to be checks drawn by Herman upon the Adams county bank, and would in nowise tend to show any advancement by Rebecca except for a pencil memorandum appearing thereon as follows: "Chg. R. Fist ac." These documents, if genuine, would, it will be seen, afford potent evidence to establish the transactions as Emanuel had narrated them, but such instruments do not prove themselves, and Emanuel's testimony that they were checks showing the payment was insufficient to prove the genuineness of a single signature or indorsement. There was no testimony whatever as to who made the memorandum "Chg. R. Fist ac.," when it was made, or why. Yet the materiality of the checks bearing that memorandum depended entirely upon its force. The checks were received without sufficient proof of their authenticity, and

the error was clearly prejudicial. The checks were offered *en masse*, the same objection was interposed to all, and in the petition in error a single assignment covers all the checks. In the brief, however, complaint is made only of admitting one of the Herman Fist checks, and that because of the failure to prove the memorandum referred to. It is contended that the plaintiff in error has thus abandoned the rest of his assignment, and thus admitting that the other checks were properly admitted he is in the position of having made his objection and assignment of error too broad. The rule is that the court will not consider assignments of error not discussed in the briefs. They are treated as waived. By so waiving them we do not think plaintiff in error estops himself from taking advantage of exceptions taken at the trial with special reference to the waived assignments, but pertinent also to matters insisted upon. The failure to discuss an assignment merely indicates that it is not considered of sufficient importance, in view of the whole record, to ask the court's attention to. The objection to all the checks was good. The assignment in error directed against all was well taken. That being so, plaintiff in error is not precluded from its benefit because in his brief he selects for attack only a portion of the field covered by that assignment.

REVERSED AND REMANDED.

BERTHA LEOLA MARTIN, APPELLEE, V. IDA A. LONG ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 7810.

Parent and Child: ADOPTION: INHERITANCE. An infant was adopted by strangers. The articles of adoption provided that if she should remain with them until her majority she should receive $500. The articles further bestowed on her "equal rights and privileges of children born in lawful wedlock." *Held*, That the first pro-

vision was not exclusive as to property rights, but that on the death of the foster parents intestate, before the child reached her majority, she was entitled to inherit as if their own.

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

Byron Clark and *C. S. Polk*, for appellants.

Abbott & Caldwell and *Beeson & Root, contra.*

IRVINE, C.

In 1885 Bertha Leola Martin, an infant, was adopted by Shadrach Cole and Agnes, his wife. During the minority of the child Shadrach Cole died, Bertha remaining with his widow until the latter's death severed the relationship, when Bertha returned to her mother, with whose consent the Coles had adopted her. In the course of settlement of Shadrach Cole's estate an order of distribution was made, whereby $200 was set apart for Bertha, and the remainder apportioned among the children of her foster parents. Thereafter this proceeding was begun in the county court wherein the adoption had been effected and the estate of Shadrach Cole was administered, by Bertha Martin, through her mother as guardian, to set aside the order of distribution and award to Bertha the same rights of inheritance as rested in her foster brothers and sisters. The basis of the proceeding was that there had been no service of notice of the hearing of the application for the order of distribution other than by publication, and that Bertha had not been represented by guardian *ad litem*. That such was the fact was conceded. The county court refused to vacate the original order, but the district court on appeal set it aside and awarded to Bertha her proportionate share in the estate, as if she were a daughter in fact. This appeal is from that order.

It is suggested that the action was not properly brought. The contention is that the right to vacate

erroneous proceedings against infants exists in favor of the infant concerned, and can be exercised by him alone after reaching his majority and within the statutory period; that there is no authority in the guardian to so proceed while the minority of the infant continues. We cannot see what policy could be subserved by such a construction of the law; and the statute invoked, section 609 of the Code of Civil Procedure, being a statute of limitations, and having manifestly for its object the extension of time within which suits may be brought by persons under disabilities, and not fixing a time when causes of action shall be deemed to accrue, we are not disposed, in the absence of authority, to so construe it as to postpone the opportunity to apply for the correction of judicial errors. The point is really not insisted upon, as counsel say in their brief that they do not desire that the case be dismissed without an adjudication of the merits.

The law with reference to the adoption of children is found under title 25 of the Code. It has been amended since the relations in question were created. As it then stood it provided in effect that the parents should file with the probate judge a signed and sworn statement relinquishing all right to the custody and control over the child and all claim to services and wages "to the end that such child shall be fully adopted by the party or parties" desiring to adopt such child. The person adopting was required to file a similar statement that he freely and voluntarily adopted the child as his own, "with such limitations and conditions as shall be agreed upon by the parties," and then, as a proviso, was added this language: "Whenever it shall be desirable the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock." (Code of Civil Procedure [Compiled Statutes 1895], sec. 797.) A subsequent section (799) provided for the entry of a decree "in accordance with the conditions and stipulations of such state-

ment," reserving to the judge the right to refuse the decree if satisfied that the adoption would not be for the best interest of the child. Then it was provided that the decree should be conclusive, that the child should take the surname of the foster parents "and all relations of parent and child, agreeable to such stipulations and the decree of the probate court, shall attach, and such child or children, if so stated in such decree, shall be subject to the exclusive control and custody of such parent or parents, and shall possess and enjoy all the rights, privileges, inheritance, heirships, and immunities of children born in lawful wedlock." (Code of Civil Procedure [Compiled Statutes 1895], sec. 800.) In this case the relinquishment was simple and absolute in form. The declaration of the foster parents was as follows:

"We, Shadrach Cole and Agnes Cole, being first duly sworn, depose and say that we are residents of Cass county, Nebraska. That we do freely and voluntarily adopt Bertha Leola Martin, a female child four years of age, the daughter of Mary Martin (the only surviving parent of Bertha Leola Martin) as our own, with the following limitations, to-wit:

"First—If Bertha Leola Martin remains with us until she arrives at her majority, she shall receive from us the sum of five hundred dollars.

"Second—If we should both die prior to her majority, her mother if living shall have control over her,—

and we bestow upon her equal rights and privileges of children born in lawful wedlock.

"SHADRACH COLE.
"MRS. AGNES COLE."

The decree, after a bare recital of the proceedings, was as follows:

"It is therefore considered and adjudged by me that the right to the custody of, and power and control over, said Bertha Leola Martin, and to her services and wages by her mother, Mary Martin, shall and do cease and de-

termine from this date, and that said Bertha Leola Martin shall be the adopted child of said Shadrach Cole and Agnes Cole upon the conditions of the sworn statements made herein and shall * * * and be subject to their exclusive custody and control and shall possess all the rights and privileges of children born in lawful wedlock."

The question presented is whether the first stipulation of the articles of adoption, providing for a payment of $500, is an exclusive provision as to property rights, or whether, on the other hand, it is a cumulative positive provision, leaving to the adopted child also the privileges, with regard to inheritance, that actual children enjoy. An interesting field for discussion is thus opened up, but we agree with counsel for the appellants that "the action is dependent entirely upon the construction of the articles of adoption," and it therefore presents no question of general law justifying an extended opinion. It cannot be doubted that under the statutes it was perfectly competent for the foster parents to bestow upon the child rights of inheritance as full as if she were their own, —a child born in lawful wedlock, in the awkward phraseology of the statute. Some stress is laid upon the varying terms of the section regarding the articles of adoption and that regarding the decree. The claim is that the child is only entitled to the right of inheritance when it is so stated in the decree. Whether the phrase "if so stated in such decree" applies to such matters as the rights of the child or only to the custody we need not inquire, because the preceding section requires the decree to follow the articles of adoption; and it could hardly be contended that the court would be authorized by decree to confer such rights except as expressly or impliedly conferred by the articles of adoption. This decree incorporates the provisions of the articles by reference thereto, and expressly confers, in the language of both the articles and the statute, the rights and privileges of children born in lawful wedlock. The omission of the word "immunities" can have no significance. The right of inheritance

is an affirmative privilege. It is not an immunity. Nor, as intimated, can the omission of the word "inheritance" be significant. The articles followed the section with relation thereto, and that section contained no such word. The use of the word in the section relating to the decree, in view of the fact that the proceeding is one contractual in its nature, and that the court could not impose an obligation not assumed by the parties, indicates, if it indicates anything, that its meaning was comprehended within the term "rights" or "privileges" employed in the section with reference to the articles whereby the obligations are by the foster parents assumed. What, then, did the foster parents mean by the articles in this case? The statute does not enlighten them and there is no extrinsic evidence as to the situation of the persons concerned which is of any assistance. It is doubtful if any competent evidence of that character could be offered. It is not doubtful that the last clause of the articles standing alone would be sufficient to confer rights of inheritance. If such was not the intention, it must be because a contrary intent is to be gathered from the first clause. In considering this it must be borne in mind that the mother of the child was a party to the proceeding and was surrendering her child to others, and that the right to inherit is not absolute, but may be defeated by will. To give an adopted child in that respect the rights and privileges of children proper would be an empty form if all such rights could be defeated by will. The most natural impulse of a mother so situated, and yielding to others the care of a child, presumably from motives touching only the child's welfare, would be to guard in this respect by requiring a stipulation for something certain when the wardship should cease; an obligation enforceable as a contract, not one resting in the mere volition of others. If this language was meant to be exclusive, it is hardly conceivable that the broad language would have been used at the close. The foster parents, if not intending to confer property rights, would

not have employed language, the most obvious import of which, as determined by usage, relates thereto. We think that it was the intention to confer upon the child all the rights of children proper, and, in addition thereto, to secure to her in any event, upon her majority, the sum specified in the first clause.

AFFIRMED.

JULIUS C. SHARP ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED FEBRUARY 2, 1898. No. 9660.

1. **Municipal Corporations: GAS COMPANIES: FRANCHISES.** It is within the power of cities of the first class having less than 25,000 inhabitants to grant the right to a gas company to lay and maintain its pipes and mains under the streets and other highways of the city for the purpose of supplying its inhabitants with gas, and to regulate the charge therefor.

2. ———: ———: ———. The authority to grant such a franchise is not restricted to persons or companies authorized to erect works within the city for the manufacture of gas, nor need such franchise be limited to the period of five years.

3. ———: ———: ———. Subdivision 15 of section 68 of chapter 13*a*, article 2, Compiled Statutes, is not a restriction upon subdivision 16, but a concurrent provision relating to another subject, the former to laying mains on the streets, the latter to lighting the streets.

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

George E. Pritchett, for appellants.

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

IRVINE, C.

The council of the city of South Omaha passed, and the mayor approved, an ordinance purporting to grant to the South Omaha Gas Light Company, its successors and

assigns, authority, for a period of twenty-five years, to sell and supply gas within the city, and to lay and maintain pipes and mains under the surface of the streets, alleys, and other public highways of the city. In pursuance of provisions in the ordinance the South Omaha Gas Light Company assigned its rights, through an intermediate grantee, to the Omaha Gas Company. The Omaha Gas Company was proceeding to lay its mains in the streets of South Omaha when this suit was begun by three taxpayers of South Omaha, who alleged in their petition the foregoing facts and asserted that the ordinance was void. The prayer was for an injunction restraining the gas companies from laying their pipes and the defendants, the city and the two gas companies, from performing any acts in pursuance of the ordinance. The city did not appear in the action, and its default was entered. The two gas companies answered, denying many of the averments of the petition. A decree was rendered reciting that the cause was "submitted to the court upon the petition of the plaintiffs Julius C. Sharp, Harry Sharp, and Louis Schroeder, and the answer and demurrer of the defendants the South Omaha Gas Light Company and the Omaha Gas Company, without evidence, and was argued by counsel, on consideration whereof the court finds upon the issues joined between the plaintiffs * * and defendants * * * in favor of the plaintiffs," and granting a perpetual injunction as prayed. This finding is not so unwarranted as would appear at first blush, because the averments of the petition were largely conclusions of law, and most of the denials in the answer were denials of those conclusions. Where issues of fact were joined their materiality is doubtful. The real question is the power of the mayor and council to enact such an ordinance, its passage, approval, and terms being admitted.

The charter provisions invoked on either side as bearing on the question, are the following, from article 2, chapter 13*a*, Compiled Statutes:

Sec. 35. "The mayor and council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances."

Sec. 68, sub. 15. "To make contracts with and authorize any persons, company, or association to erect gas works, electric or other light works in said city, and give such persons, company, or association the privilege of furnishing lights for the streets, lanes, and alleys of said city for any length of time not exceeding five years; to purchase or provide for, establish, construct, maintain, operate, and regulate, for the city, any such gas works, electric or other light works; or to condemn and appropriate for the use of the city, gas works, electric or other light works and plants in a manner and form as provided in subdivision nineteen of this section; and to levy a tax not exceeding five mills on the dollar in any one year for the purpose of paying the cost of lighting the streets, lanes, and alleys of said city, or for the purpose of buying or establishing, extending, and maintaining such gas works, electric or other light works; and where the amount of money which would be raised by the tax levy provided for in this section would be insufficient to establish or pay for a system of gas, electric, or other light works, to borrow money and pledge the property and credit of the city upon its negotiable bonds or otherwise to an amount not exceeding fifty thousand dollars for the purpose of establishing or paying for, maintaining, and operating such gas, electric, or other light works, authority therefor having first been obtained by a majority vote of the people at an election upon a proposition submitted in a manner provided by law for the submission of propositions to aid in construction of railroads and other works of internal improvement; and when any such bond shall have been issued by the city, to levy annually upon all the taxable property of the city such tax as may be necessary (not exceeding one mill for twenty thousand

dollars of bonds so issued) for a sinking fund for the paying of the accruing interest on such bonds and the principal thereof at maturity; to provide for the office of light commissioner, and to prescribe the duties and power of such office; *Provided*, That in cities having a water commissioner, such water commissioner shall be ex officio light commissioner."

Sec. 68, sub. 16. "To provide for the lighting of streets, laying down of gas pipes, and erection of lamp posts, and to regulate the sale and use of gas and electric or other lights and the charge therefor, and rent of gas meters within the city, and to require the removal from the streets, avenues, and alleys, and the placing under ground of all telegraph, electric, and telephone wires."

The ordinance attacked provides in its first section that the South Omaha Gas Light Company, its successors and assigns, are authorized, for a period of twenty-five years, "to sell and supply gas in the city of South Omaha, Douglas county, Nebraska, and to use, lay, and maintain pipes and mains, with all necessary and proper attachments, connections, and appurtenances below the surface of the highways, sidewalks, streets, alleys, lanes, avenues, boulevards, and public places, and on bridges and viaducts in said city," etc. By the second section the quality of gas to be furnished is specified, and it is provided that it shall be sold at a certain maximum rate. By section 3 it is provided that the company shall furnish gas to the city for its public buildings at the rate of $1 per 1,000 cubic feet. Other provisions regulate in detail the manner of laying pipes, and provide for the payment to the city of five cents for each thousand cubic feet of gas sold and paid for. A forfeiture is provided in case of the company's failure to perform any of the conditions of the ordinance. Provision is made for the city's requiring the company to extend its mains, and in this connection is the following: "The South Omaha Gas Light Company, its successors and assigns, shall be required to extend its mains upon like requests whenever the city shall enter

into contract with it for lighting and furnishing with gas not less than four street lamps for every 1,000 feet of such extension," etc. It will be observed that the ordinance does not expressly authorize the construction of gas works within the city. It only authorizes the use of the streets and other public highways for the laying and maintenance of mains. Nor is there involved in the ordinance any contract for the lighting of the streets. The clause last quoted merely anticipates the probability of such a contract in the future, and in view of that probability reserves a power to require a further use of the franchise than the grantee might see fit to make of its own accord. It is alleged in the petition, denied in the answer, and without evidence by the court found to be true, that the assignee, having already gas works in Omaha, intends to supply the city of South Omaha from such works. We shall assume as the district court did, that the ordinance did not contemplate the erection of works for the manufacture of gas in South Omaha.

It is admitted by the plaintiffs that the general power of control over the streets, conferred by section 35, would be sufficient, if that section stood alone, to authorize such an ordinance as the one under consideration. It is practically admitted that subdivision 16 of section 68, standing alone, would not restrict the power conferred by section 35, even if it did not itself grant the power. It is, however, contended that subdivision 15 is a specific grant on the subject, which prevails against and limits the more general provisions, and restricts the power of the city in the premises to the granting of the right to lay pipes in the streets to such persons, companies, or associations as have already or contemporaneously been authorized to erect gas works in the city, and that then the franchise cannot endure for more than five years. In support of this argument attention is called to the subsequent provisions of subdivision 15, for the acquisition, by construction, purchase, or condemnation, of gas works. The argument is that the language of the grant of power

is confined to persons or corporations which shall have gas works in the city, and that a reason is found for the restriction in a manifest policy of the act to provide for ultimate municipal ownership. It is said that effective exercise of those provisions demands that private plants should be wholly within the city. The force of this argument is entirely destroyed by reference to the fact that previous to 1895, subdivision 15 began as at present, but ended with the words "not exceeding five years." The provisions for municipal construction, purchase, and condemnation were added by amendment in that year. (Session Laws 1895, ch. 13.) The peculiar language of the first part of the statute could not, therefore, have been adopted with any reference to the policy of municipal ownership. We must ascertain the force of the provisions by looking to their original form. The new words do not affect this case. There was then a general supervision and control of the streets vested in the council. This was followed by a grant of power to authorize "any person * * * to erect gas works * * * in said city, and give such persons, * * * the privilege of furnishing lights for the streets * * * for any length of time not exceeding five years." Then there came a grant of power, referring again to the lighting of streets, but also to keeping them free from electric wires, and also to provide for the laying down of gas pipes, and regulate the sale and use of gas and the charge therefor. Subdivision 15 relates solely to the lighting of highways. Subdivision 16 relates, among other things, to the furnishing of gas to private consumers and the use of the streets for that purpose. They are separate provisions relating to different subjects, not intended the one to nullify the other, but intended to exist concurrently and each to control with reference to its own subject-matter. We need not consider whether contracts may be made for lighting the streets with persons who have not gas works within the city. Entirely distinct from the provisions on that subject there is an ample grant of power,

unqualified as to persons, method, or time, to regulate the laying down of mains, the sale and use of gas, and the rate to be charged therefor. The ordinance in question extends only to that subject and is within the power.

REVERSED AND DISMISSED.

JOHN V. FARWELL, JR., V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

FILED FEBRUARY 17, 1898. NO. 7505.

Eminent Domain: DAMAGE TO CITY LOTS: EVIDENCE.

REHEARING of case reported in 52 Neb. 614.

Cornish & Lamb and *Tibbets, Morey & Ferris*, for plaintiff in error.

L. W. Billingsley and *R. J. Greene, contra.*

PER CURIAM.

This is a rehearing of the case reported in 52 Neb. 614. The former opinion is adhered to, and for the reason therein stated the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

FRED LEWON V. THOMAS P. HEATH.

FILED FEBRUARY 17, 1898. No. 7844.

1. **Descent and Distribution.** Lands of which a person dies seized, and which he has not devised, descend to the heirs, and the title vests in them, subject, however, to the debts of the ancestor.
2. **Ejectment:** ACTION BY HEIR. An heir may bring and maintain an action of ejectment relative to lands of which his ancestor died seized against any and all persons except the administrator of the estate and such as have a right or rights thereto derived from the administrator, and this the heir may do during the pendency of the administration proceedings and prior to final settlement or any decree of distribution.
3. **Adverse Possession.** "To establish title to real property in this state by virtue of the operation of the statute of limitations there must have been maintained by the party asserting it an actual, continuous, notorious, and adverse possession of the premises under claim of ownership during the full period required by the statute." (*Twohig v. Leamer*, 48 Neb. 248; *Gatling v. Lane*, 17 Neb. 77; *Lantry v. Parker*, 37 Neb. 353.)
4. ———: EVIDENCE. No definite or fixed rule can be framed in relation to what shall constitute *indicia* of adverse possession; such evidences must necessarily vary and be in accord with the conditions existent in the portion of the political division or subdivision in which the property to which it is claimed applicable is situate in regard to age of settlement, the extent and prevailing manner of cultivation, or use of lands, also the purposes for which the lands are or may be by nature adapted.

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

C. A. Baldwin, for plaintiff in error.

L. D. Holmes, contra.

HARRISON, C. J.

The defendant in error commenced this, an action of ejectment, in the district court of Douglas county to recover the possession of a certain forty-acre tract of land at the time in the possession of the plaintiff in error. One of the defenses interposed was that of adverse possession for more than the statutory period of ten years.

After issues joined and on the trial thereof it was of the instructions to the jury,—

"First—That the plaintiff has shown a complete legal title to the premises in controversy, and is in law the legal owner of the premises described in the petition, and is entitled to the possession thereof.

"Second—You are also instructed that upon the question of adverse possession, as set up in the defendant's answer, there has been a failure of proof upon his part, and that he has not shown such possession as the law contemplates to be adverse, open, notorious, and hostile for ten years prior to the commencement of this suit. You will, therefore, in rendering your verdict upon the question of the possession of the real estate described in the petition, find for the plaintiff."

It appeared in testimony that one William B. Lacey during the year 1860 obtained from the United States a patent conveying to him the land the recovery of the possession of which was sought in this suit. Lacey was a resident of the state of Ohio and there died leaving a widow and three sons, his heirs. After his death an administrator of his estate was appointed by the probate court of the proper county in Ohio, who entered upon the duties of the settlement of the estate of the deceased. Neither the intestate during his lifetime, his heirs, nor the administrator of his estate ever saw or had any actual physical possession of this land. The defendant in error introduced evidence of the conveyance by the widow to him of her interest in the land of date during the year 1888; also conveyances by the three sons of their interests respectively in and to the land, one of date during the year 1883, one 1884, and the other 1888. There was no competent evidence that a decree of distribution of the estate had ever been made by the probate court.

It is argued by counsel for plaintiff in error that in order to recover it devolved on the plaintiff in error, inasmuch as he claimed by conveyances from the heirs, to show a final settlement of the estate and a decree of dis-

tribution by the probate court having jurisdiction. The administrator of the estate has the right to possession of the real estate of which the decedent died seized and may collect the rents, issues, and profits thereof until the final settlement of the estate or until delivered to the heir or devisee by order of the probate court. (See section 202 of the law in regard to decedents, Compiled Statutes 1897, p. 527, ch. 23.) It is conceded that the construction of this section in connection with some others of our law relative to the same subject must govern the disposition of the point presented. Lands of which a person died seized, when not devised, descend to the heirs in the order designated in the statute, subject, however, to the debts of the deceased (Compiled Statutes 1897, p. 503, ch. 23, sec. 30); and it may be further said, subject to the administrator's statutory right of possession conferred by the section to which we have hereinbefore alluded. The title vests in the heirs as it did at common law. (*Shellenberger v. Ransom*, 41 Neb. 631; *Johnson v. Colby*, 52 Neb. 327.) There exists no reason or rule, aside from the statutes, which would seem potent in its call to us to declare that the heirs of a deceased person claiming title and possession of real estate of which their ancestor died seized, or a person claiming the title and right of possession of real estate by, through, or under them, shall not have the right to the possessory action of ejectment as against all persons in possession, except such as are so by right derived through, under, or from the administrator; nor, as we view and construe the provisions of the statutes on the subject separately or connectedly, do they furnish any forcible arguments or grounds for saying that to allow said heirs or their transferees the right to such action would place them as to their asserted rights and the administrator and his possessory rights in an irreconcilable or any conflict, or to hold that such heirs or persons may not enforce the right of possession by action as against all save and except the administrator or persons claiming by, through, or under him. If the title passes to and

vests in the heirs, as it most certainly does, then the possessory right goes with it, except to the extent it is placed by law in the administrator, which is not exclusively or absolutely, but optionally with him, and for purposes indicated by statute and for none other; and such purposes may be subserved and fulfilled consistently with the right of the heirs or persons claiming under them to assert and obtain possession of any save parties who are in as of right derived from the administrator.

In the case of *Territory v. Bramble*, 5 N. W. Rep. [Dak.] 945, it was said, in reference to a section of the probate act of the territory, in the exact words of the section 202 of our law which we are considering: "Our statute was taken from Wisconsin, whence it was taken from Michigan, and was afterward enacted in Nebraska and Oregon. A similar statute is found in Alabama and Mississippi, in all of which states it has received a judicial construction; and under the rule that a legislature taking a statute from the laws of another state gives to the new enactment the same construction given to it by the courts of the state from which it was taken, we may, with profit, inquire what construction was placed upon this statute by the court of Wisconsin and Michigan."

In *Kline v. Moulton*, 11 Mich. 370, the administrator had sold the real property without obtaining license, as required by the statute, and the grantee under the deed, while admitting that he got no title to the land, contended that he got all the right the administrator had, to-wit, the right of possession; but the court denied the right, and held that the administrator had no right of possession that he could sell or transfer."

In *Marvin v. Shilling*, 12 Mich. 356, the court stated: "In *Streeter v. Paton*, 7 Mich. 341, we had occasion to consider the effect of this statute on the rights of the heir, and came to the conclusion that the statute did not interfere with the descent of the real estate to the heir, and his right to take possession, or bring ejectment therefor against any one, except the administrator or some one in

possession under him, and that the object of the statute was to permit the personal representative of the deceased to take possession of the real estate and hold it until it should be sold by him under a license of the probate court, or the final settlement of the estate if he thought proper to do so, unless ordered to deliver it over to the heir by the probate court."

In the case of *Jones v. Billstein*, 28 Wis. 221, wherein from the facts it appeared that an administrator had sold real estate of his decedent and the sale was void, the heir of the deceased brought an action of ejectment against the grantee who asserted that conceding that the sale did not pass the title to the land to him, yet the deed was not void, but conveyed to him the possessory right of the administrator, and if the deed was void the heir could not maintain the action, for the right of possession was in the administrator until the settlement of the estate and the administrator alone could bring ejectment. The court, in its opinion, stated on this subject: "It is claimed that the statute which gives to the executor or administrator the right to the possession of the real estate, and the power to receive the rents, issues, and profits thereof, necessarily deprives the heir of such right of possession until such time as the estate is settled or delivered over to him by order of the court. But we think that no such result necessarily follows. As we understand the statute, it gives the personal representative the power to reduce the real estate to his actual possession should he think proper, or should the probate court direct him so to do, but it does not imperatively require him to take possession thereof, and until he does so the common right of the heir to the possession remains unimpaired." (See also *Holbrook v. Campau*, 22 Mich. 288; *Flood v. Pilgrim*, 32 Wis. 376; *Filbey v. Carrier*, 45 Wis. 469; *State v. Reeder*, 5 Neb. 203; *King v. Boyd*, 4 Ore. 326.)

The doctrine announced in *Marvin v. Schilling*, *supra*, *Streeter v. Paton*, and *Campau v. Campau* was quoted with approval in *Dundas v. Carson*, 27 Neb. 640.

In the case of *Balch v. Smith*, 30 Pac. Rep. [Wash.] 648, which is cited by counsel for plaintiff in error as sustaining his position and which does so, it is said: "Section 956, Code Proc., provides that the administrator may take possession of the real estate of his intestate, and maintain possession thereof, with the responsibility of ownership, until the same shall have been delivered over by order of the probate court. And it is contended on the part of the respondents that this shows clearly the intent on the part of the legislature that, before the heir gets such title as he can enforce in the courts, the property claimed by him must have been so delivered over; and that the simple fact of his heirship, without the aid of such adjudication by the probate court, is not sufficient to authorize him to maintain an action against an adverse holder;" and, after stating that the courts of Dakota, Michigan, and other states hold a doctrine directly contrary to the contention of counsel, further says: "But we should feel constrained to hold with these decisions were this section 956 the only provision of our statute relating to this subject. The cases of which we have been speaking seem to have gone off entirely upon the language of the section of the statutes of the respective states corresponding to our section 956, and if they had other provisions similar to the succeeding sections of our probate practice act, to which we shall now call attention, such fact seems to have escaped the attention of the courts, and we assume that these further provisions of our statute were not contained in those under discussion when those cases were decided. Our section 956, as we have already seen, simply gives the administrator permission to take possession of the real estate,—at least, it uses the word 'may' instead of the word 'shall,' and in the light of the cases above referred to, we should construe such language as they have done, were it not for such further provisions of our law." The opinion announces the doctrine that title and the rights incident thereto regularly pass to an heir only by a decree of distribution of the court in which adminis-

tration proceedings are or have been pending. This was followed in the case of *Hazelton v. Bogardus*, 35 Pac. Rep. [Wash.] 602, but, as fully appears, the rule announced was based on the construction of the section of the statutes of Washington almost if not identical with ours in terms connectedly with others; the effect of the whole number so viewed forcing the conclusion. But there are no further provisions of our law which, read in connection with section 202, call into existence such conditions as confronted the Washington court; hence the opinions cited are not in point and the doctrines therein stated cannot be adopted or followed in the case at bar.

A second point discussed by the counsel for plaintiff in error is that the court erred in instructing the jury to the effect that the plaintiff in error had failed to produce evidence sufficient to establish a title by adverse possession. In regard to adverse possession and claim of title by reason thereof it has been several times announced by this court: "To establish title to real property in this state by virtue of the operation of the statute of limitations there must have been maintained by the party asserting it an actual, continuous, notorious, and adverse possession of the premises under claim of ownership during the full period required by the statute." In the opinion in the case of *Lantry v. Parker*, 37 Neb. 353, wherein the adverse possession of land was in question, it was said: "This evidence is, we think, sufficient to justify the trial court in finding that defendant had the notorious, continuous, and adverse possession of the land for the statutory period. The law does not require that possession shall be evidenced by a complete inclosure, nor by persons remaining continuously upon the land and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature, adapted." (See also *Twohig v. Leamer*, 48 Neb. 247.) Taking into consideration the facts that this land was quite hilly and rough, or what is commonly termed "broken

land;" that one portion of it was so sandy as to be used as a "sand pit," where persons procured sand for use in making mortar for plastering and other purposes; that not a great portion was arable land or fit for cultivation; also the conditions existent in this state during many of the years of plaintiff in error's alleged possession, relative to fencing, cultivation, and other of the well-defined and approved *indicia* of possession, and that many of them were not present where the possession was undoubted; also bearing in mind for what purpose this land was by nature adapted, we think the evidence adduced on the subject of the adverse possession of plaintiff in error was sufficient to demand that question be submitted under appropriate instructions to the jury for its consideration and determination, from which it follows that the court erred in giving the instruction it did, and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

N. N. BRUMBACK ET AL. V. AMERICAN BANK OF BEATRICE.

FILED FEBRUARY 17, 1898. NO. 7865.

Trial: OPENING AND CLOSING. The party to an action upon whom rests the burden of the issues is entitled, on the trial of the cause, to open and close the evidence; also the arguments to the jury. *Hickman v. Layne*, 47 Neb. 177, followed.

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

J. E. Cobbey and *G. M. Johnston*, for plaintiffs in error.

C. E. White, contra.

HARRISON, C. J.

This action was instituted by the defendant in error in the district court of Gage county to recover of plaintiffs

in error the amount alleged to be due defendant in error on a promissory note. Issues were joined, and as a result of a trial the bank received a verdict and judgment, and the opposite parties have presented the cause here for review in error proceeding.

At the inception of the trial a motion or claim was made for plaintiffs in error that they be allowed the opening and closing in the introduction of testimony and argument of the cause to the jury. This was overruled, to which action an exception was noted for the movers and it is of the errors assigned and argued. An examination of the pleadings discloses that if there had been no evidence introduced the plaintiff in the action would have been entitled to a judgment. The issues being thus joined the motion for plaintiffs in error should have been allowed and the action thereon was an error for which the judgment must be reversed. It is provided in section 283 of the Code of Civil Procedure: "When the jury has been sworn the trial shall proceed in the following order, unless the court for special reasons otherwise direct: * * Third—The party who would be defeated, if no evidence were given on either side, must first produce his evidence. * * * The parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence shall have the opening and conclusion." (See *Vifquain v. Finch*, 15 Neb. 505; *Rolfe v. Pilloud*, 16 Neb. 21; *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432; *Osborne v. Kline*, 18 Neb. 344; *Rea v. Bishop*, 41 Neb. 202; *Hickman v. Layne*, 47 Neb. 177.)

There is but one brief filed, it being that which contains the argument on behalf of plaintiffs in error, and as the case must be remanded supposably for another trial, we do not deem it necessary at this time to discuss the other matters presented.

REVERSED AND REMANDED.

JASON R. GEORGE ET AL. V. WILLIAM CLEVELAND.

FILED FEBRUARY 17, 1898. No. 7775.

Village Bonds: INTERNAL IMPROVEMENTS: COMPLIANCE WITH CONTRACT: INJUNCTION. The electors of the village of Shelton, in Buffalo county, by a favorable vote on the proposition, authorized the issuance and delivery of the bonds of the village to two designated persons on the construction and operation by said persons of a mill. The persons named did not build the mill but entered into a copartnership with two other parties under the name and style of the Shelton Milling & Grain Company, and the company built and operated the mill. *Held*, That the voters of the village could demand the strict or literal performance of the contract; and the erection and operation of the mill by the copartnership was not such a fulfillment of the compact and did not entitle either the company or the two persons named in the proposition approved by the voters at the election to demand and receive the bonds.

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

Marston & Nevius and *John M. Thurston*, for plaintiffs in error.

Calkins & Pratt, contra.

HARRISON, C. J.

This action was instituted by defendant in error for himself and others similarly interested to restrain the issuance and delivery of the bonds of the village of Shelton, Nebraska, in the aggregate sum of $2,000, to Jason George and Thomas Turney. Pleadings were filed by the parties, by which issues were joined, of which a trial resulted in a decree by which the delivery of said bonds was perpetually enjoined and restrained. From such decree the present appeal has been perfected.

It appears that George and Stevens submitted for the consideration of the citizens of Shelton the following proposition, the date *et cetera* are shown in copy:

"We, the undersigned, herewith submit the following

proposition to the citizens of the village of Shelton, in Buffalo county, Nebraska, to-wit: In consideration of the voting and delivery of bonds by the said village of Shelton, in the sum of $2,000, we hereby agree with the said citizens of Shelton to build and fully equip and operate for five years a flouring mill with roller process, to be run by water-power and to do custom work, and have a capacity of 75 barrels per day; said mill shall be 24 by 40 feet, three stories high exclusive of basement, with addition 16 by 40 feet, and to cost not less than $15,000.

"And we further agree to produce flour equal in quality and yield to any flouring mill in the state. When said mill is completed and successfully run three months to the satisfaction of a citizens' committee of said village of Shelton, the said bonds to be turned over and delivered to us.

"Dated at Shelton, Nebraska, this 10th day of June, 1893. J. R. GEORGE.

"THOMAS TURNEY."

The authority for the issuance of any bonds of the character involved in this litigation, if it exists, is contained in the provisions of our statute in relation to issuance of bonds in aid of works of internal improvements. A petition was presented to the county board and, pursuant to the prayer thereof, an election called for the purpose of taking a vote of the citizens on the question of the issuance of the bonds and their donation to the parties who had made the offer, in accordance with the terms and on their compliance with the conditions and obligations by the offer placed on them. The published call and notices of the election, the holding of which was fixed and occurred of date July 18, 1893, contained the following as of the essential portions of the proposition submitted:

"Shall the village of Shelton and state of Nebraska issue the bonds of the village of Shelton to the amount of $2,000, payable to J. R. George and Thomas Turney, or bearer, on the expiration of ten years from the date of same, and bearing interest at the rate of six per cent per

annum, payable annually, with coupons attached to said bonds payable to bearer at the office of the treasurer of Buffalo county, Nebraska? And shall the county board cause to be levied annually upon the taxable property of the village of Shelton, in addition to the regular taxes, an amount of taxes sufficient to pay the annual interest on said bonds to-wit, one hundred and twenty dollars, and two hundred dollars each year for ten years to pay the principal? Said bonds to be held in trust by the trustees of the said village of Shelton, to be turned over to the said J. B. George and Thomas Turney when they shall have erected in the said village of Shelton a flouring mill, with roller process, to be run by water-power and to do custom work, three stories high, exclusive of basement, main part to be 24x40 feet with addition 16x40 feet with a capacity of seventy-five barrels per day, and to cost not less than $15,000, provided that said bonds shall not be so turned over by said trustees until said mill has been fully equipped and successfully operated for three (3) months."

The original petition presented (as is stated in short in the brief filed for the defendant in error) the following reasons why the bonds should not be delivered:

"1. That the notice of the election was not published for four weeks as required by law.

"2. That no copy of the question submitted was posted up at the place of voting during the election.

"3. That the petition for said election was not signed by fifty freeholders.

"4. That no notice of the result of said election had been published for two weeks or at all.

"5. That the mill for which said bonds were voted was not a public mill within the provisions of section 27, chapter 57, Compiled Statutes, and that it did not and could not grind for toll as required by said chapter 57, Compiled Statutes, concerning public mills.

"6. That the donees had not complied with the terms of the proposition, in that they had not built a mill cost-

ing fifteen thousand dollars, nor any greater sum than ten thousand dollars."

During the trial it appeared in evidence (it was of the testimony given by Mr. George, one of the plaintiffs in error) that about August 1, 1893, or subsequent to the election, the result of which was favorable to the issuance of the bonds, and prior to the erection of the mill, Jason R. George and Thomas Turney, with two other persons, formed a copartnership under the name and style of the "Shelton Milling & Grain Company," a one-third interest in the mill property being conveyed to the two parties who joined in the copartnership with Mr. George and Mr. Turney, and the company builded and owned the mill by reason of the construction of which George and Turney claimed the right to demand the delivery of the bonds to them. Leave was then asked for defendant in error to file an amendment to the petition to conform to the facts as proved, and to which we have just referred. This was granted, and the amendment was prepared and filed. The trial court embodied in its decree the following findings:

"1. That the petition presented to the county board for calling of the election mentioned in the petition herein was in all respects legal and sufficient.

"2. That the publication of the notice of said election was full, complete, and in accordance with law.

"3. That a copy of the proposition contained in said notice was duly posted at the polling place in the said village of Shelton on the day of said election, as required by law.

"4. That the canvass of the return of said election was duly made by the proper officers, and report thereof made to the county board, and that said proposition was duly declared carried in accordance with law.

"5. The court doth further find that all the preliminary steps necessary to the validity of said bonds, if issued, were duly taken and had in accordance with the statute.

"6. That the said mill erected was an internal improve-

ment, and public mill under the statute, under and by virtue of which the said preliminary proceedings were taken and had; that said bonds were duly issued, registered, and placed in the hands of the trustees of said village of Shelton, under the terms of said proposition.

"7. The court doth further find that the evidence in this case shows that a proposition was made in writing by the defendants J. R. George and Thomas Turney to construct and operate a mill of certain dimensions, character, and capacity, described in said proposition, and to cost not less than $15,000, and that the schedule showing the items of cost of said mill, in evidence, shows that among said items was one of $7,000 for the plant, which consisted of a water privilege, right of flowage, race, and superstructure of an old grist mill occupying the present site of the mill tendered as being constructed in accordance with the terms of said proposition. That there was no proper evidence showing that the taxpayers of said village voted upon said proposition with the knowledge that said 'old plant' was to be a part of the said sum of $15,000, which said proposed mill should cost, and the court therefore finds that by reason of the failure to embody the proposed use of said 'old plant' in the said proposition in writing was a failure to inform the legal voters of said village of the full terms and complete consideration offered for the issue of said bonds, and for that reason the delivery of said bonds should be restrained.

"8. The court further finds that after said election, and before the construction of said mill, the said Jason R. George and Thomas Turney, the beneficiaries named in said bonds, and about the first day of August, 1893, took into partnership with them two other persons and formed a copartnership under the name and style of the Shelton Milling and Grain Company, and conveyed to said two persons a one-third interest in said mill property, and that said copartnership constructed said mill. And the court finds that by such a proceeding the

real beneficiaries in said bonds, and the donees thereof, were changed and that said mill was not constructed by the said Jason R. George and Thomas Turney as required by the terms of said proposition and contract on the part of the taxpayers of said village, and for that reason the delivery of said bonds should be restrained."

From which will be gathered that finding numbered 8 is one which in and of itself furnishes sufficient basis and support for the decree rendered. There can be no doubt of the propriety of such an amendment of the petition as was asked or the right of the court to allow it, or that it was an entirely correct action in the present case. The citizens, the electors, having been informed by the offer as first made in the petition circulated and presented to the county board, in a call for notices of the election, and in the proposition submitted, in fact at every stage of the proceedings, that the mill would be erected and operated by Jason R. George and Thomas Turney, this being the consideration to be received by them and which they had stamped with their approval and sanctioned by their votes, were entitled not only to expect, but to demand that the conditions and terms of the compact, for such it was, be exactly fulfilled—be literally performed. The construction and operation of the mill by the Shelton Milling & Grain Company was not a literal compliance with the contract and did not confer upon it the right to demand and receive the bonds; nor did it place George and Turney in a position to entitle them to the bonds, nor to receive them in part for their own benefit and in part for the benefit of their partners; nor to demand and receive them in their names but in reality for the company.

In the case of *Township of Midland v. County Board of Gage County*, 37 Neb. 582, it was sought to restrain the issuance and delivery of certain bonds of the township. The issuance of the bonds to a designated railroad company in aid of the construction of its railroad had been authorized by a vote of the electors of the township.

The designated company did not complete the railroad, but sold and transferred all its rights and interests to another company,. which completed the railroad and claimed the bonds. The trial court, by decree, perpetually enjoined the issuance of the bonds. On appeal to this court, in its opinion this court said: "The petition presented to the board of supervisors by the freeholders of the township prayed the calling therein of an election and the submission to the electors of a proposition to aid the railroad company. The proposition submitted to the electors was to aid the railroad company. The electors voted to aid the railroad company and authorized the board of supervisors, on the completion of the improvement by the railroad company, to issue the bonds of the township and deliver them to the railroad company. Yet this railroad company did not complete the improvement. It sold out its property and franchises, and its vendee built the improvement and now claims the bonds. This will not do. If one vendee can claim this aid successfully, any vendee of the railroad company can. * * * The electors of the township are entitled to stand on the very letter of their promise. If they promised a donation to A if he would build a certain improvement, it does not follow that B is entitled to the donation, though he builds the improvement; in other words, the township electors designated the donee and only the one designated can take the donation. The electors did not authorize the supervisors to deliver the bonds voted to the railroad company or its vendee, and had they, it would have been ineffectual and the bond invalid. (*Jones v. Hurlburt*, 13 Neb. 125; *Spurck v. Lincoln & N. W. R. Co.*, 14 Neb. 293; *State v. Roggen*, 22 Neb. 118.) The most that can be said for the appellees is that the electors of this township authorized their agents, the board of supervisors and the county clerk of Gage county, to issue the bonds of said Midland township and deliver them to the railroad company when it had built a certain improvement. The railroad company never

complied with the condition coupled with the authority given by the township electors to its agents. The vendee of the railroad has complied with the condition to build the improvement, and it now claims these agents should deliver the bonds to it. Authority from a principal to an agent to do a specific act is limited to that act." (See also *State v. Commissioners of Nemaha County*, 10 Kan. 577.)

In the case of *Nash v. Baker*, 37 Neb. 713, in which the relief sought was to enjoin the collection of $75,000 of bonds which, by vote, the citizens of Kearney had donated in aid of the construction by the Kearney & Black Hills Railway Company of its railroad on the ground that it had been represented to the voters that the road when built would be and operate as an entirely independent line and not under the control of any other railroad or railway and that said statement was untrue, in the discussion of one of the questions presented this court states: "In the case under consideration the representation was of the existence of a fact of controlling weight with the electors called upon to vote bonds in aid of the enterprise projected. The voter could only know of the nature and object of the project to be assisted, by the representations of its promoters. These representations necessarily referred to future conditions, the power to establish which was lodged in the promoters of the scheme. The promise was, that the road, when built, should exist and operate in entire independence of the domination of another road already in existence. It might be that this independence was undesirable, useless, and worthless. That proposition, however, should have been argued to the voters. It cannot now be urged against them. In an opinion in this court, in *Township of Midland v. County Board of Gage County*, 37 Neb. 582, filed during the present term, it has been held that the electors of a township are entitled to stand upon the very letter of their promise, a wholesome rule which should be extended to the facts under consideration. In the

case at bar it may be that the insistence upon independence of the Union Pacific Railway was without reason, and even merely whimsical, yet it was a condition which the voters had a right to insist upon as qualifying their proposed donations. The propriety of employing the power of taxation to making donations to enterprises in no way connected with the administration of government may well be doubted in any case. Such restrictive conditions as the voters see fit to insist upon must not be ignored by the proposed donee, especially after accepting the donation burdened with them." A rehearing was moved for and granted, and in a second opinion, reported in 40 Neb. 294, it was said: "The argument upon the rehearing is largely directed to the proposition that the evidence failed to establish some elements necessary to sustain a claim for relief on the ground of false representations. We think that each one of these elements is fairly established by the proof in the case, but if the case depended upon other principles the result would be the same. It is an incontrovertible fact that the contract of the voters, in view of the representations made and assurances held out, was for a railroad independent of other lines and not subject to the control of any other road. What they obtained was in fact a railroad practically owned and absolutely controlled by the Union Pacific Railroad Company, and bound to it by a close traffic agreement. Commenting upon certain language in the former opinion, as to the propriety of exercising the taxing power for such purposes, counsel insist that that question is for the legislative branch of the government and not for the courts. This may be conceded, but still, if taxes are to be imposed upon the whole body of taxpayers by a vote of a certain proportion of them for the purpose, not of exercising any legitimate function of government, but solely for the purpose of making a gift in aid of an enterprise quasi-public in its nature, but still of a business character, it is the duty of the courts to see that such power is not abused; that the donees bring

themselves within the strict terms of the grant, and that the donors receive precisely what they bargain for."

The doctrines announced in the opinions of this court, from which we have quoted, are directly pertinent and applicable in and to the state of facts of the case at bar and must govern its decision.

There are other questions argued in the briefs, and they were also presented in the oral argument, but, in view of the disposition of the cause which must follow from the conclusion reached on the grounds which we have considered and determined, their discussion is unnecessary and will be omitted. The judgment of the district court is

AFFIRMED.

LEWIS E. KARNES V. GEORGE E. DOVEY ET AL.

FILED FEBRUARY 17, 1898. No. 9754.

1. **Exemption:** WAGES. It is the purpose of the statutory law to absolutely exempt from forced application to payment of indebtedness the sixty days' wages of parties designated in the statute.
2. ———: ———: ASSIGNMENT OF CLAIM: DAMAGES. If an account, claim, or evidence of indebtedness has been sold and assigned by the party to whom it belonged, and in an action in the courts of this or another state or a territory the exempt wages of the debtor have been taken under process and applied to the payment of such indebtedness, in an action by the debtor against the original owner thereof to recover the amounts as provided by statute he may, if there are facts shown in evidence from which an inference or conclusion might be drawn that the assignment had been made without any intent or purpose on the part of the assignor to avoid or evade the effect of the exemption laws, the question of the existence or non-existence of such intention or purpose is one of fact to be determined by the jury under appropriate instructions; and an instruction requested to be given which ignores said proposition is erroneous and its refusal proper.
3. **Instructions:** ASSIGNMENTS OF ERROR. Errors in giving instructions and in refusals to give requested instructions must be separately assigned in the motion for a new trial and petition in error. Where this rule is violated and the trial court's action is deter-

mined to have been proper as to one of either of instructions given or refused in relation to which errors have been assigned in gross, the assignment need be no further considered.

ERROR from the district court of Cass county. Tried below before RAMSEY, J. *Affirmed.*

D. O. Dwyer and *E. H. Wooley*, for plaintiff in error.

Beeson & Root, Byron Clark, and *C. A. Rawls, contra.*

HARRISON, C. J.

It appears herein that on and prior to August 19, 1892, the defendants in error were, as partners, engaged in general mercantile business in the city of Plattsmouth, this state, and the plaintiff in error on the date mentioned was indebted to them on account; that said account was then sold and assigned to a third party, who in a court of the state of Iowa instituted an action thereon in which a writ of attachment was procured to issue, accompanied by a summons in garnishment against, and which was served on, the Chicago, Burlington & Quincy Railroad Company, owner and operator as assignee of the Burlington & Missouri River Railroad Company in Nebraska, of which last mentioned company the plaintiff in error was an employé; that as a result of said action in the Iowa court the wages of the plaintiff in error, which he asserts herein were by the laws of this state exempted from forced application to the payment of his indebtedness of which was the account sold by defendants in error, were taken and appropriated in payment of said account. The present action was commenced in the district court of Cass county to recover of defendants the damages alleged to have been suffered by plaintiff by reason of the alleged assignment by defendants of the account and the subsequent proceedings in the Iowa court and the seizure and application therein of the exempt wages of the plaintiff. Issues were joined, and in a trial the defendants were successful and the plaintiff presents the cause to this court for review.

It is argued that the trial court erred in refusing to give in charge to the jury instruction numbered 2, requested for plaintiff, in terms as follows: "The court instructs the jury that if they believe from the evidence that plaintiff is the head of a family and a resident of this state, and that the money attached by the Iowa court was earned within the period of sixty days prior thereto, then and in that case your verdict should be for the plaintiff, and in this connection you are instructed that under the laws of Nebraska a creditor cannot lawfully assign a claim against a resident debtor of Nebraska to a person in another state and have exempt wages taken by such persons in the other state." And in this connection it is also urged that it was error of the court to give paragraph numbered 3 of its charge to the jury. The first would, if it had been read in connection with the other portions of the charge, have informed the jury, as is claimed in argument, that if an account against certain parties designated in our statutes was by the owner thereof assigned and by the assignee or other person to whom it might be further assigned taken to another state and suit thereon instituted in which the wages earned within the sixty days or time fixed by law were taken and applied in satisfaction of the account, an action would lie and could be successfully maintained against the original owner and assignor, and the verdict, regardless of the appearance of other fact or facts in evidence, should in this case be against the defendants. Paragraph numbered 3 given, and which, as we have stated, is attacked in this connection, was in effect the same as that numbered 2 requested for plaintiff, except in that it informed the jury if it further appeared in evidence that the account was sold and assigned without any intent or purpose on the part of the assignors of evading the exemption laws of the state the verdict should be for the defendants. It is provided in section 531*a* of the Code of Civil Procedure: "The wages of laborers, mechanics, and clerks who are heads of fam-

ilies, in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; *Provided*, That not more than sixty days' wages shall be exempt." And on the same subject, in section 531*c*: "That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employé of any corporation, firm, or individual in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employé by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." In section 531*e*: "In any proceeding, civil or criminal, growing out of a breach of sections one or two of this act, proof of the institution of a suit, or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state or in this state, to seize, by process of garnishment or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done." Also, in 531*f*: "Any persons, firm, company, corporation, or business institution guilty of a violation of sections one or two of this act shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished,

or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state." The object of these and other provisions of statute on the subject, it is evident, is to exempt absolutely, if possible, the wages of the persons designated, to the extent or amount stated, and they should be construed in such manner as to render them effective of the expressed purpose. If we give the language used its ordinary and precise import, always bearing in mind the object sought to be accomplished by the law-makers who framed and enacted the portions of our law now under consideration, we think it is clear that if it appears in evidence that an account or claim has been assigned and an action instituted thereon by the assignee in a state other than this in which the exempt wages of the debtor have been seized and appropriated to the payment of the debt, and other facts have been shown from which the fair inference or conclusion might be drawn that the assignment by the original owner of the claim had been wholly without any intention or purpose of avoiding or evading the law of exemptions, the questions are of fact and to be submitted to the jury under proper instructions, and in this view of the matter the instruction requested and refused was erroneous, in that it ignored the proposition of the good faith of the assignors of the account at the time of such transfer; and the one given was correct, in that it noticed the proposition which was omitted from the requested instruction.

It is an established rule that alleged errors in regard to instructions given or refused must be specifically and separately assigned in both motion for a new trial and the petition in error; that if they be grouped in assignment in either pleading the errors indicated will be examined no further if it be ascertained that one of the errors of the group alleged is without force. (See *Graham v. Frazier*, 49 Neb. 90; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Denise v. City of*

Omaha, 49 Neb. 750.) In this case errors were assigned in group in the motion for new trial in relation to several instructions given, and in the same manner in both motion for a new trial and the petition in error of instructions requested for plaintiff in error and refused, and having determined that one given was without error and of one refused the action was proper, we need consider no further alleged errors as to either group. There are no other objections presented in argument, and it follows that the judgment of the district court must be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JOHN POLLARD.

FILED FEBRUARY 17, 1898. No. 7698.

1. **Railroad-Crossing**: DANGER: NOTICE. A railroad-crossing is a place of danger, and all persons to whom negligence may be imputed are bound to take notice of that fact.

2. ———: ———: NEGLIGENCE. A traveler on a street or public highway approaching a railroad-crossing thereof for the purpose of using it or going over must exercise ordinary care, or such care as would be exercised by a prudent man under all the facts and circumstances attendant upon and surrounding his approach to and crossing the track.

3. **Negligence**: QUESTION FOR JURY. If different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court but must be submitted to the jury. *Omaha S. R. Co. v. Lochnicsen*, 40 Neb. 37, followed.

4. ———: EVIDENCE. The evidence in this case examined, and *held* not to establish conclusively and as matter of legal imputation contributory negligence on the part of the plaintiff.

5. ———: ———. Actions of the trial court in giving and in refusing to give instructions in charge to the jury, and to which exceptions were urged, examined, and *held* not erroneous or not prejudicially so.

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

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

Sawyer, Snell & Frost, contra.

HARRISON, C. J.

The plaintiff in this action, commenced in the district court of Saunders county, sought of the company a recovery of damages which he alleged became his due by reason of injuries to himself and the destruction of a wagon and harness, caused by the negligence and carelessness of the company's employés in the operation and running of a locomotive and passenger train of the company over and on its line of road through the village of Greenwood, this state; that by reason of such negligence and carelessness the said locomotive and train of the company struck the wagon in which, with team of horses attached, the plaintiff was crossing the railroad of the company at the regular street crossing thereof in said village, and threw the plaintiff from the wagon and inflicted on him the permanent injuries of which he complained, and destroyed his wagon and harness. The answer of the company placed in issue the material allegations of plaintiff's petition and alleged affirmatively that the injuries to himself and his property, if any occurred at the time and place claimed, were the results of his own negligence and carelessness. Of the issues joined there was a trial to the court and a jury. The verdict was returned favorable to plaintiff and judgment rendered thereon. The cause is presented to this court by error proceeding on the part of the company.

The discussion in the argument is, as was stated by counsel, confined to two or three points, the main one of which is that there was such contributory negligence on the part of plaintiff as to defeat a recovery on his part though the company might have been negligent. It is

insisted in this connection that the evidence in the case shows conclusively, and as a matter of legal imputation, negligence in the actions of plaintiff which must defeat his action to recover for the alleged negligence of the company.

This is one of the class of cases based on the incidents of accidents at crossings of streets or public highways and lines of railroads, in all of which as to the facts and circumstances there is a general likeness or resemblance, though in each there appears some particular and distinguishing facts or details not present in others. In this case the plaintiff testified as follows:

Q. Were you in the village of Greenwood on the 8th of April, 1893?

A. Yes, sir; in the afternoon.

Q. What did you take down, anything that day?

A. I took, I and my boy took, down a couple of loads of corn.

Q. Did he drive one team and you another?

A. Yes, sir.

Q. In going from your place to the elevators there in Greenwood did you cross any railroad track?

A. Yes, sir.

Q. On what street?

A. I think they call it First street.

Q. What did you do with the corn that you took to town that day?

A. Dumped it in Railback's elevator.

Q. Where is that elevator?

A. It is south of Second street.

Q. After you had dumped the corn what did you do?

A. Drove around and weighed my wagon and started for home.

Q. On what side of the railroad track were you after you had dumped your corn?

A. On the southeast.

Q. In going from Second street, or near there, when you had dumped your corn, how did you get to First street?

A. By going north.

Q. Is there a wagon road along there?

A. Yes, sir.

Q. How does it run with reference to the railroad track?

A. Along-side of it.

Q. Now describe to the jury just what you did, what precautions you took in the way of looking for any trains on the way from Connor's elevator where you put your corn until you were struck by the train.

A. Used all the caution that I could use. The teams had not been in town for quite a bit; my boy had a team behind; I dumped my load first and I was watching for a train on account of his team, and also for myself, and when I got close to the track I saw smoke down towards Ashland, and I thought to myself, there is a train coming from that way, I just held the horses until I could see it was not a train, and I just turned in an instant,— it seemed only a few instants from the time, from the time I quit looking towards Lincoln, I had looked a few minutes towards Ashland——

Q. Was it minutes?

A. Not minutes; I just looked, just turned my head toward Lincoln, and there seemed to me to be an engine standing right there, and I just slashed the lines and let the horses loose from my hands, just let them have their heads, and that is all I know about it.

Q. What signals did you hear in the way of a bell or whistle?

A. I did not hear anything.

Q. Those two toots that some witness spoke about, did you hear that?

A. I did not catch it. My wagon was a loose box and may have stopped the noise; before the sound got to me the engine got to me, and if it did toot I did not hear it.

Cross-examination:

Q. How fast were you going that day?

A. I don't know; the team was walking along, going

on the railroad crossing. Well, I have timed them; they walk about four miles an hour.

Q. Probably three or four miles an hour?

A. Yes, sir.

Q. What kind of a team, did you have a quiet team?

A. Yes, sir; quiet.

Q. You were walking along on an ordinary walk?

A. Yes, sir.

Q. The team was quiet and paying no attention?

A. Yes, sir.

Q. There was no reason why you could not have stopped within twenty feet of it?

A. No, sir.

Q. You did not see the train until you were stepping on the crossing?

A. No, sir.

Q. The horses were stepping on the crossing?

A. Yes, sir; the horses were going over the last rail on the main line.

Q. Then you would be about over the first rail?

A. I think my wagon was; I don't know about myself, it was so quick I could not catch it.

Q. Where had you been looking?

A. Looking down toward Ashland and I saw a smoke down that way.

Q. Until you arrived at the crossing you had been looking toward Ashland?

A. Yes, sir; as the horses were starting over the switch I took my eye from toward Lincoln and turned toward Ashland, I saw smoke down there.

Q. Before you looked toward Lincoln?

A. Yes, sir.

Q. How long?

A. A few seconds.

Q. How many?

A. I could not hardly tell.

Q. Where did you begin to look toward Lincoln?

A. From the time I left the elevator.

Q. And you kept looking toward Lincoln from the time you left the elevator?

A. Yes, sir; until I looked the other way.

Q. You knew that this train was coming?

A. Yes, sir; I knew it was due about that time, the three o'clock flyer.

Q. You knew it did not stop?

A. Yes, sir; I knew it did not stop at Greenwood.

Q. You kept looking toward Lincoln until the horses stepped on the track?

A. Yes, sir; I saw smoke down there.

Q. How did you happen to see a smoke down there, looking toward Lincoln?

A. I turned my eye.

Q. You were not looking toward Lincoln all the time?

A. Maybe you know.

Q. You could not have seen a smoke toward Ashland if you had been looking toward Lincoln all the time?

A. If I had been looking direct there of course I could not, but I looked that way, and kind of cast my eye the other way and saw a smoke and held it there just a minute.

Q. Now, Mr. Pollard, as you drove along this street parallel to the railroad, you went along on an ordinary walk?

A. Yes, sir.

Q. You were not driving so that the wagon made much noise?

A. No, sir.

Q. Were you listening for the train?

A. Well, yes; my mind was on the train.

Q. You knew the train was due about that time?

A. About that time; I did not know just the time, I knew there was a "three o'clock flyer" about three o'clock.

Q. Did you know this was about three o'clock?

A. Yes, sir; about that.

Q. And your mind was on that train?

A. Yes, sir.

Q. You stood in the middle of the wagon?

A. Yes, sir; somewhere.

Q. How high would the line of your eye be from the ground as you drove along in that road?

A. I don't know.

Q. Eight feet?

A. Well, something like that, I expect; I never measured anything of that kind.

Redirect examination, by Mr. Snell:

Q. About what distance would you be in your wagon from the heads of your horses, how far from where you were standing in your wagon would it be to the heads of your horses did you say?

A. It would be about eighteen feet, I guess; somewheres near that, or sixteen feet; I never measured that.

Q. You speak of holding your eye toward Ashland a second or two, and you noticed something there. Why was it necessary to keep looking there? Was there any obstruction in the way?

A. The stock yard was there, and I think there was a box car there. I had looked to see if I was right or not, if a train comes up to switch in for the flyer to pass.

Q. As soon as you got where you could see clear by this box car there by the stock yards, then what did you do?

A. Then I turned my head to see if I could see down the track.

Q. Towards Lincoln?

A. Yes, sir; towards Lincoln.

Q. Now, what obstructions were there along the right of way, this wagon road, that prevented you from seeing towards Lincoln?

A. There was a little grain house there and an elevator office, two elevators and two offices and the depot. * *

Recross-examination:

Q. Where was this box car that you speak of?

A. I think there was one standing right by the hog shoot.

Q. Up toward Ashland?

A. Yes, sir.

Q. That is all, was it?

A. That is all that I seen.

It was stated by one of the witnesses called for the company:

Q. Did you see Pollard as he drove up to the track?

A. Yes, sir.

Q. I wish you would tell the jury what you saw.

A. I seen him make the turn in the road that parallels the railroad.

Q. As it goes to the crossing it makes the turn?

A. Just when he made the turn I seen him and watched him drive up on the crossing; he was in a lumber wagon, standing up, I believe; he drove up on the crossing, and seemed to be wrapped in his thoughts and oblivious of the surroundings. It appeared to me——

A. He stood looking down into his wagon and went up on the crossing and the horses crossed, and it seemed to me near the front end of the wagon struck the main line; he looked and seen the train coming, and he slashed the horses with the lines that way (indicating), and immediately the engine hit the wheel of the wagon, and that is the last I seen of him.

Q. What did he appear to be looking at as he drove up towards the crossing?

A. He was looking down in his wagon, as though he was studying about something.

Q. Did you see him look down toward the depot?

A. I did when the front end of his wagon hit the main line, he turned his head and seen it, and struck the horses with the lines, that way (indicating).

Q. Is that the first time he looked toward the depot?

A. Yes, sir; the first I seen.

Q. If he had been looking toward the depot, could you notice that?

A. Yes, sir; I never took my eyes off him since I first see him.

Q. Why was that?

A. When I seen the man driving on there and the train coming, when I heard the train coming, and he appeared to me to be oblivious of everything around him, I kept my eye on him until the train intervened, until the train hit the hind wheel of the wagon.

Q. Could you tell about where the train was when you heard it?

A. No, sir; I only saw him when he was probably forty feet from the main line, I did not notice the train until I seen the man that drew my attention, when I seen the man driving across, and I heard the train coming, heard the roaring.

And by another:

Q. What did Mr. Pollard appear to be paying attention to, if anything, as he drove up toward the crossing?

A. He didn't seem to be paying attention to anything more than the team; he was standing there driving along, and he didn't seem to notice anything.

Q. If he had had his face turned toward the south, could he have seen from where you were?

A. Yes, sir; I think he could very readily.

Cross-examination:

Q. Did he have his face turned toward the south?

A. No, sir; not when I saw him first.

Q. Then how did you come to the conclusion that he was not paying attention?

A. He stood there just driving the team along, and didn't seem to be looking either way to me.

Q. What part of his body could you see?

A. The back and side.

Q. Do you know where his eyes were, which way he was looking?

A. His face was turned toward the horses and I suppose he was looking at them.

Q. You suppose he was looking toward the horses?

A. Yes, sir.

It will be noticed that these witnesses, other than the plaintiff, but testify to what it seemed or appeared to them he was doing, and in regard to them it must be said that this is all they could do, as they were back of or behind plaintiff and could not see his eyes or know where he was looking except by the position of his head. The train which struck plaintiff's wagon was generally known along this portion of the line of railroad as the "flyer," did not stop at the station but passed through a portion of the village and until it struck the wagon at the street crossing its speed being estimated by one witness at twenty-five miles an hour and by the majority of the witnesses at forty or fifty; they were all, however, little if any, better than mere guesses, though all agreed that it was running quite rapidly. Between the depot and this crossing of First street (the depot was in the direction from the crossing from which this train came) stood on the company's right of way, two elevators, two grain dealers' offices, and one granary, at such distances apart and so situated as to obstruct (to what extent the witnesses were not all quite of the same opinion) the view of the track or railroad which would otherwise have been open to a person approaching the crossing along the street as the plaintiff did prior to the accident. A view of the track in the other direction was obstructed by stock yards, and on that particular day by a freight car. When a point thirty-five or thirty-six feet distant from the track was reached by one approaching to cross, the view along the line toward and beyond the depot was unobstructed for a considerable distance, one quite reliable calculation placed it half a mile. In the contrary direction the view of the line of railroad was obstructed by the stock yards and a freight car.

There are many cases cited by counsel which announce the doctrine in relation to the duty of a person about to go over a railroad track on a street or road crossing. This court, in reviewing one of this class of cases, *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, stated

the rule as follows: "It is the duty of a traveler upon a public highway, when approaching a railroad crossing, to exercise ordinary care. All men must take notice of the fact that a railway crossing is a place of danger. And we are of opinion that a person who goes upon a railway crossing without first listening and looking for the approach of a train, in the absence of a reasonable excuse therefor, does not exercise ordinary care. We further think that the act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, in the absence of a reasonable excuse therefor, admits of no other inference than that of negligence, and if such failure to look and listen contributes to the party's injury he cannot recover. *Pennsylvania R. Co. v. Rathgeb*, 32 O. St. 66, is a case very much like the one at bar. In that case Rathgeb was injured while attempting to cross the railroad track in a wagon. Before going upon the track he looked in one direction only. The district court charged the jury: I will not say to you that the plaintiff should have looked east along the track. I will only say that he was obliged to use his sense of sight in a reasonable manner, and it is for you to say whether he ought to have looked to the east along the track or not before he attempted to cross. But the supreme court held that the district court should have charged the jury that it was Rathgeb's duty to look to the east as well as the west along the track before attempting to cross it. In that case the court also held ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence and will defeat an action by such person for an injury to which such negligence contributed. In the case at bar, Talbot did not look toward the southeast, the direction from which the train came which injured him. He alleges as a reason for not

looking in that direction that he supposed the train bound northwest had already gone by, as it should have done if it was on time; but this supposition of Talbot will not excuse him for not exercising ordinary care in looking both ways for the approach of a train. A traveler approaching a railway crossing has no right to assume that cars are not approaching on the track, or that there is no danger therefrom." And the question of contributory negligence may on certain conditions of facts become one of law for the court. (*Guthrie v. Missouri P. R. Co.*, 51 Neb. 746.) Also applicable in such cases we have the following principles and rules:

It is the duty of a traveler on a street or public highway about to cross a railroad track at a crossing to view the track in both directions for the approach of a train. (*Omaha & R. V. R. Co. v. Talbot, supra; Nixon v. Chicago, R. I. & P. R. Co.*, 84 Ia. 331, 51 N. W. Rep. 157; *Schlimjen v. Chicago, M. & St. P. R. Co.*, 90 Wis. 194, 62 N. W. Rep. 1045; *Railroad Co. v. Houston*, 95 U. S. 697; *Baker v. Kansas City, Ft. S. & M. R. Co.*, 26 S. W. Rep. [Mo.] 20.)

It is the doctrine of this court that "Though it is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question rather than where deductions and inferences are to be made from them. And whether the facts are disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury." (*Atchison & N. R. Co. v. Bailey*, 11 Neb. 332. See to the same effect *City of Lincoln v. Gillilan*, 18 Neb. 115; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475; *Johnson v. Missouri P. R. Co.*, 18 Neb. 690; *Miller v. Strivens*, 48 Neb. 458; *Union P. R. Co. v. Cobb*, 41 Neb. 120; *American Water-Works Co. v. Dougherty*, 37 Neb. 373; *Omaha Street R. Co. v. Craig*, 39 Neb. 601, and cases cited.)

"The policy of the law has relegated the determination of such questions to the jury, under proper instructions

from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." (*Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. Rep. 679.)

When the view of the road is so obstructed as to render it difficult to see an approaching train, the question whether a traveler was wanting in due care is one for the jury to determine; and it is also a question for the jury under complicated circumstances, calculated to deceive and throw the traveler off his guard. (Beach, Contributory Negligence [2d ed.] sec. 195.)

It was not for the trial court, and is not for this court, to determine and say as a matter of law just what exact point in the plaintiff's approach to the railroad he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose. The question was, did he, under his surroundings and all the circumstances, observe the care which ordinarily would have been taken by a prudent person? It is insisted for the company that the evidence discloses that it was impossible that plaintiff looked and did not see the train approaching, notwithstanding what he states on this subject in his testimony; that this appears so clearly that no two reasonable men considering the evidence could or can differ in the conclusion drawn therefrom, and the question was one of law for the court. Counsel for plaintiff contend that there is presented herein a set of facts and circumstances which made the question of the contributory neg-

ligence one for the decision of the jury. The plaintiff states he looked along the track toward Lincoln, the direction from which the train came and from which he had reason to expect one at or about that time. His view of the track, in the direction just indicated, was partially, at least, and during some portions of his approach to the crossing wholly, obstructed by the buildings on the right of way, and until he was thirty-five or thirty-six feet from the main track to be crossed and on which the train came. His attention was attracted in the opposite direction by seeing some smoke there, which he conceived possibly to be proceeding from a train approaching from that direction. His view of the track looking toward the smoke was obstructed by stock yards and a freight car, and he states as soon as he obtained a clear view he turned again toward Lincoln and saw the train, but too late, as he thought, to avoid its striking him. It will be remembered that there were witnesses who stated that from where they saw the plaintiff as he approached the crossing, seemingly he was not looking either up or down the track or making any effort by use of either the sense of sight or hearing to ascertain whether there was a coming train by which he might be injured. This was a conflict in the evidence on this point. When the physical objects which were near, mainly the buildings on the right of way, their positions relatively to each other and to the track, the distance from it at which the view of the track was clear and unobstructed by the buildings to the plaintiff in his coming to the crossing, the time probably consumed by plaintiff in reaching and passing over so much of the crossing as he did, the speed of the train which while we do not think the evidence given definitely fixed it, it was conceded by all that it was running quite rapidly, that it was necessary plaintiff should look in both directions, which he says he did, that his attention was drawn away from the way from which the train was coming by smoke in the other direction, that his survey of the portion of the track to which he then turned his

eyes was obstructed, are all considered,—we cannot say that there arises a certainty that he did not and had not looked toward the approaching train, that it was impossible that he should have done so and not seen it and that it was conclusively shown that he was negligent. It might be said that in consideration of all the surroundings and complications, in the observation of ordinary care, he should have stopped his team when he saw the smoke toward Ashland, when it was within his knowledge that it was about the time a train, "the flyer," was due from the other direction, and assure himself of safety before starting over the track; but this would probably properly have been for the jury to consider as an element of the general question of whether the plaintiff, under all the facts and circumstances and his situation on the day he was injured, exercised ordinary care, was not urged in argument, and we need not give it further notice. From a full and careful examination and consideration of all the evidence we conclude that contributory negligence of plaintiff did not conclusively appear; that whether the plaintiff's precautions to avoid danger were such as prudence demanded, whether he exercised ordinary care or such care as the somewhat distracting circumstances, under all the attendant facts and circumstances demanded, was not a question of law, but one for the determination of the jury. (*Brown v. Edgerton*, 49 Pac. Rep. [Kan.] 159; *Loucks v. Chicago, M. & St. P. R. Co.*, 18 N. W. Rep. [Minn.] 651; *Moore v. Chicago, St. P. & K. C. R. Co.*, 71 N. W. Rep. [Ia.] 569; *Omaha, N. & B. H. R. Co. v. O'Donnell, supra; Breckenfelder v. Lake Shore & M. S. R. Co.*, 44 N. W. Rep. [Mich.] 957; *Nosler v. Chicago, B. & Q. R. Co.*, 34 N. W. Rep. [Ia.] 850; *McDuffie v. Lake Shore & M. S. R. Co.*, 57 N. W. Rep. [Mich.] 248; *Omaha S. R. Co. v. Lochneisen*, 40 Neb. 37.)

It is complained that the court erred in refusing to read to the jury an instruction numbered 1 prepared and requested for the company. This was to the effect that there was conclusive evidence of contributory negligence

on the part of the plaintiff; hence he could not recover in the action, and the verdict should be for the defendant. The conclusion that we have hereinbefore reached, that under the evidence herein the question of contributory negligence on the part of plaintiff was one to be submitted to the jury for decision settles the point here presented, and it follows therefrom that it was not error to refuse the proffered instruction.

It is urged that the court committed error in giving in charge to the jury an instruction numbered 5, asked for plaintiff, which reads as follows: "In determining whether the plaintiff was guilty of contributory negligence, you can take into consideration whether he looked and listened for the train, the distance from the track at which he could first see it, the obstructions to his view, the smoke he saw, if any, in the direction of Ashland, and if from all the evidence you find that he exercised the care and caution in attempting to cross the track in question at the time he did that a prudent and careful man would have exercised under the same circumstances, then the plaintiff was not guilty of contributory negligence." It is said in the brief: "This instruction invades the province of the jury, according to the holdings of this court. One of the issues in the case was whether the plaintiff himself was guilty of contributory negligence, and in this paragraph the court groups a number of facts together, and tells the jury, not that these might be considered by them in determining whether the plaintiff was guilty of contributory negligence, but tells them that he was not guilty of contributory negligence." We do not think the instruction is open to the objection urged against it. It but states that the jury may take certain facts into consideration, which was entirely proper in this case, then referring the jury to all the evidence as a basis for a finding on the question, states in correct terms what it was necessary should appear had been done by plaintiff to avoid the imputation of contributory negligence, did not state that the plaintiff had not been guilty

thereof, but that if the jury determined from all the evidence that his conduct and actions had been of a certain character, then it had decided that he had not been negligent. It might have been better to have defined contributory negligence generally and then further told the jury to ascertain from all the evidence including the consideration of the circumstances specifically set forth in the instruction quoted whether plaintiff had so acted as to be within the definition, but there was nothing misleading or prejudicially so, if erroneous, in the manner of statement employed.

The court instructed the jury of its own motion in the paragraph numbered 5 of its charge as follows: "The court instructs the jury that railroad companies, under their charters, have the same rights to use that portion of the public highway over which their track passes as the public have to use the same highway. Their rights and those of the public, as to the use of the highway at such point of intersection, are mutual and reciprocal; and, in the exercise of such rights both the company and those using the highway must have due regard for the safety of others, and use every reasonable effort to avoid injury to others." An instruction in the exact language of this appears in Sackett's Instructions to Juries [2d ed.] 403, sec. 29, over the following citations: *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; Shearman & Redfield, Negligence sec. 463; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 60; *Cleveland, C. & C. R. Co. v. Terry*, 8 O. St. 570. This is but a general statement and might, if given alone on the subject, without other instructions modifying its import, be open to the objection that it is too general, not explicit enough, does not sufficiently explain the reciprocal rights of the parties as to the use of the highway at the crossing. It states in a certain sense the rule, and, with probably some limitations in regard to the manner and under what rules as to care and caution the use mentioned shall be exercised, may be proper in any case of the kind, but this need not be definitely

determined here, as, at the request of the company, there were given some instructions, at least three, in regard to the duty of plaintiff when about to use this crossing, which, when read in connection with this one, we think fully cleared away any misunderstanding that could possibly have arisen in the mind of any juror through the giving of this instruction, and fully destroyed any misleading force it had, if any; hence its giving, if erroneous, was not prejudicial.

It is asserted that the several paragraphs of the instructions given were conflicting and confusing. The statement in argument on this point is that the court, in an instruction asked for plaintiff and given, informed the jury it should consider certain enumerated matters in arriving at a finding as to whether there had been any negligence on the part of the company, and in two paragraphs given at the request of the company told that body, if it should determine these matters did not affect the accident as elemental of its cause, they were robbed of any significance; and also that they might have occurred or existed and been of force as to the injury was of no consequence if the plaintiff was derelict in his duty to the extent of contributory negligence. The actions of the court as to these matters were without error; hence this objection fails. No prejudicial errors have been presented and the judgment of the district court must be

AFFIRMED.

MISSOURI PACIFIC RAILWAY COMPANY, APPELLEE, V. ESTATE OF GEORGE JAY, APPELLANT.

FILED FEBRUARY 17, 1898. No. 8140.

Administrator: REVOCATION OF LETTERS. One sued by an administrator is not authorized to petition the county court to revoke plaintiff's letters of administration. *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, followed.

APPEAL from the district court of Douglas county. Heard below before AMBROSE, J. *Reversed.*

Connell & Ives, for appellant.

B. P. Waggener and *James W. Orr, contra.*

NORVAL, J.

The county court of Douglas county appointed an administrator of the estate of George Jay, deceased. Subsequently, the administrator instituted an action in the district court of said county against the Missouri Pacific Railway Company to recover damages on account of the death of his intestate. Thereupon the railway company petitioned the county court to revoke plaintiff's appointment as administrator, which application was denied, and on appeal to the district court the letters of administration were revoked. The estate has prosecuted an appeal to this court. In *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, it was decided that one sued by an administrator is not entitled to petition the county court to revoke the letters of administration. Upon that authority the judgment of the district court is reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

CHARLES S. ELGUTTER, ADMINISTRATOR, V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 17, 1898. No. 7771.

1. **Appointment of Administrator:** COLLATERAL ATTACK. The appointment of an administrator may be collaterally attacked when the record affirmatively shows the court granting the letters acted without jurisdiction.

2. ———: APPLICATION. An application for administration must be regarded as abandoned where no action or step whatever is taken

by the court in the proceeding for nearly two years after the date fixed in the notice to the next of kin of the time and place of the hearing.

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

Connell & Ives, for plaintiff in error.

Lee S. Estelle, B. P. Waggener, and *James W. Orr, contra.*

NORVAL, J.

Ralph E. Gaylord, as administrator of the estate of George Jay, deceased, instituted this action in the court below to recover the sum of $5,000 damages on account of the death of his intestate, alleged to have been caused by the wrongful act, neglect, and default of the defendant. Subsequently, Gaylord was removed as administrator of said estate by the county court, and one Charles S. Elgutter was appointed administrator in his place, who was substituted as plaintiff herein by the district court. One of the defenses raised by the answer was that no administrator of the estate of Jay was ever legally appointed. The court below directed a verdict for the defendant on this ground, which ruling is presented for review.

The doctrine is firmly established in this state that the appointment of an administrator cannot be assailed collaterally where the county court did not exceed its jurisdiction in granting the letters of administration. (*Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Moore v. Moore*, 33 Neb. 509; *Bradley v. Missouri P. R. Co.*, 51 Neb. 653.) There is no room to doubt that the appointment of an administrator may be attacked collaterally where the record on its face discloses an entire want of jurisdiction by the county court to act in the premises. (*Moore v. Moore*, 33 Neb. 509; *Davis v. Hudson*, 29 Minn. 27; *Gillett v. Needham*, 37 Mich. 143.) Plaintiff's counsel insist that

the facts necessary to confer jurisdiction upon the county court fully appear.

There is no dispute concerning the facts. It is disclosed that George Jay died in Douglas county on February 16, 1891, from injuries inflicted by one of defendant's engines; that five days later a petition in due form alleging the essential jurisdictional facts was presented to the county court of said county by a person claiming to be the widow of said decedent, although as a matter of fact she was not his widow, nor in any manner interested in his estate as a creditor or otherwise; that upon the filing of said petition an order was entered by the county court assigning April 24, 1891, as time for hearing of the application, and notice thereof was given by publication to all persons interested as required by law; that on said date no hearing was had, nor was any adjournment taken, and no other or further steps were had in the matter until February 3, 1893, when an application, setting forth no jurisdictional fact, was presented on behalf of the parents, brothers, and sisters of the decedent, to the county court of Douglas county, praying the appointment of an administrator of the estate of said George Jay, deceased; that no notice of this application was ever given, but on the day of the filing thereof Ralph E. Gaylord was appointed administrator, who qualified as such and received letters of administration, and on May 5, 1894, the county judge of his own accord revoked the appointment of Gaylord, and Charles S. Elgutter was substituted in his place, who duly qualified as administrator. The petition for the appointment of the administrator was sufficient in form and substance, and the statutory notice of the time and place fixed for the hearing was given, so the county court upon the face of the record at one time had jurisdiction to grant letters of administration upon the estate of the decedent. (See the decisions of this court heretofore cited.) The contention of the defendant is that the county court was ousted of its jurisdiction by reason of

its failure to take any step in the matter of the appointment of an administrator for nearly two years after the giving of the notice of the hearing. This position is unanswerable. In addition to a sufficient petition for administration, the statute requires notice of the application "and of the time and place of hearing thereof to be given by personal service on all persons interested, or by publication under an order of such court in such newspaper printed in the state as he may direct." (Compiled Statutes, ch. 23, sec. 195.) The giving of notice is as essential to jurisdiction as is the filing of a sufficient application or petition for the granting of administration. (*Davis v. Hudson*, 29 Minn. 27; *Gillett v. Needham*, 37 Mich. 143; *Palmer v. Oakley*, 2 Doug. [Mich.] 433; *Dalton v. State*, 6 Blackf. [Ind.] 357; *Hart v. Gray*, 5 Sumner [U. S.] 339; *Seaverns v. Gerke*, 3 Sawyer [U. S.] 353.) The purpose of the notice is to advise persons interested in the estate of the contemplated proceedings, so that they may appear and take such action as shall best subserve their interests. The proper notice was given, it is true, but there was no appointment of administrator made at the time fixed in the notice for the hearing, nor for almost two years thereafter; nor was the hearing of the application continued or postponed. On the contrary, the record shows that the entire proceedings were abandoned, no steps looking to the appointment of an administrator of the Jay estate having been taken until February 3, 1893, when a new application for the granting of administration, wholly defective in substance, was filed, which was acted upon by the county judge at once, without any notice whatever. The proceedings were absolute nullities, and are entirely valueless as authority for the administration. (*Torrance v. McDougald*, 12 Ga. 526; *McGehee v. Ragan*, 9 Ga. 135.) It follows that plaintiff had no authority to maintain the action, and the judgment of the district court is

AFFIRMED.

PHILIP BERGERON V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1898. No. 9618.

1. **Criminal Law**: INSTRUCTIONS. An instruction purporting to cover the whole case is erroneous which fails to include all the elements necessarily involved in the issues and within the evidence.
2. **Burglary.** By section 48 of the Criminal Code breaking and entering in the night-season are essential elements of the crime of burglary.
3. ———: INFORMATION: EVIDENCE. Where an information for burglary charges that the breaking and entering were effected with the intent to steal, it is necessary to prove that the property possessed some value and was within the building.
4. **Instructions**: REVIEW. A faultless instruction will not cure a misstatement of the law in another paragraph of the court's charge to the jury.

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

Thomas H. Matters and *Tibbets Bros., Morey & Ferris,* for plaintiff in error.

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

NORVAL, J.

The object of this proceeding is to secure the reversal of a conviction of the crime of burglary. Of the several assignments in the petition in error, consideration will be given to those relating to instructions alone.

This prosecution was brought under section 48 of the Criminal Code, which declares: "If any person shall, in the night-season, willfully, maliciously, and forcibly break and enter into any * * * storehouse, * * with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more

than ten nor less than one year." The information charges that the accused burglariously broke and entered, in the night-season, a certain store building with the intent to steal specifically described chattels situate therein of the value of $30, belonging to Parmenter & Ellsworth.

The seventh instruction given at the request of the state is excepted to, which reads as follows:

"7. The court instructs you that it is not necessary for the state to prove beyond a reasonable doubt that the defendant stole and carried away all the property enumerated in the information, but if you believe from the evidence beyond a reasonable doubt that the defendant, Philip Bergeron, feloniously, burglariously, willfully, maliciously, and forcibly did break into and enter the building described in the information, and you further believe that said building was occupied by Parmenter & Ellsworth, and you further believe beyond a reasonable doubt that the said Philip Bergeron, being in said building in the second story thereof, by means of a pole, or any other instrument, reached through the skylight opening in the floor of the second story into the store room of Parmenter & Ellsworth below, in the night-season, and by means of said pole, or other instrument, took any property of value, however small, of Parmenter & Ellsworth, named in the information, and you further believe beyond a reasonable doubt that the said Philip Bergeron so took said property for the purpose and with the intent to steal the same, you are instructed that you shall find the defendant guilty, notwithstanding the fact that you may also believe from the evidence that the said Philip Bergeron did not steal and carry away all of the goods of Parmenter & Ellsworth mentioned in the information."

This instruction purported to include every element of the offense charged, and it told the jury, in effect, if they found the existence, from the evidence, of the enumerated ingredients of the crime, it was their duty to return a verdict of guilty. It is a familiar rule that an instruc-

tion is faulty which purports to cover the entire case, but which in fact fails to include all the elements necessarily involved in the case and within the evidence. (*Barnes v. State*, 40 Neb. 545; *McAlcer v. State*, 46 Neb. 116.) The instruction quoted omitted important elements of the crime charged, namely, that the breaking and entering of the building occurred in the night-time, and with the intent to steal. Under the instruction the defendant could have been convicted of burglary, even though he broke and entered the building in the daytime for a lawful purpose, in case he subsequently, in the night-time, took property in the building belonging to the complaining witnesses, with the intent to steal the same. On account of the omissions indicated the instruction was erroneous. (*Ashford v. State*, 36 Neb. 38.)

Complaint is made of this instruction given on the request of the state:

"The court instructs the jury if they find beyond a reasonable doubt the defendant did at the time charged in the information, willfully, maliciously, burglariously, and forcibly break and enter said store building, with the intent then and there to steal, take, and carry away the property of the firm of Parmenter & Ellsworth, and although he did not steal, take, and carry away any of said property, yet you should find the defendant guilty."

The court by this instruction attempted to state what was necessary to be proven to entitle the state to a conviction, yet the paragraph of the charge omitted therefrom the question of the value of the property. The section of the Criminal Code already mentioned requires that the property must possess some value to constitute the offense of burglary when the information charges that the breaking and entering were effected with the intent to steal. The instruction likewise leaves out the element of ownership of the building, and fails to state that the property intended to be stolen must have been within the building. These were essential ingredients of the crime. (*Winslow v. State*, 26 Neb. 308.)

The second and eighth instructions on behalf of the state were also erroneous for the reasons already given.

The attorney general has suggested that instructions should be construed as a whole. This is undoubtedly the rule, and if when so considered they state the law correctly, they will be upheld. But this principle is not applicable here, since a good instruction will not cure one which attempts to cover the entire case, but which is palpably bad. (*Burlingim v. Baders*, 45 Neb. 673; *Farmers Bank v. Marshman*, 33 Neb. 445; *Ballard v. State*, 19 Neb. 609.) The judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

OSCAR BRYANT V. DAKOTA COUNTY.

FILED FEBRUARY 17, 1898. No. 7739.

1. **Statutes:** TITLES: CONSTITUTIONAL LAW: DEFECTIVE HIGHWAY: DAMAGES. The proviso clause of section 4, chapter 7, Laws 1889, which requires an action against a county for injury or damages resulting from a defective public highway to be brought within thirty days after the occurring of such injury or damages, is not inimical to that part of section 11, article 3, of the constitution which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title."

2. ———: REPUGNANCY. An act complete in itself is not unconstitutional, although it may be in conflict with, or repugnant to, a prior statute not referred to nor in express terms repealed.

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

Daley & Jay and *Jay & Beck*, for plaintiff in error.

R. E. Evans, contra.

NORVAL, J.

This action was instituted in the court below against Dakota county to recover damages for personal injuries

alleged to have been sustained by the plaintiff by reason of the defective condition of a certain public highway which it was the duty of defendant to keep in repair. A demurrer to the petition was sustained, and the cause dismissed; and to obtain a reversal of this ruling is the purpose of this proceeding.

The record discloses that the suit was commenced more than thirty days after the alleged injury and damages occurred, which fact, the defendant insists, is sufficient to defeat a recovery. This contention is based upon section 4, chapter 7, Laws 1889 (Compiled Statutes 1897, ch. 78, sec. 117), which reads as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; *Provided, however,* That such action is commenced within thirty (30) days of the time of said injury or damage occurring." It is obvious that, if the proviso clause of said section is valid legislation, the demurrer to the petition was properly sustained, since this suit was not commenced within the designated period of thirty days. It is argued by counsel for plaintiff that said proviso contravenes section 11, article 3, of the constitution, which declares: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And 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." It is suggested that the said act of 1889 is inimical to the above provision for the reason it embraces two distinct subjects of legislation,

and that one of them alone is expressed in the title. The act is designated as "An act relating to highways and bridges and liabilities of counties for not keeping the same in repair." Prior to the adoption of this piece of legislation there existed in this state no right of action against a county for the recovery of damages resulting from defective public highways or bridges (*Woods v. Colfax County*, 10 Neb. 552), while by the law under consideration the authority to bring such a suit was granted (*Hollingsworth v. Saunders County*, 36 Neb. 141; *Raasch v. Dodge County*, 43 Neb. 508). It is conceded that the purpose to confer such right of action is with sufficient clearness expressed in the title given to the law by the legislature, but it is insisted that such title is not broad enough to include the provision in the body of the act, limiting the period within which the action should be commenced. We are unable to yield assent to the proposition. The legislature had the undoubted right to give the remedy in question, or withhold as it saw proper. So, too, the law-making body had the power in conferring the remedy to attach as a condition that the action should be instituted within a specified length of time; and the remedy was given upon the express condition that it should be invoked within thirty days after the sustaining of the injury or damages. Such limitation was not an independent subject of legislation, but was germane to the principal object and purpose of the law, and was included in the title to the act. As was said in the opinion in *State v. Tibbets*, 52 Neb. 228, "The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject-matter is within the scope of the title, the constitutional require-

ment is met." Tested by this rule it is plain that the title to the act before us was sufficiently broad and comprehensive to indicate the subject-matter of legislation, and the requirements of the constitution were fully complied with.

Foxworthy v. City of Hastings, 23 Neb. 772, does not conflict with the views already expressed. It was there held that a provision in an act creating cities of the second class, limiting the time to six months in which actions may be brought for negligence against any city embraced within such class, was invalid, as being special legislation, and not because such provision was passed in violation of section 11, article 3, of the constitution. Moreover, the act there under consideration created no right of action, but the obnoxious clause was intended as a new statute of limitation for an existing remedy or right of action.

In *Weigel v. City of Hastings*, 29 Neb. 379, it was ruled that the title of an act providing for the organization, government, and powers of cities of the second class having over five thousand inhabitants was not sufficiently comprehensive to include a provision exempting such cities from liability for damages resulting from the neglect of a street railway company to keep in a reasonably safe condition the street on which its line is being constructed. The provision of the act there condemned was not germane to the subject-matter of the law expressed in the title, while in the statute under review the remedy thereby conferred is conditioned upon the proper steps being taken within a designated period, and the clause limiting the time for bringing the suit was not an independent subject of legislation, but was intimately connected with the main purpose and subject of the act.

Lancaster County v. Trimble, 33 Neb. 121, is not in point here. In that case there was under consideration section 1, article 4, chapter 77, Compiled Statutes, which authorized the foreclosure of tax liens by county commissioners where they have purchased for the county real

estate at tax sales, but limited such right of action to cases where the amount due on the tax certificate exceeds $200. It was decided that the limitation contravened section 4, article 9, of the constitution in that it had the effect to authorize the county commissioners to release the taxes upon lands where the amount of delinquent taxes thereon does not exceed the sum already named. Section 11, article 3, of the constitution was in no manner involved in that case.

The remaining three cases cited by counsel for plaintiff, *State v. Lancaster County*, 17 Neb. 85, *State v. Hurds*, 19 Neb. 323, and *Muldoon v. Lee*, 25 Neb. 457, merely announce the familiar doctrine that where a statute contains provisions which conflict with the constitution, if the valid and invalid portions are capable of separation, the latter alone will be disregarded, in case that it appears that the invalid part was not an inducement to the legislature to pass the remainder of the act.

It is urged that the act before us is bad because it modifies or amends the general statute of limitations contained in the Code, without in any manner referring to the same. A short answer to this line of argument is that the act is complete in itself, and therefore is not inimical to the constitution merely because it may be in conflict with, or repugnant to, some prior statute. For an able discussion of the question and citation of authorities see the opinion of RYAN, C., in *State v. Cornell*, 50 Neb. 526.

For the reason stated the district court did not err in sustaining the demurrer to the petition, and the judgment is accordingly

AFFIRMED.

CITIZENS NATIONAL BANK, APPELLANT, V. ISAAC D. GREGG, APPELLEE.

FILED FEBRUARY 17, 1898. No. 7748.

1. **Costs: TAXATION: REVIEW.** Where costs have been illegally taxed, the appropriate remedy is by a motion to retax made to the court where the alleged mistake occurred.

2. ———: **FEE BILL: INJUNCTION.** A court of equity will not enjoin the collection of a fee bill where all the legal costs therein taxed have not been paid or tendered.

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

T. T. Bell, for appellant.

Paul & Templin, contra.

NORVAL, J.

This is an appeal from a decree refusing to enjoin the collection of a fee bill issued out of the district court of Howard county, in a replevin suit determined therein in which the Citizens National Bank was plaintiff and one William W. Kendall, sheriff, was defendant. The writ of replevin was executed by Noah Baxter, the county coroner, who returned the process into court with an itemized statement of his fees, amounting to $15.50. The replevin suit was decided against the plaintiff, and judgment was rendered against it for all costs. The fee bill was issued under section 3, chapter 28, Compiled Statutes, for the said sum claimed to be due the coroner, with seventy-five cents additional for issuing the fee bill. The contention of plaintiff is that the costs have never been taxed in the replevin suit, and furthermore that the total amount of costs was not inserted in the judgment at the time it was journalized. The record shows the rendition of a judgment against the plaintiff for the costs of suit; that the costs, including the amount due the

coroner, had been taxed by the clerk of the district court and itemized upon the fee book prior to the issuance of the fee bill. This was sufficient. If a mistake was made in the taxation of the costs by the clerk, the appropriate remedy for correcting the error was by motion to retax. (*Woods v. Colfax County*, 10 Neb. 552; *Cozine v. Hatch*, 17 Neb. 694; *Whitall v. Cressman*, 18 Neb. 508; *Wilkinson v. Carter*, 22 Neb. 186; *Hoagland v. Van Etten*, 31 Neb. 293.) In no event could plaintiff enjoin the enforcement of the fee bill until it had first paid, or tendered, all the legal costs chargeable against it. Unquestionably the sum of $3.75 was due from plaintiff as legal costs, of which amount $3 belonged to the coroner for serving the writ, and the remainder to the clerk for issuing the fee bill. Plaintiff paid all except seventy-five cents of said sum after the fee bill was in the hands of the coroner, but the bank could not invoke the aid of a court of equity, at least until it had paid all costs legally taxed against the bank. The decree is right and is

AFFIRMED.

JONAS REYNOLDS V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1898. No. 9805.

1. **Instructions**: NON-DIRECTION: REVIEW. Mere non-direction by the court below affords no ground for reversal where a proper instruction covering the point was not requested.

2. **Statutes**: AMENDMENTS. An act which in its purpose and scope is merely amendatory of a section of a prior statute must set out the new section and, in addition, contain a provision for the repeal of the old section sought to be amended.

3. ———: ———: CONSTITUTIONAL LAW: LARCENY. The act of the legislature of 1875 amendatory of certain sections of the Criminal Code, including section 116 relating to stolen goods (Session Laws 1875, p. 1), is void, because it contains no provision for the repeal of the sections amended, as required by section 19, article 2, of the state constitution adopted in 1866.

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

W. A. Prince, for plaintiff in error.

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

NORVAL, J.

Jonas Reynolds was convicted of the offense of receiving stolen goods, and he has brought the record of the trial to this court for review, assigning numerous grounds for reversal.

The first contention is that the court erred in not informing the jury, in its instructions, that the defendant had entered a plea of not guilty to the information. There are two ready answers to this suggestion: First, the accused tendered to the trial court no request to instruct the jury upon that point. The rule has been often announced and applied in this court in criminal cases that the mere failure to charge the jury upon a particular proposition is not reversible error, unless a suitable instruction has been tendered. (*Gettinger v. State*, 13 Neb. 308; *Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Barr v. State*, 45 Neb. 458; *Metz v. State*, 46 Neb. 547; *Pjarrou v. State*, 47 Neb. 294; *Johnson v. State*, 53 Neb. 103.) In the second place, the rights of the accused could not have been in the least affected by the failure to advise the jury in specific terms what plea the defendant had entered to the charge against him, since, in several of the instructions, the jury were, in plain and unequivocal language, told that the defendant was presumed to be innocent of the accusation contained in the information, should be acquitted if they entertained a reasonable doubt of his guilt, and that the verdict should be based alone upon the evidence adduced on the trial. In the light of the entire charge, no prejudicial error could possibly have resulted from the omis-

sion of the trial judge to state that the prisoner had pleaded not guilty.

Complaint is made of the giving of the fourth instruction, which is in the language following: "You are instructed that the law in this state is that if any person shall receive any goods or chattels of the value of thirty-five dollars or upwards, that shall be stolen or taken by robbers with intent to defraud the owner, every person so offending shall be imprisoned in the penitentiary no more than seven years nor less than one year." The foregoing is a substantial copy of section 116 of the Criminal Code of 1873, as attempted to be amended by the legislature of 1875, at least so far as the said amendatory section is applicable to the charge contained in the information. It is argued that it was reversible error to give the instruction quoted, because it was based upon a void amendment of section 116 of the Criminal Code, which objection was properly made in the court below. In the year 1873 the legislature passed an act entitled "An act to establish a Criminal Code." (General Statutes, p. 719, ch. 58.) Section 116 of said Code is here reproduced: "If any person shall receive or buy any goods or chattels of the value of thirty-five dollars or upward, that shall be stolen or taken by robbers, knowing the same to be stolen or taken by robbers, with intent to defraud the owner; or shall harbor or conceal any thief or robber, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year."

The legislature in 1875, by an act entitled "An act to amend sections eight, * * * one hundred and sixteen, * * * of the Criminal Code, chapter 58 of the General Statutes of 1873," attempted to amend forty-one sections of the Criminal Code then in force, including said section 116 relating to the receiving or buying of stolen goods and the harboring or concealing of thieves or robbers. This act of 1875 is not, nor does it purport

to be, entirely new legislation, creating a new offense, but is purely amendatory in its nature and character, and contains no provision for the repeal of any of the sections sought to be amended. The new act, it is claimed, is unconstitutional because it contains no repealing clause. The doctrine has been frequently asserted and applied in this state that an act, not complete in itself, but which is merely amendatory of a section of a statute, must set out the section amended and, in addition, contain a provision for the repeal of the old section so amended. (*Ryan v. State*, 5 Neb. 276; *Lancaster County v. Hoagland*, 8 Neb. 38; *City of South Omaha v. Taxpayers' League*, 42 Neb. 671; *State v. City of Kearney*, 49 Neb. 325; *State v. Tibbets*, 52 Neb. 228.)

The suggestion of the attorney general that the amended section 116 was enacted prior to the adoption of the present constitution is no sufficient answer to the objection urged against the validity of the section by counsel for the accused, since said act of 1875 contravened section 19, article 2, of the state constitution adopted in 1866, which declares that "no law shall be revived or amended, unless the new act contains the entire act revived, and the sections amended, and the section or sections so amended shall be repealed." The provision just quoted is substantially the same as the latter part of section 11, article 3, of the constitution of 1875. The amendatory section 116 of the Criminal Code was not adopted in the mode prescribed by the constitution of the state at that time in force, for the reason the amendatory act contained no provision for the repeal of the original section attempted to be amended, as required by said section 19, article 2, of the constitution of 1866. It follows that said amendatory section 116 is unconstitutional, and void, and the original section remains in full force and effect.

The amendatory section 116 did not contain the words "knowing the same to be stolen or taken by robbers," which were incorporated in the original section, nor does

the amended section contain language of like import. Under the old section *scienter*, or knowledge of the accused that the property had been stolen or taken by robbers, was an element of the crime as originally defined, while the legislature by the latter act attempted to eliminate from the statute this feature of the offense. It requires no argument to show that the fourth instruction omitted to state one of the ingredients of the crime, and was accordingly prejudicial to the accused. Under that instruction the jury would have been justified in finding the defendant guilty, even though he had no knowledge that the goods described in the information had been stolen. It is true the record before us discloses that the trial judge, after verdict, but before passing sentence, read to the prisoner said original section 116 and the section as amended, and inquired of him whether he had anything to say why judgment should not be pronounced. It is obvious the reading of the original section at that time could not cure the error in giving the fourth instruction.

The conclusion reached makes unnecessary an examination or consideration of the other assignments of error. The judgment is reversed and cause remanded for a new trial.

REVERSED AND REMANDED.

JULIUS H. LANGHORST V. WILLIAM COON.

FILED FEBRUARY 17, 1898. No. 7740.

1. **Instructions:** REVIEW. An assignment of error against an entire charge is unavailing where one of the instructions is faultless.
2. **Review:** INSTRUCTIONS: ASSIGNMENTS OF ERROR. Errors in respect to refusing instructions must be separately assigned in the motion for a new trial and petition in error.
3. **Real Estate Agents:** COMPENSATION. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for

his services unless he produce to the owner a purchaser within the time limited who is able and willing to buy upon the terms prescribed in the contract of employment.

4. **Review: CONFLICTING EVIDENCE.** A verdict based upon conflicting evidence will not be disturbed on review.

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

J. H. Haldeman, for plaintiff in error.

Beeson & Root, contra.

NORVAL, J.

Plaintiff sued to recover commissions for effecting the sale of real estate, and from the judgment rendered against him he prosecutes an error proceeding.

Complaint is made in the brief of the giving of five instructions. The charge of the court consisted of seven consecutively numbered paragraphs, and they were all grouped in a single assignment in the motion for a new trial, as well as in the petition in error. Two of the seven instructions are not assailed in the brief, and an examination of them convinces the court that they are faultless; therefore, the assignment relating to the giving of instructions will not be further considered. (*Union P. R. Co. v. Montgomery*, 49 Neb. 429; *Adams-Smith Co. v. Hayward*, 52 Neb. 79.)

Error is assigned for the refusal to give instructions 1 to 5 requested by plaintiff. Two of these requests are not included in the transcript, and the third was properly refused, because it was practically an instruction to return a verdict for plaintiff. Under the authorities the other requests need not be considered, since they were not separately assigned for error in the motion for a new trial and petition in error.

It is finally argued that the evidence fails to sustain the verdict. The testimony was conflicting. That introduced by plaintiff tended to show that he was em-

ployed by the defendant to procure a purchaser of the farm of the latter at a specified price, and was to receive as commissions for his services the sum of $400, and that in pursuance of such agreement plaintiff did induce one Peter Reutter to buy the land. On the other side, testimony was adduced to the effect that plaintiff was given two weeks in which to procure a purchaser for the farm, and that plaintiff was to receive for his services all in excess of $9,200; that at the expiration of that period he informed the defendant that he could not make the sale for said sum, and afterwards defendant himself sold the land to Reutter for said sum. The conflicting testimony was submitted to the jury under appropriate instructions, and the proofs are ample to sustain a finding in favor of the defendant. If the contract of employment was conditional, plaintiff could not recover without establishing that the conditions on his part to be performed had been fulfilled. (*Beatty v. Russell*, 41 Neb. 321; *Barber v. Hildebrand*, 42 Neb. 400.) It is a fact that plaintiff was instrumental in enabling defendant to dispose of his farm to Reutter, but plaintiff stipulated as to the terms upon which he was to receive a compensation, and these stipulations cannot be disregarded. The delay in making the sale was through no fault of defendant, so far as the record discloses. The judgment is

AFFIRMED.

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

FILED FEBRUARY 17, 1898. No. 7859.

1. **Counties**: ALLOWANCE OF CLAIMS: MANDAMUS. One in whose favor a claim has been duly allowed by a county board may, by mandamus, compel the issuance of a warrant for the payment of such claim.

2. ———: ———: REVIEW. The validity of an order of a county board allowing a claim cannot be raised for the first time in this court in a case brought here by appeal or petition in error.

3. Corporation: EXISTENCE: PLEADING. A denial that the relator "is a corporation duly organized under the laws of the state of New York" does not put in issue the relator's corporate existence.

4. Payment: EVIDENCE. Evidence examined, and *held* insufficient to sustain respondents' plea of payment.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Reversed.*

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

C. S. Polk and *H. D. Travis, contra.*

SULLIVAN, J.

By a petition in error filed in this court, the Seth Thomas Clock Company seeks a reversal of a judgment of the district court for Cass county denying its application for a peremptory writ of mandamus against the county commissioners and county clerk of said county. From an examination of the record it appears that in the year 1891 the county of Cass purchased of the relator a tower clock for use in its new court house, then in process of construction. The negotiations which resulted in the sale were conducted by one Charles Wickersham, who resided at Plattsmouth and managed his wife's jewelry business in that city. The wife's name was S. L. Wickersham. The clock company had no knowledge of either of the Wickershams, except what it gained through correspondence in relation to the transaction here in question. This correspondence was carried on in the name of S. L. or Susan L. Wickersham. The contract of sale was in writing. It was executed on behalf of the relator by Wickersham in the name of his wife. In due time the clock was forwarded to Plattsmouth, consigned to S. L. Wickersham, and some time later, with the assistance of an expert sent out by the

relator, was set in place and accepted. Soon after the acceptance, a bill for $981, that being the contract price, was filed with the county clerk, allowed by the county board, and a warrant therefor, payable to the relator or bearer, was issued and delivered by the county clerk to Charles Wickersham, who converted it to his own use. To compel the issuance and delivery to it of another warrant for the amount of its claim the relator brought this suit.

The respondents attempt to justify the finding and judgment of the trial court on four distinct grounds. In their answer they pleaded payment of relator's claim "by delivering to S. L. Wickersham, the agent of relator, a warrant, No. 132, for the payment of $981;" and they now insist that this defense is established by the evidence. But we think otherwise. S. L. Wickersham was a real person; she resided, and was engaged in business, at Plattsmouth. She was the person the relator had in mind, and upon whom it conferred authority to act for it, in its dealings with Cass county. There is in the record no legal evidence whatever from which it could be inferred that Charles Wickersham was the owner of the jewelry business which was conducted in the name of S. L. Wickersham, or that the latter name was assumed and used by him for business purposes. The relator did not intend to make Wickersham its agent; it conferred upon him no authority, real or apparent. The contract of sale itself recites that it is made with S. L. Wickersham as agent of the relator; and the county clerk, at the time he delivered the warrant to Charles Wickersham, dealt with him, not as the agent of the clock company, but as the agent of his wife. We quote from the testimony of Frank Dixon, the county clerk:

Q. Now you never heard this Wickersham called anything but Charles Wickersham or C. W. Wickersham, did you?

A. Yes, sir; heard him called C. M. Wickersham.

Q. Now, the facts are, that your understanding of the

matter was that S. L. Wickersham was the wife of Charles Wickersham of whom you have spoken, and acting as her agent in the transaction of the business in which she was engaged in this city?

A. That was the understanding that I had.

Q. And you delivered to him this warrant, supposing he was the agent of S. L. Wickersham, and transacting all of her business for her?

A. Yes, sir.

Q. And that was the reason that you delivered it to him?

A. Yes, sir.

While Wickersham had, doubtless, general authority to manage his wife's business, she could confer upon him no power to act for the relator in relation to its business. (*Furnas v. Frankman*, 6 Neb. 429; *Ingraham v. Whitmore*, 75 Ill. 24; *Brown v. Railway*, 45 Mo. 221; *McKinnon v. Vollmar*, 75 Wis. 82.) She had no actual authority to appoint a subagent, and the nature of the business to be transacted conferred no implied authority to do so. We, therefore, conclude that the plea of payment was not sustained.

It is urged as a second defense that if Wickersham was not the agent of the relator, the delivery of the warrant to him was a conversion of it for which there is a plain and adequate remedy at law to which it must resort. This position is obviously unsound. After the expiration of ten days from the allowance of the relator's claim, it became entitled to receive from the respondents a warrant in due form, which it might present to the county treasurer for payment. The duty to deliver the warrant was one due to the relator from the respondents in their official capacity and was enforceable by mandamus. (*State v. Spicer*, 36 Neb. 469; *State v. Farney*, 36 Neb. 537; *Boasen v. State*, 47 Neb. 245.)

It is next insisted that the claim allowed by the county board was not verified, and hence the order of allowance was null. Without conceding the correctness of the

legal proposition here contended for, it is sufficient to say that the answer having admitted the allowance of the claim, the respondents are not now in a position to question the validity of the order of allowance.

It is further urged, in support of the judgment, that the corporate character of the relator was not established by the proof, and that it, therefore, did not possess legal capacity to maintain this action. The application for the writ alleges that the relator "is a corporation duly organized under the laws of the state of New York." The answer denies "that the Seth Thomas Clock Company is a corporation duly organized under the laws of New York." This denial is a mere negative pregnant. It does not traverse the corporate existence of the relator, but only the regularity of the proceedings by which it was incorporated. (Boone, Code Pleading 61; Bliss, Code Pleading 332; *Harden v. Atchison & N. R. Co.*, 4 Neb. 521; *Leroux v. Murdock*, 51 Cal. 541.)

The evidence in the record conclusively establishes relator's right to a warrant for the amount of his claim as allowed by the county board, together with legal interest thereon. Therefore, the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

UNITED STATES WIND ENGINE & PUMP COMPANY V. H. P. DREXEL ET AL.

FILED FEBRUARY 17, 1898. No. 7843.

1. **Bonds:** VALIDITY: DEFECTS. A statutory bond is not void for want of a penalty nor because the beneficiaries are named as obligees therein, instead of a trustee according to the requirement of the statute under which it is given.

2. ———: APPROVAL: PUBLIC BUILDINGS. A bond for the protection of persons furnishing labor or material for the erection of a public building under the laws of the state of Iowa does not be-

come a binding obligation until accepted and approved by the officer charged by law with that duty.

3. ——: ——: DEFECTS. The approval of an irregular bond limited to certain beneficiaries named therein and based on an express waiver of their rights, is a rejection of such bond as to all other persons for whose benefit it was intended. HARRISON, C. J., and NORVAL, J., concur in the judgment for the reason stated in the third division of the syllabus alone.

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

The opinion contains a statement of the case.

Cavanagh & Thomas, for plaintiff in error:

Obligors cannot escape liability, because the bond does not run to the county. (*Heatherington v. Hayden*, 11 Ia. 335; *Pursley v. Hayes*, 22 Ia. 29; *Huffman v. Koppelkom*, 8 Neb. 344; *Koppelkom v. Huffman*, 12 Neb. 95; *Thomas v. Hinkley*, 19 Neb. 324; *Riggs v. Miller*, 34 Neb. 666; *Fillows v. Gilman*, 4 Wend. [N. Y.] 414; *Faurote v. State*, 110 Ind. 463.)

The bond is not void for want of a penalty. (*Dodge v. St. John*, 96 N. Y. 260; *Williams v. Golden*, 10 Neb. 432; *Noble v. Himeo*, 12 Neb. 193.)

The defense that the bond was not delivered and accepted should not be sustained. If the bond was a statutory one, it was deposited where the statute directed. If the bond was a common law bond, placing it with the treasurer was a delivery. (*McCracken v. Todd*, 1 Kan. 148; *Green v. Wardwell*, 17 Ill. 278; *Ashkum v. Lake*, 12 Brad. [Ill. App.] 29.)

B. G. Burbank, H. C. Brome, and *A. A. McClanahan, contra.*

SULLIVAN, J.

The United States Wind Engine & Pump Company, by this proceeding in error, challenges the correctness of the order and judgment of the district court for Doug-

las county sustaining a demurrer to its petition and dismissing its action. The material allegations of the petition are in substance as follows:

1. It is the assignee and owner of a subcontractor's claim, amounting to $4,000, due for labor and material furnished in the erection of a court house for Montgomery county, in the state of Iowa.

2. The laws of Iowa give subcontractors a lien for all material and labor furnished in the erection of public buildings not owned by the state.

3. The statute giving such lien provides:

"Sec. 4. The contractor may at any time release such claim by filing with the treasurer of such corporation a bond to such corporation, for the benefit of such claimants, in sufficient penalty, with sureties to be approved by such treasurer, conditioned for the payment of any such sum which may be found due such claimant, and such contractor may prevent the filing of such claims by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims."

4. In February, 1891, Richards & Co. as principal, with the defendants in this action as sureties, signed and delivered to the treasurer of Montgomery county a bond conditioned as follows:

"Now, therefore, we, Richards & Co., as principals, and H. P. Drexel, E. J. Refregier, E. A. Blum, J. H. Hulbert, and Albert Foll, as sureties, for the purpose of releasing the claim now on file with the auditor of Montgomery county, Iowa, in favor of the Northwestern Terra Cotta Company, which claim is a mechanic's lien against a public corporation, to-wit, Montgomery county, Iowa, and for the purpose of preventing the filing of any mechanic's lien for material furnished or work and labor performed in the building and erection of said court house, for which the persons furnishing said material and performing said labor would under the laws of the state of Iowa be entitled to file a mechanic's lien against said public corporation, to-wit, Montgomery county, Iowa, and for

the use and benefit of said Northwestern Terra Cotta Company, and for the use and benefit of such other persons who now have or shall hereafter have a right to file a mechanic's lien against said public corporation, Montgomery county, for materials furnished or work and labor performed, and for the purpose of paying any and all sum or sums found to be due the said Northwestern Terra Cotta Company from Richards & Co. aforesaid, and for the purpose of paying any and all sums due from said Richards & Co. to any and all persons for materials furnished or to be furnished, or for work and labor done or to be done, for which any of said persons have now, or may hereafter have a right to file a mechanic's lien against said public corporation, Montgomery county, Iowa, for said labor, work, or materials done or furnished, this obligation is executed, and we bind ourselves and assigns to pay any such sum or sums so found to be due said Northwestern Terra Cotta Company or any other person or persons as hereinbefore mentioned. This obligation is executed for the use and benefit of all persons who now have or who may have hereafter a right to file a mechanic's lien against said Montgomery county, Iowa, under and by virtue of the provisions of sections 3322, 3327, 3328, and 3329 of McClain's Annotated Code of Iowa, edition of 1888, being the laws of the 20 G. A., chapter 179, sections 1 to 4 inclusive, for materials furnished or to be furnished, or work or labor done or to be done, in the building and erection of a court house at Red Oak Junction, Montgomery county, Iowa, said court house being erected and built by the said Richards & Co. aforesaid."

Afterwards the county treasurer indorsed upon said bond his approval in the following terms:

"It appearing to me that the Northwestern Terra Cotta Company, of Chicago, Ill., has now and claims the right to file a mechanic's lien or claim against Montgomery county for materials furnished in the building of the court house for said county;

"And it also appearing to me that Carnegie, Phipps & Co. claim to have the right now and hereafter to file a lien against said county for materials furnished and labor performed and to be hereafter furnished;

"And each of corporations and persons having consented in writing by me now held that non-resident sureties may file a bond:

"Now, as to the Northwestern Terra Cotta Company and Carnegie, Phipps & Co., the within and foregoing bond is now by me filed and approved this February 9th, 1891. JOEL CAREY,

"Treasurer of Montgomery County, Iowa."

5. The labor and material which are the basis of this action were furnished in reliance upon the bond above mentioned; and plaintiff's assignor relying thereon, permitted Richards & Co., the principal contractor, to draw from Montgomery county the whole amount due according to the terms of the contract.

The bond in question was not in strict conformity with the provisions of the statute under which it was given, inasmuch as it fixed no penalty and failed to name Montgomery county as the obligee therein. But these defects would not vitiate it. They are mere irregularities affecting in no manner the substantial elements of the contract. (*Noble v. Himco*, 12 Neb. 197; *Williams v. Golden*, 10 Neb. 432; *Dodge v. St. John*, 96 N. Y. 260; *Fellows v. Gilman*, 4 Wend. [N. Y.] 414; *Huffman v. Koppelkom*, 8 Neb. 344; *Koppelkom v. Huffman*, 12 Neb. 95; *Thomas v. Hinkley*, 19 Neb. 324; *Riggs v. Miller*, 34 Neb. 666.)

But was the bond delivered for the use and benefit of the plaintiff? That it was so tendered must be admitted, but to make it effective required not only a tender but an acceptance as well. To make it a binding obligation required that indispensable element of all valid contracts, a meeting of the minds of the contracting parties.

Richards & Co. presented to the county treasurer the contract in suit. The treasurer was an officer charged

by law with the duty of accepting such bond if found sufficient in substance and form. It was not sufficient in form and he evidently was not satisfied with it because the sureties were non-residents of the state of Iowa. He, therefore, as appears from his indorsement and as he rightfully might do, rejected it as a statutory bond. His acceptance of it "as to the Northwestern Terra Cotta Company and Carnegie, Phipps & Co." was, by the clearest implication, a rejection of it as to all others for whose benefit it was tendered. In acting on this bond he, in effect, declared: "This bond is not in conformity with the statute. The sureties are non-residents of the state, nevertheless, at the special instance of the Northwestern Terra Cotta Company and Carnegie, Phipps & Co., I accept and approve it for their benefit only, reserving to all other subcontractors the right to file their statutory liens." To hold the defendants liable in this case would be to charge them upon an unaccepted offer of suretyship. The judgment of the district court is

AFFIRMED.

AMOSKEAG SAVINGS BANK, APPELLEE, V. OLIVER ROBBINS ET AL., APPELLANTS.

FILED FEBRUARY 17, 1898. No. 7803.

1. Judicial Sales: NOTICE: OBJECTIONS. It is not a good objection to the confirmation of a sale of real estate made under a decree of foreclosure that the notice of sale did not accurately state the sum for the satisfaction of which the land would be sold.

2. ———: APPRAISEMENT: REVIEW. The finding of the district court upon conflicting evidence that an appraisement was not fraudulent will, ordinarily, be sustained.

3. ———: ———: INCUMBRANCES. When there is no error in the appraisement of land sold under a decree of foreclosure, the owner cannot complain because the county clerk's certificate, furnished to the sheriff as required by section 491*c* of the Code of Civil Procedure, includes the mortgages which are the basis of the decree.

4. ———: SHERIFF'S RETURN: TIME. A foreclosure sale should be confirmed, notwithstanding the order of sale, issued by the clerk of the district court to the sheriff or other officer directing him to execute the decree, be returned more than sixty days from its date.

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

Francis G. Hamer and *J. M. Easterling*, for appellants.

Dryden & Main, contra.

SULLIVAN, J.

This case is here on appeal from an order of the district court of Buffalo county confirming a sale of real estate made under a decree of foreclosure.

The first objection is that the notice of sale did not correctly state the amount due one Hawkins as fixed by the decree. The record shows that Hawkins was given a lien on the premises sold for $420, with ten per cent interest from December 22, 1893, while the notice of sale recites that the amount is $420, with interest thereon from December 22, 1892. We do not understand what baleful influence this variance had upon appellants' rights. We know of no law that requires the amount due on a decree of foreclosure to be stated in the notice of sale with mathematical accuracy. The notice would have fully answered the requirements of the statute without stating any amount whatever.

The claim that the appraisement was fraudulent was submitted to the district court upon conflicting evidence and we are bound by the conclusion reached.

It is next urged against the order of confirmation that the certificate of the county clerk shows both mortgages foreclosed in the action as prior incumbrances on the land in question. The clerk's certificate exhibits all the liens and incumbrances affecting this land appearing upon the records of his office. But these mortgages were not deducted from the gross value of the land in making

the appraisement, so, of course, this objection is without merit.

Appellants contend, finally, that confirmation should have been denied because the order of sale was returned into court by the sheriff more than sixty days after it was issued. In the case of *Rector v. Rotton*, 3 Neb. 171, this question was considered and decided. In the opinion LAKE, J., uses the following language: "In case of foreclosure, which is a proceeding *in rem*, the decree of the court operates directly upon the mortgaged property; no writ or other process of the court is resorted to to bring it within its jurisdiction. By its judgment the court simply enforces a contract of sale voluntarily made by the owner. Nor is it at all necessary that an order of sale be issued by the clerk of the court to the officer charged with the execution of a decree; the judgment is his warrant of authority, and none other is required." The rule thus announced was subsequently affirmed in *Johnson v. Bemis*, 7 Neb. 224, in *Wyant v. Tuthill*, 17 Neb. 495, and in *Johnson v. Colby*, 52 Neb. 327. There has never been any departure from it. It is still the doctrine of this court. In the case of *Burkett v. Clark*, 46 Neb. 466, cited as supporting appellants' contention, the question whether an order of sale must be returned within sixty days from its date was neither presented by the petition in error nor argued in the briefs of counsel. Consequently, what is said on that subject is *obiter*. In that case the judgment of the district court confirming the sale was reversed because the land was advertised for sale before it was appraised, and for the further reason that the sheriff did not forthwith deposit in the office of the clerk of the district court a copy of the appraisement, including the certificates of liens and his application therefor. At page 474 of the opinion it is said: "The officer having levied upon the property, and having appraised the interest of the execution defendant therein, section 491*d* provides that he 'shall forthwith deposit a copy of' the appraisement made, together with the writ-

ten application made by him to the clerk of the district court, county treasurer, and register of deeds, and the certificates furnished by them to him, in the office of the clerk of the court from which the execution which he holds was issued. After this deposit has been made, the statute (Code of Civil Procedure, sec. 491*d*) provides that the officer 'shall immediately advertise the real estate.' It will thus be seen that the officer holding an execution for the sale of real estate has not authority to advertise the same for sale until he has levied upon it, caused it to be appraised, and deposited in the office of the clerk, from which the execution in his hands was issued, a copy of the appraisement made by him and the two freeholders, together with the application in writing for liens made by him to the clerk of the district court, the county treasurer, and the register of deeds, and the certificates which such officers furnished him in pursuance of said application." The only point in the syllabus bearing upon this question is the 16th, wherein it is said: "An officer holding an execution and having levied the same upon real estate, whether he has offered it for sale or not, and if he has offered it for sale, whether he has sold it or not, must return the execution within sixty days from its date, stating what he has done under it." The sale in this case having been made in pursuance of the decree and in strict conformity therewith, it cannot concern the appellants when the order of sale was returned or whether one was ever issued. The judgment of the district court is

AFFIRMED.

GEORGE A. BENNETT, SHERIFF, v. C. A. WARNER.

FILED FEBRUARY 17, 1898. No. 7845.

Attachment: FRAUDULENT CONVEYANCES: EVIDENCE. Evidence examined, and *held* sufficient to entitle the defendant to have the case submitted to the jury on the theory that the sale in question was merely colorable and made to hinder or delay a creditor in the collection of his claim.

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

W. S. Shoemaker, for plaintiff in error.

Horton & Blackburn, contra.

SULLIVAN, J.

Under a peremptory direction of the trial court the jury in this case returned a verdict for Warner, who was plaintiff below. To secure a reversal of the judgment rendered on this verdict Bennett prosecutes error to this court. The facts are these: In 1893, and for several years before that time, H. G. Gwynne was engaged at Pocatello, Idaho, in buying hides and wool, which he shipped for sale to his uncle, D. H. McDaneld, who was engaged in the commission business in Chicago, Illinois. As a result of their dealings Gwynne became indebted to McDaneld in a sum claimed by the latter to be in the neighborhood of $4,000. A misunderstanding in regard to this indebtedness having arisen between the parties, their business relations were terminated some time prior to July, 1893. Some time in October of the same year Gwynne left Pocatello for Chicago, instructing his manager, McCarty, before starting, to call on Warner for any money he might need during his absence. Acting on his instructions, McCarty did soon after obtain from Warner $40 at one time and $50 at another time. A little later, on October 24, McCarty again applied to

Warner for an advancement. Warner, however, refused to further respond in the way of a loan, but proposed to buy a car-load of hides if McCarty had authority to sell. McCarty thought he possessed the necessary power to make the sale and accordingly made it, taking in payment Warner's check for the price agreed upon, less the $90 previously loaned. The hides were then consigned in Warner's name to John Miller & Co., a Chicago commission firm. While at Omaha, in transit, they were seized by Bennett, sheriff of Douglas county, as the property of Gwynne, under an order of attachment, in an action commenced against him by D. H. McDaneld. The alleged wrongful seizure of this property is the basis of the judgment of which the plaintiff in error complains.

Warner had been at one time in the employ of Gwynne in the hide and wool business, but, having been admitted to the bar in 1891, he then engaged, and has since continued, in the practice of his profession at Pocatello. He was the friend and legal adviser of Gwynne. He knew the latter was indebted to McDaneld, and that, on account of some misunderstanding in regard to that indebtedness, their business relations had been discontinued. He had talked with McDaneld about the matter and promised to use his good offices with Gwynne to bring about an adjustment of the differences between them. He knew that in the previous July, McDaneld had sued Gwynne and attached a car-load of hides owned by him and then in transit from Pocatello to the city of New York. He knew that Gwynne was worth about $20,000 and that McDaneld was his only creditor. It does not appear that he had ever before advanced Gwynne any money, or that he had bought any hides of him or anybody else during the course of his professional career. Neither does it appear why Gwynne expected Warner to act as his bank during his absence or why it became necessary to resort to him for loans with which to conduct his ordinary business transactions. The business of Gwynne was to buy hides at Pocatello and

sell them in the eastern markets, and it does not appear that either he or McCarty had ever before sold hides in the market where they were purchased. The defendant below tried the case on the theory that the sale to Warner was colorable merely and made to prevent an attachment of the hides by McDaneld in Chicago or while in transit to that city. This theory was not without evidential support and should have been given to the jury under proper instructions. In the light of the evidence detailed, it was for the jury to say whether the transaction in question was an honest or corrupt one. (*Connelly v. Edgerton*, 22 Neb. 82; *Fitzgerald v. Meyer*, 25 Neb. 77; *Riley v. Melquist*, 23 Neb. 474; *Davis v. Scott*, 22 Neb. 154.) The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

PHENIX INSURANCE COMPANY OF BROOKLYN V. LOUIS SLOBODISKY.

FILED FEBRUARY 17, 1898. No. 7836.

Insurance: ACTION ON POLICY: PLEADING: EVIDENCE: BREACH OF CONTRACT: ESTOPPEL. Where an insurance company in its answer denies that it entered into a contract for the issuance of a policy of insurance on plaintiff's property in the usual or in any other form, such company cannot be permitted to offer in evidence a blank policy of the usual form for the purpose of showing the existence of certain conditions, restrictions, and warranties, with a view to showing such breaches thereof as, by the terms of the policy, operated to render it void.

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

Jacob Fawcett and *Greene & Breckenridge*, for plaintiff in error.

Parke Godwin and *John D. Howe, contra.*

RYAN, C.

This proceeding is for the reversal of a judgment rendered by the district court of Douglas county against the Phenix Insurance Company of Brooklyn, New York. The petition in said district court contained averments to the effect that, February 14, 1893, plaintiff was the owner of certain described personal property of which the defendant agreed to become the insurer to an amount equal to $2,000, but not in excess of $5,000, for a period of one year, in consideration of the payment of $30, and agreed to make and deliver to plaintiff a policy of insurance for $2,000 in the usual form of such policies issued by the defendant. It was further alleged in the petition that by the terms of the policies issued by the defendant in the usual form the said defendant promised to indemnify the assured against loss or damage by fire of the property described to an amount not exceeding the cash value thereof at the time of such loss, and in no event to exceed the sum of insurance, and the said amount to be paid by defendant sixty days after proofs of loss of said property shall have been made by the assured and received by the defendant and the loss shall have been ascertained by the arbitrators appointed and the loss proved in accordance with the terms and provisions of such policy, or unless the company shall have given notice of their intention to replace, rebuild, or repair the property damaged or destroyed within said sixty days. It was further averred in the petition that, February 20, 1893, while the said agreement to insure was in full force, the property insured was destroyed by fire and that its value was $7,000, no part of which had ever been paid by the defendant. It was also alleged in the petition that plaintiff had furnished proofs of loss and in all other respects complied with the conditions of said agreement and policy on his part to be performed. There was a prayer for judgment in the sum of $2,000, with interest thereon from February 21, 1893. The an-

swer of the insurance company contained the following averments: "It admits that on the 21st day of February, 1893, the dwelling-house and household furniture and other personal property described in plaintiff's petition were partially damaged by fire, but denies that the same were totally destroyed by fire, and denies that said household furniture and other personal property was of the value set out in plaintiff's petition, and denies each and every other allegation in plaintiff's petition contained. As a further defense to plaintiff's action the defendant alleges that no completed contract of insurance was ever entered into between the plaintiff and defendant for the insurance set out in plaintiff's petition, and that no policy of insurance was ever executed or delivered to the plaintiff for any of the insurance set out in plaintiff's petition; and that no money or premium of any kind was ever paid to the defendant by plaintiff or any of the insurance set out in plaintiff's petition." Following the above language there were averments in the answer to the effect that the usual form of policy which defendant was issuing on said February 17, 1893, to its patrons in Omaha contained certain conditions, restrictions, limitations, agreements, and warranties which were described at great length. By these it was provided that the policies should become void if the insured property should be sold, transferred, or incumbered, and it was provided that all representations as to the condition of the title upon which the policy issued should be deemed warranties, which, if broken, should render the policy void. By its answer the insurance company pleaded that the property was incumbered February 17, 1893, etc., and upon these facts pleaded that the policy was void. In the course of the trial there was an offer in evidence of a policy by the defendant of the usual form. The court refused to permit the introduction of this policy and the errors argued in this case depend upon this ruling.

In making proof to entitle him to recover, plaintiff

followed the averments of his petition which have already been described. There was no cross-examination as to whether or not the usual form of policy contained the conditions, provisions, restrictions, or warranties set up in the answer. The proofs made by plaintiff, if believed by the jury, entitled him to recover. There was, therefore, no such condition as we can imagine might exist, when, under a denial, proof of the usual contents of a policy would be admissible. If it had been admitted in evidence, the usual form of policy could have subserved no purpose of the defendant, except to show that there were certain conditions, restrictions, and warranties, the breach of which destroyed plaintiff's cause of action. In other words, the introduction of the usual form of policy was material for only one purpose, and that was to serve as a basis for an affirmative defense. In *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, it has been held that 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 proofs of loss and adjustment. The principle on consideration of which the conclusion just stated was reached is of controlling force with respect to the error herein assigned. A party cannot deny the existence of a contract and at the same time insist that such contract contained conditions for his protection. In other words, there must be a confession if he would avail himself of an avoidance.

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

AFFIRMED.

HELEN W. CHANDLER, APPELLANT, V. JAMES PYOTT ET AL., APPELLEES.

FILED FEBRUARY 17, 1898. No. 7826.

1. **Principal and Agent:** PAYMENT. A party who pays money to another to be applied on a note which such person has not in his possession, assumes the burden of showing the authority of such person to receive payment.
2. **Mortgages:** PAYMENT TO AGENT. The mere facts that a mortgagor had sent coupons, as they matured, to a certain person to whom the amounts thereby evidenced as due had been paid, and that the person so receiving such payments had delivered or even advanced the amount of such coupons to one to whom before maturity had been transferred the principal negotiable promissory note secured by mortgage, *held* not sufficient to satisfy the above requirement as to a payment to such person of principal and interest made before the same became due.

APPEAL from the district court of York county. Heard below before BATES, J. *Reversed.*

Sedgwick & Power, for appellant.

Harlan & Taylor and *J. W. Merriam*, *contra.*

RYAN, C.

In her petition filed in the district court of York county Helen W. Chandler prayed the foreclosure of a certain trust deed for the security of a certain negotiable promissory note of date April 1, 1889, by its terms due April 1, 1894. The payee named in this note was the Western Investment Bank of Chicago. The interest, at the rate of seven per cent per annum, was payable in semi-annual installments on the first days of April and October, respectively, as evidenced by coupons for $73.50 each. To secure the payment of said note and interest the makers thereof, Martha Pyott and James Pyott, executed a trust deed to William P. Kimball, by the terms of which, as trustee, Kimball was authorized, upon default of pay-

ment of principal or of interest existing for a certain time, to institute and prosecute foreclosure proceedings against the land described in the aforesaid trust deed, and on such proceedings to receive payment. There were paid to Kimball September 26, 1892, the sums of $1,000 as principal and $73.50 as interest. This money was never received by Mrs. Chandler, and the question in the district court was whether she must bear the loss or whether it must be borne by Wilhelm Gocke, who, meantime, had become the owner of the land described in the trust deed and had sent that money to Kimball. The judgment was in favor of the defendants.

William P. Kimball was president of the Western Investment Bank of Chicago until May 3, 1891, when said bank transferred its bankable assets to the Central Trust & Savings Bank. To close up the affairs of said Western Investment Bank its cashier, Mr. Vose, and James Frake were constituted a committee and so acted. After the transfer of the banking business above noted William P. Kimball conducted a loan business until August, 1893, when he failed. His testimony was to the effect that he never learned of the payment of the $1,073.50 above noted until his financial embarrassment did not admit of his making payment of the money to Mrs. Chandler. It is clear that, as trustee, Mr. Kimball was not authorized to receive payments unless they were made upon foreclosure proceedings instituted by him as trustee. The powers of the trustee were thus limited by the trust deed, and beyond this limitation the trustee as such had no power to act. (*Stark v. Olsen*, 44 Neb. 647.) His authority to receive the payment, concerning which this litigation has been carried on, if it existed, must therefore be found in his real or apparent agency for Mrs. Chandler, independently of his trusteeship. The testimony on behalf of Mrs. Chandler was that there was never such an agency, either real or apparent. Mr. Kimball testified that when the bank sold the note to Mrs. Chandler it was agreed between herself and himself that

the coupons and principal as they matured would be collected by the bank without expense to Mrs. Chandler. This did not at all change the status of affairs material to a consideration of this case, for there is no pretense that the $1,073.50 in dispute was ever paid to the bank. As a matter of fact, when this payment was made, the bank had not been doing business for more than a year. Mr. Kimball further testified that he always understood that, while acting as president of the bank and while doing business individually in these transactions, he was acting as the agent of Joseph B. Chandler, who was acting as agent for his wife, Helen W. Chandler. The twentieth interrogatory propounded to Mr. Kimball and his answer thereto were as follows: "You may state how frequently you saw either the plaintiff or her husband and talked with them with regard to the collection of loans that you had in your charge." Answer: "Mr. Chandler probably called seven or eight times or more per annum at the bank, or later, at my office, usually coming a day or two before the coupons became payable, bringing for collection whatever ones were maturing which belonged to his wife or himself. Occasionally I gave him a check for the total sum due before he left the office, at others the check was mailed to his address." The evidence above described, with that of an even less satisfactory nature, is that upon which depends the correctness of the finding of the district court in favor of the defendants. There is no question that the husband of Mrs. Chandler received for his wife all the payments which came into her hands and transacted all the business pertaining thereto. He testified, unequivocally, that he, in no instance, entrusted a coupon to Mr. Kimball, and that his surrender of coupons was always upon payment being made upon presentation, either to the bank or to Mr. Kimball. When the payment of $1,000 on the principal, and the interest then due was made, the note and coupon were in possession of Mrs. Chandler. The rule in such cases is that a party who pays money to another to be applied on a note,

which such person has not in his possession, assumes the burden of showing the authority of such person to receive the payment. (*South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606; *Bull v. Mitchell*, 47 Neb. 647; *Richards v. Waller*, 49 Neb. 639; *Thomson v. Shelton*, 49 Neb. 644; *City Missionary Society v. Reams*, 51 Neb. 225; *Greenman v. Swan*, 51 Neb. 81; *Frey v. Curtis*, 52 Neb. 406.) In *Porter v. Ourada*, 51 Neb. 510, it was held by this court that the mere fact that a mortgagee has been in the habit of collecting interest from the mortgagor and remitting it to an assignee of the mortgagor is not alone sufficient to authorize the conclusion that the mortgagee's agency was such as to authorize him to collect the entire unmatured mortgage debt, citing *Stark v. Olsen*, *supra*. The testimony of Mr. Kimball as to his understanding that he was acting as an agent for Mrs. Chandler was but the statement of his own deduction. The facts from which this deduction was drawn alone were proper to be stated as evidence. If his conclusion was based upon facts which he failed to state it would manifestly be unfair to give this conclusion any weight in the determination of this case. We can consider only the facts which he stated as justifying his conclusion, and these, above stated clearly, fall short of establishing his authority to receive the $1,073.50 payment for Mrs. Chandler. The judgment of the district court is reversed and this cause is remanded with instructions to the district court to enter a decree in conformity with the views above expressed.

REVERSED AND REMANDED.

HUGO E. NELSON V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1898. No. 9663.

Intoxicating Liquors: EVIDENCE OF UNLAWFUL POSSESSION. In a prosecution for having in his possession certain intoxicating liquors, among which it was charged that there was beer, the defendant introduced evidence tending to show that there was no beer and that the liquid described in the information as beer was a tonic, not intoxicating in its nature. The state offered in evidence a search-warrant issued in an independent proceeding in which it was recited that an information under oath had been filed by a credible resident freeholder, whose name was given, that such freeholder had reason to believe and did believe that the accused had in his possession beer among other intoxicating liquors, kept for the purpose of sale and which were being sold in violation of chapter 50, Compiled Statutes of Nebraska. On this warrant there was a statement in the return that the officer executing the same had, upon search, found on the premises of the accused sixty-seven bottles of beer. This warrant and return the court admitted in evidence. *Held*, That, as the recitations of the warrant and return were with reference to the essence of the crime for the commission of which the accused was being tried, the admission of the warrant and return as independent evidence was prejudicially erroneous.

ERROR to the district court for Burt county. Tried below before POWELL, J. *Reversed.*

H. H. Bowes and *Ira Thomas*, for plaintiff in error.

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

RYAN, C.

In the district court of Burt county Hugo E. Nelson was convicted of having in his possession on May 27, 1896, intoxicating liquors, to-wit, whiskey, beer, wine, ale, alcohol, and brandy, kept and intended for sale, and which were being sold without the license which is required in chapter 50 of the Compiled Statutes.

We shall consider but one assignment of error, which is that the court erred in receiving in evidence Exhibit

1. This was identified by the officer by whom the return thereon was signed, as the warrant under which he had acted before the preliminary information was filed in this case. It was therefore executed in an independent proceeding, of the nature of which we are not advised, except that, as we gather from the oral testimony adduced in this case and the warrant and return hereinafter described, the proceeding was one under section 20, chapter 50, Compiled Statutes. The contents of the exhibit are as follows:

"In the County Court of Burt County, Nebraska.

"THE STATE OF NEBRASKA, }
COUNTY OF BURT. }

"To the sheriff or any constable of said county:

"Whereas, Chas. A. Patterson, a credible resident freeholder of said Burt county, has made complaint in writing and upon oath before me, Frank E. Ward, county judge in and for Burt county, Nebraska, that he has reason to believe, and does believe, that Hugo E. Nelson, of the county of Burt, state of Nebraska, on the 27th day of May, 1896, in the county aforesaid, then and there being, did then and there have, and now has, in his possession intoxicating liquors known as whiskey, beer, wine, ale, alcohol, in the cellar and building situated on lot thirteen (13), in block six (6), of the village of Oakland, Burt county, Nebraska, said place being kept by him, and that such intoxicating liquors were then and there, and are, intended for sale by said Hugo E. Nelson without a license as provided in chapter 50 of the Compiled Statutes of Nebraska for the year 1895: You are therefore commanded, with necessary and proper assistance, to enter in the daytime the said cellar and building kept by the said Hugo E. Nelson, situated on lot 13, in block 6, of the village of Oakland, in Burt county, Nebraska, and diligently search for said intoxicating liquors known as whiskey, beer, wine, ale, alcohol, and, if found, you shall seize said liquors with the vessels containing the same and keep the same securely until

final action be had thereon, and immediately arrest the said Hugo E. Nelson, or the person in charge of said liquors, and bring him before me for examination, to be disposed of or dealt with according to law.

"Given under my hand and official seal, the 27th day of May, A. D. 1896.

"[Seal county court, Burt county.]

"FRANK E. WARD,
"County Judge.

"STATE OF NEBRASKA, }
BURT COUNTY. }

"May 28th, 1896, I made diligent search for the goods described in the within warrant and at the place mentioned therein, and have found the following: One six gallon tin can containing about three gallons of alcohol, one (1) gallon bottle full of whiskey, one and one-half gallon bottles full of port wine, and one gallon bottle full of blackberry wine, one gallon bottle two-thirds full of brandy, and on the 28th day of May I researched the premises and found sixty-seven bottles of beer. I now have said goods and chattels and the body of said Hugo E. Nelson present in court.

"J. A. CLARK, *Sheriff.*
"By W. R. LANGFORD, *Deputy.*"

By the accused it was sought to be shown on the trial of this case that the alcohol, wine, brandy, and whiskey were necessarily used in his business as a druggist in the preparation of tinctures, etc. As to the nature of the contents of the sixty-seven bottles taken on May 28, there was direct conflict in the evidence—that for the accused being to the effect that it was not beer, but was what was called "Hospital Tonic," a preparation of the nature indicated by its name and in its nature, as one witness at least testified, not intoxicating. With this condition of evidence existing, the introduction of the warrant and the return thereon disclosed that a person not examined as a witness in this case, who, in the warrant, was described as a credible resident freeholder, had

made an affidavit to the effect that the accused in this case was keeping certain intoxicating liquors, among which was beer, for the purpose of selling it in violation of law, and the return of the officer upon this warrant was that he had found sixty-seven bottles of beer upon the premises of the defendant. These facts, which the warrant and return tended to establish, were facts very material as against the accused, for by section 20, chapter 50, Compiled Statutes, the possession of intoxicating liquors by one not licensed to sell the same is presumptive evidence of the commission of the offense with which Nelson was charged. The officer by whom the above quoted return was made was examined and cross-examined as a witness in this case, and his testimony had much less of the positiveness than did his return wherein the contents of the sixty-seven bottles, unequivocally, were described as beer. Mr. Patterson, who filed the information upon which the search warrant issued, was not examined at all in this case; hence there was no opportunity to cross-examine him with reference to the sworn charges which by him had been made against Nelson. Independently of all the papers filed, the warrant recited what Mr. Patterson had alleged under oath, and these allegations were with reference to matters very important in determining this case. We conclude, therefore, that in admitting in evidence Exhibit 1 the district court erred, and accordingly its judgment is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

H. GUND & COMPANY V. WILLIAM HORRIGAN ET AL.

FILED FEBRUARY 17, 1898. No. 7848.

Judgments: ENTRY NUNC PRO TUNC. If a judgment was in fact rendered and such judgment was not recorded, the court at any time afterward, in a proper proceeding, and upon a proper showing, may render such judgment *nunc pro tunc*. Following *Van Etten v. Test*, 49 Neb. 725.

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

B. F. Smith, for plaintiffs in error.

T. J. Doyle, contra.

RYAN, C.

This action was begun in the district court of Adams county to subject to the payment of a judgment certain real property claimed by William and Catherine Horrigan as a homestead. On January 19, 1893, there was a trial, resulting in findings of certain facts, among which were the findings that William and Catherine Horrigan had a homestead interest in the real property, subject and second to a mortgage of $1,400 and accrued interest thereon; that a conveyance of William and Catherine Horrigan to their co-defendant, Peter Horrigan, was in fact and law a mortgage, which was subject and inferior to the claim of plaintiff, H. Gund & Co., and not a lien upon the premises. While these findings were followed by an order directing that judgment be entered upon them, there seems to have been no such judgment rendered at that time. On May 16, 1894, there was filed in this case a paper, which, though more pretentious in its designation and scope, may be treated as a motion for an entry of judgment *nunc pro tunc*. Notice of the pendency of this application was served on the attorneys for Gund & Co., by whom a special appearance was filed July

2, 1894, objecting to the jurisdiction of the court for the reason that no summons had been served on their client, and for the further reason that the court had lost jurisdiction of this case. On July 3, 1894, the record discloses that the cause was submitted to the court upon the evidence, oral, written, and documentary, which had been under consideration originally, and that the court thereon made a finding that the property was of the value of $3,400, and that because of the mortgage thereon of $1,400 there was no balance above the homestead exemption subject to the judgment in favor of H. Gund & Co. There was thereupon entered a decree that the judgment in favor of H. Gund & Co. was not a lien on the premises, and the homestead rights of William and Catherine Horrigan were quieted against said judgment. In *Van Etten v. Test*, 49 Neb. 725, it has been held that where, in fact, a judgment was rendered but not recorded, the court, at any time afterward, had power, independently of statutory authority, *nunc pro tunc*, to enter a proper judgment against the defendant upon due showing in a proper proceeding. The facts in this case justified the entry of a judgment *nunc pro tunc*, and in legal effect there was but the entry of such a judgment. There has been pointed out no irregularity in the exercise of this power, and we therefore conclude that no such irregularity exists. The judgment of the district court is accordingly

AFFIRMED.

ELSIE D. TROUP ET AL., APPELLEES, V. PAUL W. HORBACH ET AL., APPELLANTS.

FILED FEBRUARY 17, 1898. No. 9375.

1. **Corporations:** SALES OF STOCK: PAYMENT IN PROPERTY: LIABILITY OF PURCHASERS. Owners of property have a right, in disposing of it, to place such valuation thereon as they see fit; and if, with such property at an overvaluation, they pay for capital stock issued to

them by a corporation, the excess above the real value of the property cannot subsequently be treated by creditors of the corporation as never having been paid, in the absence of fraud, misrepresentation, suppression of the truth, and the violation of the obligations of law or morality, express or implied.

2. ———: ———: ———: ———. A purchaser of the capital stock of a corporation from one who has fully paid for the same in property cannot be held liable to creditors of such corporation solely on the theory that the property recognized as a proper medium of payment had been accepted as payment by the corporation at too high a valuation.

3. Attorney: VERIFICATION OF PLEADING: ESTOPPEL. Where a defendant, an attorney at law, as such, signed the petition praying judgment against himself, and verified such petition, in which it was averred that he owed the plaintiff a certain sum, he cannot in the face of these facts, on appeal, be relieved in the supreme court.

APPEAL from the district court of Gage county. Heard below before LETTON, J. *Reversed.*

The facts are stated by the commissioner.

John D. Howe, for appellants:

Purchase of stock and payment in property at more than its real value will not enable a creditor giving credit to the corporation with full knowledge of the facts to charge the stockholder with the difference between the real value of the property and the value at which it was taken. (3 Thompson, Corporations sec. 2932; *Bank of Fort Madison v. Alden*, 129 U. S. 372; *Thompson v. Bemis Paper Co.*, 127 Mass. 595; *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. Rep. [Minn.] 1117; *Adamant Mfg. Co. v. Wallace*, 48 Pac. Rep. [Wash.] 415; *First Nat. Bank v. Gustin Minerva Consolidated Mining Co.*, 44 N. W. Rep. [Minn.] 198; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. Rep. 554.)

John A. Horbach was not a stockholder, as each party must consent—the one to become a member, and the other that he should become a member of the corpora-

tion. (*Essex Turnpike Corporation v. Collins*, 8 Mass. 299; Angell & Ames, Corporations sec. 527, and cases cited.)

Other references in an argument on the non-liability of appellants: *Gilke v. Dawson Town & Gas Co.*, 46 Neb. 333; *Wood v. Dummer*, 3 Mason [U. S.] 308; *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 549; *Jackson v. Traer*, 64 Ia. 469; *New Albany v. Burke*, 11 Wall. [U. S.] 96; *Steacy v. Little Rock & Ft. S. R. Co.*, 5 Dil. [U. S. C. C.] 348; *Webster v. Upton*, 91 U. S. 65; *Upton v. Tribilcock*, 91 U. S. 45; *Phelan v. Hazard*, 5 Dil. [U. S.] 45; *Hart v. Lauman*, 29 Barb. [N. Y.] 410; *Moore v. Hudson River R. Co.*, 12 Barb. [N. Y.] 156; *Porter v. Buckfield B. R. Co.*, 32 Me. 539; *Memphis & L. R. Co. v. Dow*, 120 U. S. 287; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Shaw v. Robinson*, 50 Neb. 403; *Morgan v. Brower*, 77 Ga. 627; *Flinn v. Bagley*, 7 Fed. Rep. 785; *Hatch v. Dana*, 101 U. S. 205; *Graham v. Railroad Co.*, 102 U. S. 148; *Gilman v. Gross*, 72 N. W. Rep. [Wis.] 885; *Coleman v. White*, 14 Wis. 762; *Hadley v. Russell*, 40 N. H. 109; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Griffith v. Mangam*, 73 N. Y. 611; *Morgan v. New York & A. R. Co.*, 10 Paige Ch. [N. Y.] 290; *Mann v. Pentz*, 3 N. Y. 415; *Pollard v. Bailey*, 20 Wall. [U. S.] 520; *Terry v. Little*, 101 U. S. 216; *Patterson v. Lynde*, 106 U. S. 519; *Nicer v. Crane*, 98 N. Y. 40.

Charles Offutt, also for appellants:

The contracts between the Horbachs and the transit and power company were not frauds upon the creditors of the corporation, not a single creditor was injured by either of the contracts, John A. Horbach was never a shareholder either in fact or beneficially, and appellants are not liable. (*Fogg v. Blair*, 139 U. S. 118; *Christensen v. Eno*, 106 N. Y. 97; *Van Ostrand v. Reed*, 1 Wend. [N. Y.] 424.)

The shares of stock issued to Paul W. Horbach were not subscribed by either of the Horbachs or by Lantry. These shares had all been previously issued by the com-

pany to the original or other shareholders, and were by the holders voluntarily surrendered to the company to enable it to execute its agreement with Horbach. Hence the shares issued to Horbach were assets of the company which it had the right to sell for what it could get, and the purchaser or owner of such shares incurred none of the liabilities of a subscriber to shares, nor any liability to pay the difference between the par value of the shares and what had been previously paid thereon. (1 Cook, Stock and Stockholders [3d ed.] sec. 29; *Ramwell's Case*, 50 L. J. Ch. [Eng.] 827; *Otter v. Brevoort*, 50 Barb. [N. Y.] 247; *People v. Albany & S. R. Co.*, 55 Barb. [N. Y.] 371; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Morrow v. Iron & Steel Co.*, 87 Tenn. 262; *Handley v. Stutz*, 139 U. S. 417; *Clark v. Bever*, 139 U. S. 96; *Van Cott v. Van Brunt*, 82 N. Y. 535.)

A transferee of shares is not liable for unpaid subscriptions on his shares unless he has agreed with the corporation to pay them. If he has not promised he is not liable. (*Seymour v. Sturgess*, 26 N. Y. 143; 1 Cook, Stock and Stockholders [3d ed.] sec. 46; *Foreman v. Bigelow*, 9 Fed. Cases 441; *Currie's Case*, 3 De Gex, J. & S. [Eng.] 367; *De Ruvigne's Case*, 5 L. R. Ch. D. [Eng.] 306; *Anderson's Case*, 7 L. R. Ch. D. [Eng.] 94; *Christensen v. Eno*, 106 N. Y. 97.)

Existing creditors were not injured by the contracts with the Horbachs, and other creditors had knowledge thereof. Appellees cannot, therefore, complain of these contracts. (*First Nat. Bank of Deadwood v. Gustin Minerva Consolidated Mining Co.*, 42 Minn. 327; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174; *Handley v. Stutz*, 139 U. S. 417; 1 Cook, Stock and Stockholders [2d ed.] sec. 46.)

E. R. Duffie and *A. H. Babcock*, also for appellants.

J. E. Cobbey and *G. M. Johnston*, *contra*:

Lantry having such notice as would put him on in-

quiry, the burden of showing himself an innocent purchaser rested on him. (*Wishard v. Hansen*, 68 N. W. Rep. [Ia.] 691; *Oswald v. Minneapolis Times Co.*, 68 N. W. Rep. [Minn.] 15.)

The decree was correctly entered. (*Commercial Nat. Bank v. Gibson*, 37 Neb. 750.)

Appellants are liable. (*Gilkie v. Dawson Town & Gas Co.*, 46 Neb. 333; *Elyton Land Co. v. Birmingham Warehouse Elevator Co.*, 9 So. Rep. [Ala.] 129; *Wishard v. Hansen*, 68 N. W. Rep. [Ia.] 691; *Globe Publishing Co. v. State Bank*, 41 Neb. 175; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 47 N. W. Rep. [Wis.] 726; *Sanger v. Upton*, 91 U. S. 56; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 50 Neb. 734; *Boulton Carbon Co. v. Mills*, 43 N. W. Rep. [Ia.] 290; *Welles v. Larrabee*, 36 Fed. Rep. 866; *Preston v. Cincinnati, C. & H. V. R. Co.*, 36 Fed. Rep. 54; *Shields v. Casey*, 25 Atl. Rep. [Pa.] 619; *Davis v. Stevens*, 17 Blatchf. [U. S.] 259; *Case v. Small*, 10 Fed. Rep. 722; *National Bank v. Case*, 99 U. S. 628; *McKim v. Glenn*, 8 Atl. Rep. [Md.] 130; *Baines v. Babcock*, 27 Pac. Rep. [Cal.] 674.)

A transferee of stock is liable for the balance remaining unpaid upon stock which he purchases or receives, knowing it to be unpaid, though it be issued as fully paid and non-assessable. (*White v. Greene*, 70 N. W. Rep. [Ia.] 182; *Henderson v. Turngren*, 35 Pac. Rep. [Utah] 495; *Peninsular Savings Bank v. Black Flag Stove Polish Co.*, 63 N. W. Rep. [Mich.] 514; *Hastings Malting Co. v. Iron Range Brewing Co.*, 67 N. W. Rep. [Minn.] 652; *Scoville v. Thayer*, 105 U. S. 225; *Calumet Paper Co. v. Stotts Investment Co.*, 64 N. W. Rep. [Ia.] 782; *Carter v. Union Printing Co.*, 16 S. W. Rep. [Ark.] 579; *Peck v. Elliott*, 79 Fed. Rep. 10; *Addison v. Pacific Coast Milling Co.*, 79 Fed. Rep. 459.)

All creditors becoming such after the corporation authorized the issue of stock may enforce the liability. (*Handley v. Stutz*, 139 U. S. 417; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 331.)

A. C. Troup, Griggs, Rinaker & Bibb, and *E. H. Hinshaw*, also for appellees.

RYAN, C.

This appeal was advanced for hearing upon an agreement of parties in compliance with rule 2. (52 Neb. ix.) The action was brought in the district court of Gage county, wherein there were judgments against the several defendants conformably with the prayer of the petition. Plaintiffs alleged that they were creditors of the Beatrice Rapid Transit & Power Company in various sums which were described in separate paragraphs, and in many instances were evidenced by judgments against that company. They further alleged that under a decree of the United States circuit court for the eighth circuit, district of Nebraska, all the property of the Beatrice Rapid Transit Company had been sold and that it was without any property for the payment of its aforesaid indebtedness. The prayer of the petition was as follows: "Wherefore plaintiffs pray that each of said defendants may be held liable for the several amounts hereinbefore claimed due from them upon the stock of the Beatrice Rapid Transit & Power Company, as hereinbefore alleged, and that said defendants, and each of them, may be required to pay to these several plaintiffs the amounts of their several claims; that the court may adjudge the amount due from each may be held and decreed to be due to these several plaintiffs the full amount of their respective claims, and that under the order of this court the amounts so found due from said several defendants may be collected of them, severally, the full amount found to be due to these plaintiffs, together with the costs of this proceeding; that the said John A. Horbach and Paul W. Horbach may be held jointly and severally liable for the amount of stock issued to the said Paul W. Horbach, as hereinbefore alleged, and that the several plaintiffs may have such other further and dif-

ferent relief as in equity they may be entitled to, and for their costs." From this prayer it is clear that the defendants were proceeded against as being liable as holders of shares of the Beatrice Rapid Transit & Power Company capital stock on the assumption that these shares had not been paid for. Issues were joined by answers, except in the instances wherein there were defaults.

To illustrate the general theory on which it was sought to hold liable certain of the stockholders it will be sufficient to quote one sample paragraph of the petition. We shall also quote another paragraph which supplements the allegations of that already referred to. The two paragraphs above indicated are in this language:

"The defendant Beatrice Rapid Transit & Power Company issued to the defendant George R. Scott 115 shares of their capital stock of the par value of $11,500; that the only consideration paid by said Scott for the issuing of said stock was services rendered to the said rapid transit company, and real estate transferred by said Scott and wife to said rapid transit company, and that the total amount of said real estate and services did not exceed the amount of $7,000; that there is still due from said Scott on his said stock the sum of $4,500.

"The defendant Beatrice Rapid Transit & Power Company issued to the defendants William Ebright, E. S. Cushman, full Christian name unknown, L. F. Easterday, full name unknown, William Bozarth, Jacob Klein, William H. Tichnor, Jonathan S. Grable, John Ellis one or more shares each of its capital stock of the par value of $100 per share; that the only consideration paid therefor was the conveyance of certain real estate conveyed by each of them severally to the said rapid transit company, but these plaintiffs have not the records of said company and cannot give the exact amount of stock issued to each of them severally, nor the amounts in fact paid thereon, nor the value of the property given in pay-

ment therefor, but plaintiffs allege that they did not in fact pay the full par value of their said stock and that there is still due from each of said defendants a small amount on each of their said shares of stock so issued to them which plaintiffs ask they may be required, upon a hearing and accounting in this court, to pay to these plaintiffs. And plaintiffs allege that said defendants Schell, Brumback, Spencer, Beatrice Real Estate & Trust Company, Johnston, Davis, Blakely, Blakely, Scott, Ryan, Ebright, Cushman, Easterday, Bozarth, Klein, Tichnor, Grable, and Ellis, and each of them, had full knowledge that the respective shares of stock issued to them respectively, as alleged, had not been paid for in full and that the said property and services had been greatly overvalued, and that the payment for such stock by said property or services at such overvaluation was a fraud on the creditors of said rapid transit company."

In the petition there was no charge of fraud against the parties first named except the above language, and this, it is quite clear, was a mere conclusion of the pleader deduced from the facts alleged. Whether or not this deduction was correct is one of the questions which, later, we shall consider. With reference to the liability of Scott the court found in its decree as follows:

"The court further finds that 200 shares of the capital stock of the rapid transit and power company, being certificates 46 to 50 inclusive, were issued to George R. and W. W. Scott in consideration of the conveyance to said company by said George R. Scott of certain real estate; that said shares were of the value of $20,000, and that the property in exchange for which they were issued was of the fair cash value of $6,000; that said property was grossly overvalued."

In the decree there was a paragraph in this language:

"The court further finds that at the time that the aforesaid shares of stock were issued to the said L. E. Spencer, N. N. Brumback, G. M. Johnston, S. K. Davis, C. L. Schell, Jacob Klein, Nathan Blakely, Mrs. I. W. Funck,

J. S. Grable, John Ellis, H. C. Bozarth, William Tichnor, William Ebright, George R. Scott, Ira L. Ryan, Beatrice Real Estate & Trust Company, L. F. Easterday, Walter W. Scott, each and all of the persons had full knowledge that the property or services in consideration for which the said shares of stock were issued by the said corporation to said several persons respectively, was greatly disproportionate in value to the face of the shares of stock exchanged therefor, and that the officer of said corporation issuing said stock, and the parties receiving the same, both well knew that said great disparity in value existed, and each of the said issues of stock to each of the several persons aforesaid was made with the full understanding and knowledge that the property exchanged for said stock was worth for the most part only about one-half of the face value of said stock and was in fact of the value hereinbefore found by the court."

If we understand correctly the theory upon which the court proceeded in entering judgment pursuant to the above findings, it was that parties who purchased stock and in payment therefor transferred to the company real property, were only entitled to receive credit for the actual value of such real property at the time it was transferred. There was no evidence that there was any misrepresentation as to the value of this property upon which misrepresentation the company had acted to its injury, indeed, in most instances misrepresentation of value could scarcely have imposed upon the officers of the company, for the property was within the corporate limits of the city of Beatrice. It was not alleged that any of these purchasers of capital stock owed any duty to the company, or that they were in any way connected with it at the time that they exchanged real property for stock. We therefore assume that the theory was that at any subsequent time, within the limit fixed by the statute of limitations, it was the right of the company, and in case of its insolvency the right of its creditors, to institute an action against stockholders for the

difference between the par value of the stock and the real value of property which the company had received as full payment for such stock irrespective of the above considerations. In this view we cannot concur. A party, without fraud or misrepresentation, has the right to fix whatever value he chooses upon his property, and a corporation no more than a person can be relieved against its own want of judgment in buying such property at the price named. In making this statement we do not take into consideration fraud, breach of warranty, misrepresentation, suppression of the truth, or other proper grounds for relief which might be proper in some cases to consider. These elements are purposely omitted, for they were neither pleaded, proved, nor found to exist. We are therefore of the opinion that the judgments of the district court rendered in this case against Charles L. Schell, N. N. Brumback, L. E. Spencer, Beatrice Real Estate & Trust Company, S. K. Davis, William Ebright, E. S. Cushman, L. F. Easterday, William Bozarth, D. W. Morrow, Nathan Blakely, and George R. Scott must be reversed. In the same class with the defendants just named there were Jacob Klein, Alexander Moore, and Ira Ryan, but the judgments against them cannot be reviewed, for the reason that they were rendered upon the default of said parties.

The judgment against G. M. Johnston must be affirmed to the extent of $1,300, for reasons which shall now be stated. In the petition it was charged that the Beatrice Rapid Transit & Power Company had issued to Johnston 153 shares of its capital stock of the value of $15,300; that the only consideration paid for this stock was $14,000 in property and services; and it was alleged: "That said Johnston still owes on said stock the sum of $1,300." This petition was signed by Mr. Johnston as an attorney for plaintiffs and was verified by him. The affirmance of this portion of the judgment, to the extent above indicated, is rendered necessary by the attitude thus assumed by Mr. Johnston and by no other consideration.

A judgment in form seems to have been entered against Elsie D. Troup and J. C. Bozarth, but as they were not named in the petition as defendants, and as no relief was asked as against them, we assume that in reality there was no judgment against either of them.

The other defendants against whom judgments were rendered were John A. Horbach, Paul W. Horbach, and Victor G. Lantry, against whom the petition contained the following averments: "The said Beatrice Rapid Transit & Power Company issued to the defendant Paul W. Horbach 1,250 shares of said capital stock of the par value of $125,000; that said Paul W. Horbach paid no consideration whatever for said stock or any of it, but that the same was issued to him by the request of John A. Horbach, who had acquired said stock by virtue of an agreement with the Beatrice Rapid Transit & Power Company by which he was to loan the said Beatrice Rapid Transit & Power Company the sum of $20,000; that said $125,000 of stock was in the nature of a bonus to John A. Horbach and as an inducement to him to make said loan and was without consideration, and was issued to his son, Paul W. Horbach, for the illegal and collusive purpose of placing it beyond the attack of creditors of the Beatrice Rapid Transit & Power Company, and to relieve him, said John A. Horbach, from any liability on account of said alleged purchase of said stock; that afterwards said $125,000 of capital stock was by said Paul W. Horbach transferred to the said defendant Victor G. Lantry, who surrendered the original certificate issued to Paul W. Horbach and had the stock reissued to him. Plaintiffs believe and allege that the said transfer from said Paul W. Horbach to said Victor G. Lantry was wholly without consideration, but whether with or without consideration, said Victor G. Lantry never paid to said Beatrice Rapid Transit & Power Company the value of said stock or any part thereof, and said Victor G. Lantry, Paul W. Horbach, and John A. Horbach each knew, and had full notice of

the fact, that said stock had been issued wholly without consideration, and that the said par value of said stock or no part thereof had been paid by them or either of them, or by any one at any time, to the said Beatrice Rapid Transit & Power Company, or to any one else for them, and each of said last named defendants had full knowledge that the said Beatrice Rapid Transit & Power Company was largely indebted at the time said stock was issued and at the several reissues thereof, and each of said three last named defendants knew that the issue of said $125,000 of stock was a fraud upon creditors of said rapid transit company, and upon the individuals and the public dealing with and extending credit to said rapid transit company, and these plaintiffs in particular; that the defendant Victor G. Lantry afterwards conveyed to the defendant D. W. Morrow and the defendant Alexander Moore, each, one share of said stock of the par value of $100, and that neither of said shares had been paid for, and which fact said defendants Morrow and Moore well knew, and said defendants well knew that said shares of stock so conveyed to them was issued without consideration and without being paid for in whole or in part by any person; that said defendants Paul W. and John A. Horbach, V. G. Lantry each became and still are liable for the full par value of said stock and said Morrow and Moore are each liable for the par value of one share of the said stock." With respect to these three defendants the finding of the district court was as follows:

"The court further finds that on about the 8th day of September, 1892, the defendant the Beatrice Rapid Transit & Power Company borrowed from one John A. Horbach, of the city of Omaha, Nebraska, the sum of $20,000 for one year, with interest at the rate of 8 per cent per annum, for the purpose of extending the lines, and completing and improving the plant of said company, and for the purpose of securing the payment of said loan at maturity the said Beatrice Rapid Transit & Power Com-

pany delivered to John A. Horbach, as collateral security, certain mortgage bonds of said company; that as an inducement to John A. Horbach for the making of said loan, said Beatrice Rapid Transit & Power Company through its directors agreed to procure and deliver to said John A. Horbach, as a bonus or premium in addition to the eight per cent interest which they agreed to pay on said loan, and for the purpose of allowing the control of said corporation to be in the hands of said Horbach, shares of stock representing one-half of the total capital stock of said company, to-wit, 1,250 shares of the par value of $125,000; that the agreement as to said shares was made with John A. Horbach in the first place, but that afterwards, at his instance and request, said shares of stock were issued to his son, Paul W. Horbach, of said city of Omaha; that at the time of making said loans, and as a part of the same transaction, it was agreed between John A. Horbach and Paul W. Horbach and the defendant Beatrice Rapid Transit & Power Company, in consideration of the sum of $20,000, that the said Paul W. Horbach should furnish the material and build the extensions, for the making of which said $20,000 was borrowed, and that the provision with reference to the 1,250 shares aforesaid should be embraced in the contract made with Paul W. Horbach, which agreement was carried out.

"The court finds that said contract and agreement by which the said shares of stock were to be issued in the name of Paul W. Horbach, was made in fact for the benefit and protection of John A. Horbach, and for the purpose of avoiding any liabilities which the said John A. Horbach might incur by reason of the issuance of said stock to him in his own name.

"The court finds that thereafter, to-wit, on the 16th day of September, 1892, the said Beatrice Rapid Transit & Power Company, in pursuance of the said agreement with John A. and Paul W. Horbach, procured an issue to said Paul W. Horbach of 1,250 shares in said corpora-

tion, which said shares of stock were issued by virtue of certificate No. 86, and were issued upon no other consideration than heretofore stated.

"The court finds that the said John A. Horbach and Paul W. Horbach, prior to the time of the issuance of said stock to Paul W. Horbach, had full knowledge and notice of the financial condition, assets, property, and indebtedness of said Beatrice Rapid Transit & Power Company as it stood at the time said contracts or agreements with them were made, and had full knowledge of the manner in which stock had been issued to the persons then holding the stock of the corporation; that the fact that said stock, or a large portion thereof, was issued in excess for property and services which were grossly overvalued, and that none of said stock had ever been fully paid for in money and money's worth, was well known to them.

"The court finds that defendant Victor G. Lantry, who became the owner of the 1,250 shares of stock assigned to him by Paul W. Horbach, had sufficient knowledge to put a reasonable, prudent man upon inquiry as to the assets of said corporation, its condition, and whether or not said stock had ever been paid for, and that he is not such an innocent purchaser of said stock as to entitle him to be relieved from liability thereon. The court therefore finds that he is liable to the same extent as John A. and Paul W. Horbach upon the said 1,250 shares of stock.

"The court finds that certificate No. 86, issued to Paul W. Horbach, was made up and composed of shares of stock issued to the persons, and certificates, the numbers of which are hereinafter set forth, and that there remained due and unpaid upon each of said several shares of stock the amounts set opposite the name of each party in the following table, together with the total amount due as shown in said table:

Name of Source of Shares.	No. of Certificates.	Bal. per Share Unpaid.	No. of Shares to Horbach	Total Amount Due.
N. N. Brumback	4-5-7-9-	$89 33	187½	$16741 37
L. E. Spencer	13-14-16-17	89 33	200	17866 00
G. M. Johnston	23 shares from No. 20; 21-22 2 from No. 26	60 00	215	12900 00
Elsie D. Troup	5 shares from No. 32	50 00	5	250 00
Jacob Klein	29	62 50	5	312 50
J. S. Grable	26	57 50	5	287 50
John Ellis	37-60	50 00	20	1000 00
H. C Bozarth	40	33 33	3	99 99
J. C. Bozarth	39	50 00	7½	375 00
William Tichnor	41	50 00	7½	375 00
William Ebright	38	50 00	8	400 00
F. L M. Easterday	57-59	50 00	7	350 00
Ira L. Ryan	43-44-45	47 55	30½	1450 00
George R. Scott & Walter Scott	46 to 50 inc.	70 00	75	5250 00
N. N. Brumback, assigned to N. T. Brumback	No. 67 (26¾ of this reissued to N N. Brumback)	89 33	73¾	6588 08
N. N. Brumback	73	33 33	10	333 30
I. W. Funck	68	50 00	13	650 00
G. M. Johnston	75-83	33 33	30	999 90
L. E. Spencer, assigned to Mary B. Spencer	70 (58¾ of this cert. reissued to L. E. Spencer)	89 33	41¼	3684 86
L. E Spencer	74-83	33 33	30	999 90
S K. Davis	77	66 66	2½	166 65
C. L. Schell	79	83 33	47½	3958 17
Nathan Blakely	84	100 00	50	5000 00
George R. Scott	85	100 00	50	5000 00
Beatrice Real Estate & Trust Co., being reissue from No. 6-15, part of Brumback & Spencer 1st issue	No. 92	89 33	50	4466 50
Paul W. Horbach		100 00	76	7600 00
			1250	$97112 72

"The court finds, as to defendants D. W. Morrow and Alexander Moore, that they are innocent purchasers without notice from the said Victor Lantry of the shares of stock held by them and that they are not liable for any amount whatsoever upon said shares of stock."

The above table shows who surrendered stock and in what amounts it was surrendered by individuals. Certificate No. 86 was simply an issue in place of stock thus surrendered. The transaction was but the regular and

proper method of transferring the stock held by these individuals. We can find no evidence that either of the Horbachs or Mr. Lantry had actual knowledge of the manner in which this stock was issued to the individuals named in the table above given. We think unsustained by the evidence the finding that Lantry, when he became the owner of the 1,250 shares of stock assigned to him, had sufficient knowledge to put a reasonable, prudent man upon inquiry as to the assets of said corporation, its condition, and whether or not the stock had been fully paid for. The certificates issued to individuals, and those issued in their stead, recited that the shares were fully paid up and there were no facts contradictory of these recitations within the knowledge of Lantry, so far as the evidence shows, except such knowledge as was possessed by the public at large, and that was merely that the corporation was not in a prosperous financial condition. We have already found, however, that the original holders of the stock were not liable under the issues joined and there was therefore no unpaid subscription which could follow the stock. There was therefore no grounds for holding John A. Horbach, Paul W. Horbach, or Victor Lantry liable as successors in the ownership of stock when their assignors had already paid for the same, or at least must be deemed to have done so, under the issues tried in this case.

The judgment of the district court against G. M. Johnston to the extent of $1,300 is affirmed; the judgments against the other defendants not rendered upon defaults are reversed and the cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

JOHN A. HORBACH, APPELLANT, V. ELSIE D. TROUP ET AL., APPELLEES.

FILED FEBRUARY 17, 1898. No. 9683.

New Trial: APPEAL: DISMISSAL.

APPEAL from the district court of Gage county. Heard below before LETTON, J. *Appeal dismissed.*

John D. Howe, Charles Offutt, E. R. Duffie, and *A. H. Babcock,* for appellant.

J. E. Cobbey, G. M. Johnston, A. C. Troup, Griggs, Rinaker & Bibb, and *E. H. Hinshaw, contra.*

RYAN, C.

The record in this case presents for review the judgment of the district court of Gage county denying the prayer of the petition of the appellant for a new trial in the case of *Troup v. Horbach,* 53 Neb. 795. As the judgment in the case just referred to has been reversed we need not inquire into the merits of this appeal, and accordingly it is dismissed at costs of appellant.

APPEAL DISMISSED.

PHENIX INSURANCE COMPANY OF BROOKLYN V. FRED A. FULLER.

FILED FEBRUARY 17, 1898. No. 7862.

1. **Insurance:** TITLE TO INSURED PROPERTY: WAIVER OF CONDITION. Where no inquiries are made of an insured as to the character or condition of his title; where he makes no false representation as to the character and condition of his title, relying upon which the insurer is induced to and does insure the property; where the insured has an insurable interest in the property, the insurer accepts and retains the premium and a loss occurs, then the insurer

cannot escape liability for such loss because of the fact that the insured at the date of the policy was not invested with an absolute and unincumbered title to the insured property, even though the policy provides that it shall be of no validity unless the title of the insured be an unconditional unincumbered one, as in such case it will be conclusively presumed against the insurer that it intended to and did insure the interest which the insured had in the property and waived the provision in the policy providing for its invalidity by reason of the imperfect title of the insured.

2. **Transcript for Review:** OPINION OF TRIAL COURT. Where a case is tried to the court without a jury and a general finding made upon which judgment is rendered, and, in addition thereto, the court files a written opinion in the case, such opinion is not an essential part of the record of the case when it is brought here for review.

3. ———. The judgment of the district court must stand or fall upon the statutory record of the case—that is, the pleadings, the finding and judgment, and the bill of exceptions made a part of the record.

4. **Trial to Court:** DECISION: REVIEW. In reviewing such case this court will conclusively presume that the trial court considered all the competent evidence before it and decided all the material and necessary issues presented, though from the language of the written opinion the contrary should be made to appear.

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

Jacob Fawcett and *Greene & Breckenridge*, for plaintiff in error.

George W. Shields, contra.

RAGAN, C.

Fred A. Fuller sued the Phenix Insurance Company of Brooklyn, New York, in the district court of Douglas county to recover the value of certain property of his destroyed by fire, which property the insurance company had insured against loss or damage by fire. Fuller had a verdict and judgment, and the insurance company has filed here a petition in error to review such judgment.

1. The policy contained this provision: "If the interest of the assured in the property be other than an uncondi-

tional exclusive ownership, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if there be a mortgage or other incumbrance thereon, whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of this policy, otherwise this policy shall be void." At the time of the issuance of the policy in suit the personal property of the insured was incumbered by a chattel mortgage. The insured did not notify the company of the existence of this mortgage, and no memorandum of its existence was written in the policy. The insurance company interposed as a defense to the action in the district court the existence of this chattel mortgage upon the insured property; and the first argument here is that the judgment of the district court is contrary to law, because the undisputed evidence shows that such a mortgage existed upon the insured property at the date of the issuance of the policy, and that the insurance company was not notified of the existence of such mortgage, and no memorandum of its existence was written in the policy. The evidence on behalf of the insured tends to show that the agent of the insurance company solicited this insurance. At the time the agent had no actual knowledge of the existence of the chattel mortgage upon the property, but made no inquiries of the insured as to whether the property was incumbered. In fact, the subject of an incumbrance upon the property about to be insured was not mentioned by either party, and while the insured kept silent upon the subject of the incumbrance, he did not do so with any sinister motive. In other words, the subject of the incumbrance upon the property was not mentioned, because it seems not to have been thought of either by the insured or the insurer. The premium for the insurance was paid by the insured and accepted and retained by the insurer. The evidence further shows that the value of the property at the date of its insurance exceeded the incumbrance thereon, and

at the date of the destruction of the property by fire the incumbrance had been so reduced that the property destroyed exceeded in value both the insurance and the incumbrance thereon. In *Ins. Co. of North America v. Bachler*, 44 Neb. 549, it was held that where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the existence of an incumbrance and did not keep silent in regard to the incumbrance from any sinister motive, the existence of a mortgage upon the property did not invalidate the policy. And in *German Ins. Co. v. Kline*, 44 Neb. 395, it was held that where the application for insurance is oral, and no inquiry made as to the condition of the title of the property, the insured in fact had an insurable interest in the property, the premium paid and accepted and retained, the insurance company would be conclusively presumed to have insured the insurable interest which the owner had in the property and to have waived the provision in the policy providing for its forfeiture by reason of the existence of an incumbrance upon the property. These cases control the case at bar.

2. This case was tried to the court without a jury, and the court found generally in favor of the insured and against the insurance company and entered an ordinary money judgment on such finding; but the learned district judge also wrote an opinion in the case, and in this opinion he states that he did not deem it necessary to pass upon the merits of the defense just considered and reserved the question presented by that defense. A second argument here is that the judgment must be reversed because the only issue in the case has not been passed upon or decided by the district court; but this argument assumes that the opinion of the district judge is an essential part of the record of the case brought here; but it is not. In reviewing a case brought here, either on error or appeal, while this court is always pleased to have the benefit of the written opinion of the trial judge, still the judgment of the district court must stand or fall upon the

statutory record of the case—that is, the pleadings, the finding and judgment of the district court, and the bill of exceptions made a part of the record; and where general findings are made by a court and a judgment pronounced thereon, we must conclusively presume that the trial court considered all the competent evidence before it, and decided all the material and necessary issues presented by the pleadings, though from the language of the opinion the contrary should be made to appear. The judgment of the district court is

AFFIRMED.

MILWAUKEE MECHANICS FIRE INSURANCE COMPANY V. FRED A. FULLER.

FILED FEBRUARY 17, 1898. No. 7863.

Insurance: TITLE TO INSURED PROPERTY: WAIVER OF CONDITION. The facts in this case and the law applicable thereto are the same as those in *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, and on the authority of that case the judgment of the district court is affirmed.

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

Jacob Fawcett and *Greene & Breckenridge*, for plaintiff in error.

George W. Shields, contra.

RAGAN, C.

In the district court of Douglas county Fred A. Fuller sued the Milwaukee Mechanics Fire Insurance Company to recover the value of property insured by it and destroyed by fire. He had a verdict and judgment and the insurance company prosecutes here a petition in error.

The facts in this case are the same as those in *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, and on the authority of that case the judgment of the district court pronounced in this is

AFFIRMED.

LOUIS SLOBODISKY V. PHENIX INSURANCE COMPANY OF BROOKLYN.

FILED FEBRUARY 17, 1898. No. 7856.

1. **Insurance:** AUTHORITY OF AGENT: PREMIUMS. Whether the agent of an insurance company is invested with authority to waive the payment of the premium in cash and give the insured credit therefor, and whether he did so, are questions of fact.
2. ———: ———: ———. It seems that the authority of an insurance agent to waive the payment of the premium in cash and give the insured credit therefor may be inferred from the fact that the agent is authorized to negotiate contracts of insurance, to fill out and deliver insurance policies executed in blank and left with him for that purpose, and to receive and receipt for insurance premiums, and to make settlements from time to time with his principal for premiums collected.
3. ———: TITLE TO INSURED PROPERTY: WAIVER OF CONDITION. Where no inquiries are made of an insured as to the character or condition of his title; where he makes no false representation as to the character or condition of his title, relying upon which the insurer is induced to and does insure the property; where the insured has an insurable interest in the property, the insurer accepts and retains the premium and a loss occurs, then the insurer cannot escape liability for such loss because of the fact that the insured at the date of the policy was not invested with an absolute and unincumbered title to the insured property, even though the policy provides that it shall be of no validity unless the title of the insured be an unconditional and unincumbered one, as in such case it will be conclusively presumed against the insurer that it intended to and did insure the interest which the insured had in the property and waived the provision in the policy providing for its invalidity by reason of the imperfect title of the insured.
4. ———: OCCUPANCY. Because property is unoccupied at the date of its insurance, the insurer being ignorant thereof, of itself constitutes no defense to an action on the policy.
5. ———: DESCRIPTION: REPRESENTATIONS. The fact that an insured building is described in the policy as a dwelling-house is not a representation of the insured that the house was then and there occupied.
6. ———: INSURABLE INTEREST: JUDICIAL SALE. One may have an insurable interest in real estate though it has been sold at judicial sale, while such sale remains unconfirmed, as the title is not divested until the confirmation of such sale. *Greenlee v. North British & Mercantile Ins. Co.*, 71 N W. Rep. [Ia.] 534, and *Hanover Fire Ins. Co. of New York v. Brown*, 25 Atl. Rep. [Md.] 589, followed.

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

John D. Howe, Parke Godwin, and *E. R. Duffie,* for plaintiff in error.

Jacob Fawcett and *Greene & Breckenridge, contra.*

RAGAN, C.

This is a suit upon an ordinary fire insurance policy brought in the district court of Douglas county by Louis Slobodisky against the Phenix Insurance Company of Brooklyn, New York. The jury, in obedience to an instruction of the court, returned a verdict for the insurance company, upon which a judgment of dismissal of Slobodisky's action was entered, and he brings that judgment here for review on error.

1. There is no dispute in the record as to the execution and delivery of the policy, nor that a fire occurred destroying some and damaging the remainder of the insured property. As a defense to the action the insurance company pleaded that the insured had failed and neglected to pay the premium for the insurance, and the policy in suit provided that the company should not be liable thereon until the premium for insurance was actually paid. Slobodisky replied to this defense that the agents of the insurer who issued the policy in suit were invested with authority to countersign, issue, and deliver policies; that for several years he had carried with said agents a line of insurance in various companies, including the insurance here; that such policies had been issued and delivered to him by said agents and a running account kept by said agents with him for the amount of the premiums on such policies, and that periodical settlements between the insured and said agents took place; that this policy was delivered by the agents of the insurer in the same manner that they had been accustomed to deliver other policies to the insured, the agents giving

the insured credit for the premium; and that shortly after the fire the insured tendered the premium to the agents and they refused to accept the same, giving as a reason therefor that they were instructed not to do so by the insurer. At the trial the insured was called as a witness and his counsel attempted to prove by him the facts averred in his reply, but this evidence was excluded by the court. The clause in the insurance policy that the company should not be liable on the policy until the premium should be actually paid was a provision inserted in the policy for the benefit of the insurer, and one which it might waive. The facts stated by the reply of the insured in this case, if true, were sufficient to authorize an inference or sustain a finding that the agents of the insurer did waive the payment of the premium in cash at the time they issued the policy, gave the insured credit for such premium, and that they had authority to do so. Whether the agents of the insurer were invested with authority to waive the payment of the premium in cash and give the insured credit therefor, and whether they did so, were questions of fact for the jury and the court erred in not submitting those questions to the jury. (*Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb. 572; *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb. 404; *Pythian Life Ass'n v. Preston*, 47 Neb. 374.) In *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, it was held that where an agent of a fire insurance company was authorized to negotiate contracts of insurance, to fill up and deliver policies executed in blank and left with him for that purpose, he had authority to make parol preliminary contracts to issue a policy, and that the payment of the premium at the time of issuing the policy was not an essential prerequisite to make the contract of insurance binding upon the company; that if the agent gave credit to the insured for the premium, the contract was binding. In *Sheldon v. Connecticut Mutual Life Ins. Co.*, 25 Conn. 207, it was held that an agreement made in good faith between an insurance company's agent having authority to

receive an insurance premium and the insured, that the agent should become personally responsible to his principal for the premium and the insured the agent's debtor therefor, constituted a payment of the premium as between the insured and the insurance company. To the same effect see *O'Brien v. Union Mutual Life Ins. Co.*, 22 Fed. Rep. 586; *Chickering v. Globe Mutual Life Ins. Co.*, 116 Mass. 321; *Harding v. Norwich Union Fire Ins. Soc.*, 71 N. W. Rep. [S. Dak.] 755; *Home Fire Ins. Co. v. Curtis*, 32 Mich. 402.

2. Another defense interposed was that the insured, at the date of the issuance of the policy in suit, had $5,500 of insurance upon the insured property, which added to the $2,500 embraced in this policy made the total insurance on the property $8,000, and that thereby the total insurance on the property was $3,000 more than permitted by the policy, as it only permitted $5,000 insurance upon the insured's property, inclusive of that embraced in the policy in suit. This defense is entirely overthrown by the policy itself, which was a risk of $2,500 placed by the insurer on a dwelling-house of the insured and the furniture therein, $500 being upon the dwelling-house and $2,000 upon the furniture. But the policy, on the face of it, provides that the total insurance permitted by the policy to be placed on the house is $5,000 and the total insurance on the furniture $5,000.

3. A third defense of the insurance company was that at the date of the issuance of the policy in suit the household furniture thereby insured was incumbered by a chattel mortgage, and that the insured wrongfully withheld from the agents of the insurer all knowledge of the existence thereof. The evidence shows that at the date of the issuance of the policy the household furniture was incumbered by a chattel mortgage, but that the value of the personal property, both at the date of the issuance of the policy and at the time of the fire, greatly exceeded the amount of the debt existing against the property which the chattel mortgage was given to secure. The

insured then at the date of the policy and at the time of the loss of the property had an insurable interest therein. The insured offered to show on the trial, under a proper reply, that the agents of the insurer solicited this insurance, and at the time they issued the policy had actual knowledge of the fact of the existence of the chattel mortgage upon the household goods. This evidence the court wrongfully excluded. But the record does not show, nor was any attempt made to show, that the insured made a written application for this insurance, or any application whatsoever; nor that he made any representation as to the character or condition of the title to his property at the time of procuring the policy; nor that any inquiries were made by the insurance agents of him as to the character or condition of the title to the property. For aught that the record shows, no inquiries were made by the insurance agents and no statements were made on the subject of the character or condition of the title to his property by the insured. He was silent upon the subject, but there is not a word of evidence in the record to show that the motive which inspired his silence was a sinister one. Whatever may be the rule elsewhere, the settled doctrine of this court is that when no inquiries are made of an insured as to the character or condition of the title to his property; where he makes no false representations as to the character and condition of his title, relying upon which the insurer is induced to and does insure such property; where the insured has an insurable interest in the property insured, and the insurer insures such property, accepts and retains the premium, and a loss occurs, then the insurer cannot escape liability for such loss because of the fact that the insured at the date of the policy was not invested with an absolute and unincumbered title to the insured property, even though the policy provides that it shall be of no validity unless the title of the insured to the property be an unconditional unincumbered one; as in such a case it will be conclusively presumed against the insurer that it intended to

and did insure the interest which the insured had in the insured property and waived the provision in the policy providing for its invalidity by reason of the imperfect title of the insured. (*Ins. Co. of North America v. Bachler*, 44 Neb. 549; *Slobodisky v. Phœnix Ins. Co. of Hartford*, 52 Neb. 395; *German Ins. & Savings Institution v. Kline*, 44 Neb. 395; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743.) This defense was not established.

4. A fourth defense of the insurance company was that the house insured by the policy in suit at the date of the policy stood upon leased ground; that is, that the insured did not own the fee-simple title to the lot upon which the insured building stood. The evidence shows that the insured, in 1889, leased this lot for twenty years and soon afterwards erected thereon a three-story brick and frame building, which is the one insured by the policy in suit; that he took possession of the leased property and was in possession of it under his lease at the date of the policy and at the time of the fire. In other words, the evidence shows that considering the building erected by him upon the leased lot as affixed to the land and being a part of the lot and therefore real estate, the insured, at the date of the policy and at the time of the loss, had an insurable interest in such property. What has just been said with reference to the third defense of the insurance company is applicable to this defense.

5. Another defense of the insurer was that by the terms of the lease between the insured and his lessor the rent reserved and the taxes upon the property were made a lien upon the insured's interest in this property and that at the time of the issuance of the policy in suit there were certain rents and taxes in arrears, and that these had become and were an incumbrance upon the insured's property, and that by reason of his default the insured's lessor had declared the lease forfeited. But the lessee had not been evicted, nor had any judgment of eviction

been pronounced against him by reason of his default in the payment of his rent. He was in possession and had an insurable interest in the property, and all that has been said of the third defense of the insurance company and the law applicable thereto is likewise applicable to this defense.

6. A sixth defense of the insurance company was that the insured building, at the date of the policy in suit, was unoccupied and that the insurer and its agents had no notice of that fact at the date of issuing the policy. Upon this subject the language of the policy is: "If during this insurance the above mentioned premises shall become vacant or unoccupied, * * * this policy shall cease and be of no force or effect." For the purposes of this case we assume that the evidence shows that the insured building was not occupied at the time of the issuance of the policy. But the defense of the insurer is that he had no notice of that fact when he issued the policy in suit. There is not a word of evidence in this record which establishes, or tends to establish, that fact; nor is there any evidence which shows, or tends to show, that the insured represented to the insurer that the building was occupied at the date of the policy, or that the insurer had any reason to infer from anything that the insured said or did that the building was occupied at the date of the policy. For anything that appears in this record the insurer issued the policy in suit on the building and its contents, then and there knowing that the building was unoccupied. We do not know of any law that prohibits an insurer from taking a risk upon unoccupied property. Whether the property was vacant at the date of the policy, whether the insurance company knew of its vacancy, whether the insured represented that it was occupied and thereby induced the insurer to take the risk, were questions of fact for the jury. But because the property was vacant and the insurer had no knowledge of these facts do not of themselves constitute any defense to this action. The fact that the insured building is de-

scribed in the policy as a dwelling-house cannot by any reasonable construction of language be tortured into a representation of the insured that it was then and there occupied. (*Browning v. Home Fire Ins. Co.*, 71 N. Y. 508.) This defense of the insurer, like the others noted above, was not established.

7. A final defense of the insurance company was that at the date of the issuance of the policy the insured building had been sold at a judicial sale to satisfy a mechanic's lien existing against it. The evidence on this subject shows, or tends to show, that a lien was filed against the property in 1890, nearly three years before the issuance of the policy in suit, for $97; that in June, 1892, a decree was rendered foreclosing this lien, finding the amount due thereon to be $115.72,—this was some eight months before the issuance of the policy in suit; that in June, 1892, an order of sale was issued, but nothing done under it until January, 1893, when a sale was made of the property. After the sale was made, to-wit, February 14, 1893, the policy in suit was issued, and in April, 1894, or more than a year after the issuance of the policy in suit, and after this controversy had arisen, this sale was confirmed. It further appears that this sale was subsequently set aside. But, notwithstanding the fact that the insured property had been sold at a judicial sale, which was presumably pending for confirmation at the date of the issuance of the policy in suit, the insured still had an insurable interest in this property, as his title to the property was not divested by that sale until it was reported and confirmed by the court under whose authority it was made. (See *Greenlee v. North British & Mercantile Ins. Co.*, 71 N. W. Rep. [Ia.] 534; *Hanover Fire Ins. Co. v. Brown*, 25 Atl. Rep. [Md.] 589.) Furthermore, as the sale was finally set aside, the insured property, at the date of the issuance of the policy, was, as a matter of law, incumbered only by the mechanic's lien judgment, and the evidence shows conclusively that at the date of this policy the value of the property exceeded by some thousands

of dollars the amount of this mechanic's lien judgment, and the amount of all liens for taxes and rents due upon the property. In other words, that the insured had an insurable interest in the house. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE W. MYERS ET AL. V. FARMERS STATE BANK OF EMERSON.

FILED FEBRUARY 17, 1898. No. 7815.

1. **Note:** AVERMENT OF TRANSFER. A petition on a promissory note alleged that the owner and holder of the note indorsed and delivered it to the plaintiff. *Held*, Equivalent to an express averment that the owner thereby transferred the title to the indorsee.
2. **Principal and Surety:** NOTE: CHATTEL MORTGAGES. Where the maker of a note secures its payment by chattel mortgage and the payee of the note indorses and delivers it to a third party, his failure to seize the mortgaged property for the purpose of satisfying the note even though requested so to do by the sureties of the maker will not of itself discharge them. (*Huff v. Slife*, 25 Neb. 448; *Eickhoff v. Eikenbary*, 52 Neb. 332.)

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

Jay & Daley, for plaintiffs in error.

J. J. McCarthy and *J. C. Robinson, contra.*

RAGAN, C.

In the district court of Dixon county the Farmers State Bank of Emerson, Nebraska, recovered a judgment against J. F. and R. R. Myers on certain promissory notes. To review this judgment the Myerses have filed here a petition in error.

1. The first argument is that the verdict is not supported by sufficient evidence. The bank in its petition

alleged that George W. Myers, J. F. and R. R. Myers executed and delivered the notes sued on to one John Kirwin, and on the date of the execution and delivery of these notes to him he indorsed and delivered them to the bank, guarantying in writing the payment thereof. J. F. and R. R. Myers, as a defense to the action, admitted the execution and delivery of the notes sued on, but alleged that they were sureties for George W. Myers; that he had given the notes to Kirwin as a part of the purchase price for a certain race horse warranted by the vendor to have great speed and to be a sound horse; that the warranty had failed; that Kirwin as a matter of fact, and not the bank, was the owner of the notes sued on; that George W. Myers executed a chattel mortgage to Kirwin on the horse to secure the payment of the notes in suit, and that the mortgagor, with the consent of Kirwin and the bank, had removed the mortgaged horse out of the state, and that neither the bank nor Kirwin had made any attempt whatever to collect the notes by seizure and sale of the mortgaged property; and that the bank knew that the plaintiffs in error were only sureties for George W. Myers. The evidence shows, without contradiction, that the bank purchased these notes in the ordinary course of business for a valuable consideration before their maturity, and without any knowledge that Kirwin had warranted the horse sold to George W. Myers, if such a warranty was made. If the fact is at all material here, we think the evidence fails to show that the plaintiffs in error were sureties on these notes. The evidence does not show that the mortgagor of the horse removed him out of the state or jurisdiction of the court with the knowledge or consent of the bank, if that fact is at all material here. The evidence does tend to show that the plaintiffs in error requested the bank to take possession of the mortgaged horse and dispose of him for the purpose of raising money to satisfy the note sued on, and that the bank neglected to do so. That question we will notice later. But the evidence sustains the finding

of the jury that the bank purchased the notes in suit in the usual course of business before maturity, for a valuable consideration, without notice of any defense which the makers thereof had against the notes in the hands of the original payee.

2. A second argument is that the petition does not state a cause of action. The argument is founded upon the fact that the petition does not expressly allege that the bank is the owner of the notes. The petition alleges the execution and delivery of the notes by the Myerses to Kirwin and then alleges: "On the same day * * * Kirwin indorsed said note and delivered it to plaintiff. * * * The following is a copy of said note with the indorsement thereon." Here follows copy of the note, and then the indorsement in this language: "For value received I hereby guaranty the payment of this note. * * * John Kirwin. No part of said note has been paid and there is due the plaintiff from defendants on this note the sum of $——." We think these recitals of the petition are equivalent to an express averment that the plaintiff was the owner and holder of the note. The averment that the owner and holder of the note indorsed and delivered it to the plaintiff implied that he thereby transferred the title of the instrument indorsed.

3. During their deliberation the jury came into court and stated that they had found from the evidence that the mortgagor had removed the mortgaged horse out of the state and that the plaintiffs in error had requested the bank to cause this mortgaged horse to be seized and returned to the state, and that the bank had neglected to do so, and they then propounded to the court this question: "Now the point of law upon which we would like to be informed is as to whether said J. F. Myers is still responsible after making this request." The court answered the query in writing as follows: "The evidence shows that all signers of the notes are makers, and the answer to your question is, yes." This action of the court is now assigned for error. The first complaint is

that the court in this answer to the jury assumed and decided that the plaintiffs in error were makers of the notes in suit, and not sureties thereon, and that this was one of the issues in the case; but as to whether they were sureties was a question of fact for the jury. As already stated, we think the undisputed evidence shows that these plaintiffs in error were makers of the notes, not sureties; but if they were sureties, and the court committed an error in saying that they were makers, the error was without prejudice to the plaintiffs in error, as, under the undisputed evidence in the case, they were liable on this note whether they were sureties or makers, and the effect of the instruction of the court was to tell the jury that the plaintiffs in error were liable upon this note notwithstanding the fact that they had requested the bank to cause the mortgaged property to be brought back into the state and the bank had neglected to do so. Where the maker of a note secures its payment by a chattel mortgage, and the payee of the note indorses and delivers it to a third party, the failure of the indorsee to seize the mortgaged property for the purpose of satisfying the note, even though requested so to do by the sureties of the maker, will not discharge them. (*Huff v. Slife*, 25 Neb. 448; *Eickhoff v. Eikenbary*, 52 Neb. 332.)

JUDGMENT AFFIRMED.

HOLT COUNTY BANK ET AL. V. HOLT COUNTY.

FILED FEBRUARY 17, 1898. No. 7873.

1. **Pleading:** COPY OF WRITING. The requirement of section 124 of the Code of Civil Procedure is that a pleader shall state the facts which constitute his cause of action or defense; and if the suit is upon a written obligation then a copy thereof should be attached as an exhibit to the pleading.

2. ———: ———. But where a pleader copies into his pleading the entire written instrument upon which his action is based this sat-

isfies the requirements of the Code, as the purpose of the section is to give the opposite party notice of the instrument upon which the cause of action or defense is based.

3. ———: ———. A petition does not fail to state a cause of action simply because the written obligation made the basis of the suit is copied into and made a part of the petition instead of being attached thereto as an exhibit.

4. **Constitutionality of Depository Law.** *Hopkins v. Scott*, 28 Neb. 661, holding the depository law of 1891 (Session Laws, ch. 50) not unconstitutional for any of the reasons therein alleged, reaffirmed.

5. **Review: EVIDENCE: JUDGMENT.** Where the judgment is the only part of the record of a former suit offered in evidence it will be conclusively presumed that the court rendering the judgment had jurisdiction of the parties thereto.

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

H. M. Uttley and *R. R. Dickson*, for plaintiffs in error.

M. F. Harrington and *H. E. Murphy, contra.*

RAGAN, C.

The Holt County Bank in March, 1892, was a banking corporation organized under the laws of the state and domiciled at O'Neill, in said Holt county. On that date it became a depository of county and public moneys in pursuance of the provisions of chapter 50, Session Laws of 1891, and executed a bond for the safe-keeping and repayment of all moneys received by it as such depository from the county treasurer of said county. Holt county brought this suit in the district court thereof against the bank and the sureties on its depository bond to recover a sum of money which it had received under the depository law and under its bond and had not paid over and accounted for to the treasurer of Holt county on his demand therefor. It had a verdict and judgment, and Adams, McBride, and Dwyer, sureties on the depository bond, bring that judgment here for review on error.

1. The first argument is that the petition does not state a cause of action. This argument is based upon

counsel's contention that a copy of the depository bond sued on must be attached to and filed with the petition. Section 124 of the Code provides: "If the action * * * be founded on * * * a * * * written instrument as evidence of indebtedness, a copy thereof must be filed with the pleading." The plaintiff in this case did not attach a copy of the depository bond to its petition as an exhibit or otherwise, but copied the entire bond into the petition and made it an integral part thereof. This of course was not a literal compliance with the provisions of the Code, but the petition did not fail to state a cause of action simply because the bond was copied into, and made a part of, the petition, instead of being attached thereto as an exhibit. *Ryan v. State Bank*, 10 Neb. 524, was a suit upon the official bond of a county officer. It was there claimed that the petition was demurrable because no copy of the bond sued on was attached to it; but the court said that the objection was untenable; that a failure to attach to the petition a copy of the bond could not be reached by demurrer but by motion. Conversely, *Pefley v. Johnson*, 30 Neb. 529, was a suit on a written contract. In his petition the plaintiff alleged the making of the contract, "which is hereto attached and made a part hereof," but in his petition, aside from this exhibit, did not set out what the contract was nor the breach of it, and it was held in that case that while this style of pleading was not to be commended, the exhibit must be read as a part of the petition. The true meaning of the Code is that a pleader should state in his pleading the facts which constitute his cause of action or defense. If the suit is upon a written obligation, then a copy should be attached as an exhibit to the pleading; but where a pleader sets out the entire written instrument, upon which his action is based, in the pleading itself, it satisfies the requirements of the Code, as the purpose of that section is to give the opposite party notice of the instrument upon which the cause of action or defense is based.

2. The second argument is that the depository law of 1891 is unconstitutional. The validity of this act was assailed in this court in *Hopkins v. Scott*, 38 Neb. 661, upon the same grounds on which it is assailed here, and it was held that the act was not invalid for any of the reasons urged against it. It is not necessary to restate our reasons for the conclusions there reached.

3. It appears that the county, before the trial of this action, had obtained judgment against the Holt County Bank on the depository bond in suit here, and on the trial of this action the county introduced in evidence that judgment. It is now insisted by the plaintiffs in error that the court erred in permitting that judgment against the bank to be introduced in evidence in this case; and the only reason they urge as to why the judgment should not have been admitted in evidence is that it was void, as the court had no jurisdiction over the bank at the time it was pronounced. The court had jurisdiction of the subject-matter of the suit, and we have before us no part of the record of that case except the judgment itself, and we must indulge the presumption that the court had jurisdiction over the bank at the time it pronounced the judgment. It is said in the briefs that the summons in that case was not served upon the bank or upon any person upon whom a valid service might be made. We do not know whether the bank voluntarily entered its appearance in the action or whether a summons was served upon it, as none of these facts are disclosed by the record.

There are other minor objections made to the judgment, but we do not deem them of sufficient importance for consideration here. The judgment of the district court is the only one that could have been correctly rendered under the pleadings and the evidence, and it is accordingly

AFFIRMED.

EUGENE MOORE V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1898. NO. 9697.

1. **State Officers:** FEES: CONSTITUTIONAL LAW. Article 5, section 24, of the constitution, providing that the officers of the executive department "shall not receive to their own use any fees, costs, interest upon public moneys in their hands, or under their control, perquisites of office or other compensation, and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the constitution, shall be paid in advance into the state treasury," not only prohibits such officers from receiving fees to their own use, but also prohibits all executive officers except the treasurer from receiving fees at all, and requires their payment in advance into the treasury by the persons by whom they are payable.

2. **Insurance Companies:** FEES: AUDITOR OF PUBLIC ACCOUNTS. Chapter 43, section 32, Compiled Statutes, adopted in 1873, and relating to fees paid by insurance companies for services performed for them by the auditor, was so far modified by the constitution of 1875 as to require such fees to be paid in advance into the treasury, and prohibit the auditor from receiving them.

3. **Penal Statutes:** DESCRIPTION OF OFFENDERS. When a penal statute is made to apply only to a certain class of persons, the description of the class is so far descriptive of the offense, and that the person charged is within the class is a substantive element of the crime itself.

4. **Embezzlement of Public Moneys:** OFFICERS. Section 124 of the Criminal Code, relating to embezzlement of public moneys, applies only to officers or persons charged by law with the collection, receipt, safe-keeping, transfer, or disbursement of the public moneys, and those who aid or abet such officers or persons.

5. ———: AUDITOR OF PUBLIC ACCOUNTS. The auditor of public accounts is not as such officer charged with the collection, receipt, safe-keeping, transfer, or disbursement of any part of the public moneys, and is therefore not within the descriptive terms of section 124 of the Criminal Code.

6. **Criminal Law:** ESTOPPEL. In order to punish one as for a crime the offense must be within the plain import of the words of the statute creating or defining the crime. An offense not within the words cannot be adjudged a crime because within the reason or spirit; and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a particular class of persons is estopped from denying that he is within that class.

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

The opinion contains a statement of the case.

W. E. Reed, Barnes & Tyler, and *Brome & Burnett*, for plaintiff in error:

On the part of plaintiff in error it is respectfully submitted: (1) That under the laws of the state he cannot be adjudged guilty of the crime of embezzlement unless the money claimed to have been embezzled by him was by him lawfully and properly received by virtue of his office; (2) that under the law of the state as it existed when this embezzlement is alleged to have occurred, and as it now exists, the auditor of public accounts was not authorized to receive, and could not lawfully collect, any fees on account of and for issuing certificates of authority or for filing annual statements of insurance companies; (3) that to comply with the law it was necessary that every insurance company desiring to file an annual statement or procure a certificate of authority to be issued to its agent or agents should pay, or cause to be paid, the fees therefor in advance into the state treasury and that having so done, no other fees could be required of any such insurance company; and that the allegation contained in the information respecting the insurance companies therein referred to, to-wit, "That each of said insurance companies having then and there fully complied with sections 20, 23, 24, and 25 of chapter 43 of the Compiled Statutes of the state of Nebraska, and all provisions of the laws of the state," is an affirmative allegation that no money or fees was at that time due from these insurance companies to the state; (4) that the state cannot invoke the doctrine of estoppel. (*Ottenstein v. Alpaugh*, 9 Neb. 237; *State v. Holcomb*, 46 Neb. 629; *Lowe v. City of Guthrie*, 44 Pac. Rep. [Okla.] 198; *Orton v. City of Lincoln*, 41 N. E. Rep. [Ill.] 159; *People v. Pennock*, 60 N. Y. 421; *San Luis Obispo County v. Farnum*, 41 Pac. Rep.

[Cal.] 445; *Hartford Fire Ins. Co. v. State*, 9 Kan. 210; *McAleer v. State*, 46 Neb. 117; *State v. Newton*, 26 O. St. 200; *State v. Meyers*, 47 N. E. Rep. [O.] 138; *Warswick v. State*, 35 S. W. Rep. [Tex.] 386; *State v. Bolin*, 19 S. W. Rep. [Mo.] 650; *State v. Johnson*, 49 Ia. 141; *United States v. Bixby*, 6 Fed. Rep. 375; 4 Lawson, Criminal Defenses 889; *State v. Moores*, 52 Neb. 770; *State v. Lovell*, 23 Ia. 304.)

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

(1.) Section 32, chapter 43, Compiled Statutes, requiring fees to be paid to the auditor, is not inconsistent with section 24, article 5, of the constitution; hence fees paid to him become in his hands the property of the state. Therefore, he was an officer charged with the receipt, safe-keeping, and transfer of public moneys. (2.) If the statute requiring payment of fees to the auditor is unconstitutional, the fees received by him from insurance companies belonged to the state, and, under section 24, article 5, of the constitution, it was his duty as an officer to pay such fees into the state treasury; and not having done so, but having converted the fees to his own use, he is guilty of embezzlement of public moneys. (3.) If the statute requiring payment of fees to the auditor is unconstitutional, the moneys paid to him by the insurance companies, with the intention of transferring the title to the state, and accepted by him with the intention of receiving the title for the state, became the property of the state, and, under section 21, chapter 10, Compiled Statutes, relating to liabilities of officers, he was responsible for such moneys as property of the state; and in failing to pay the fees into the treasury and in converting the same to his own use he was guilty of the crime charged. (4.) He is estopped to assert that he did not receive the moneys by virtue of his office. (*Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 901; *Albert v. Twohig*, 35 Neb. 563; *State v. Smith*, 35 Neb. 24; *Pleuler v.*

State, 11 Neb. 547; *Hartford Fire Ins. Co. v. State*, 9 Kan. 210; *State v. Spaulding*, 24 Kan. 1; *State v. Leidtke*, 12 Neb. 171; *Thatcher v. Adams County*, 19 Neb. 485; *Laflin v. State*, 49 Neb. 616; *State v. Wallichs*, 16 Neb. 110; *United States v. Thomas*, 15 Wall. [U. S.] 337; *Welch v. Frost*, 1 Mich. 30; *Mason v. Fractional School District*, 34 Mich. 228; *Chandler v. State*, 1 Lea [Tenn.] 296; *Phelps v. People*, 72 N. Y. 334; *Village of Olean v. King*, 116 N. Y. 355; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Waters v. State*, 1 Gill [Md.] 302; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497; *Mayor v. Harrison*, 30 N. J. L. 73; *Ex parte Ricord*, 11 Nev. 287; *People v. Royce*, 37 Pac. Rep. [Cal.] 630; *State v. O'Brien*, 94 Tenn. 79.)

IRVINE, C.

The information in this case, omitting formal parts, allegations of time, and venue, and other averments not material to the questions presented for review, was as follows: "That Eugene Moore, * * * then and there being an officer, to-wit, auditor of public accounts of the state of Nebraska, and as such officer being charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money and a certain part thereof belonging to the state of Nebraska, and the property of the state of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use, and embezzle of said public money the sum of twenty-three thousand, two hundred eight dollars and five cents in money, * * * the property of the state of Nebraska, which said money had then and there come into the custody and possession of said Eugene Moore by virtue of his office as auditor of public accounts as fees from insurance companies then and there doing business in the state of Nebraska, for services to be performed by the said Eugene Moore as said auditor of public accounts in filing by the said Eugene Moore as said auditor the annual statements of said insurance companies and in issuing certificates of authority by the said Eugene Moore as

said auditor to the agents of said insurance companies," etc. The remaining averments are chiefly in the way of particularizing the services for which the money alleged to have been converted was received. To this information the defendant pleaded guilty, and then moved in arrest of judgment on the ground that the information charged no crime. The motion was overruled and the defendant sentenced to imprisonment for eight years and to pay a fine of twice the amount alleged to have been embezzled.

A suggestion made in the argument, and reflected in several places in the state's brief, is that the plea admitted the moral guilt of the defendant, and, to quote the last sentence of the brief, "having pleaded guilty to all the charges of the information, this court may well hesitate before reversing his plea, and say he is not guilty after he has said he is guilty." Surely the attorney general cannot mean to contend that because the defendant has by his plea admitted the facts charged and therefore a moral delinquency, he should be punished even if the law does not denounce those facts as a criminal offense. The question before us is not one of moral delinquency, but simply whether the facts charged in the information constitute a crime under the laws of this state. Defendant stands in no worse position in this respect than he would on a demurrer to the information, which would, for the purposes of the proceeding, involve the same admission.

While there are several different sections of the Criminal Code relating to embezzlement by different classes of persons, it is conceded that the information in this case was drawn with a view to section 124, and that it does not charge an offense against any other section. Section 124, so far as it is material, is as follows: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county or precinct, organized city or village, or

school district in this state, shall convert to his own use, or to the use of any other person or persons, body-corporate, association, or party whatever, in any way whatever, * * * any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose, * * * every such act shall be deemed and held in law to be an embezzlement," etc. It will be observed that this section refers only to the embezzlement of public money or property, and that it applies only to a particular class of persons—those charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money or a part thereof. It goes almost without saying that no person is subject to the penalties of the statute unless he falls within the description of the class of persons to whom the statute is applicable. The description of the person against whom the penalty is denounced is to that extent descriptive of the offense. The allegation that the defendant was as auditor charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money is not an allegation of fact, admitted by the plea of guilty, but it is an allegation of law, and open to examination as such. We therefore address ourselves to the examination of that question. Unless the auditor, as such officer, was charged in one of the manners specified, the information fails to state an offense by failing to show that the defendant was within the class to which the statute applies.

In 1873 there was passed an act relating to insurance companies, section 32 of which was as follows: "There shall be paid by every company, association, person or persons, agent or agents, to whom this act shall apply, the following fees: For filing and examination of the first application of any company, and issuing of the certificate of license thereon, fifty dollars, which shall go to the auditor; for filing each annual statement herein re-

quired, twenty dollars; for each certificate of authority, two dollars; for each copy of paper filed as herein provided, the sum of ten cents per folio, and fifty cents for certifying the same and affixing the seal of office thereto; all of which fees shall be paid to the officer required to perform the duties." (Compiled Statutes, ch. 43, sec. 32.) It is under this section that the moneys alleged to have been embezzled were paid. In 1875 the present constitution of the state went into effect, and article 5, section 24 thereof, after fixing the salaries of the executive officers, proceeds as follows: "After the adoption of this constitution they shall not receive to their own use any fees, costs, interest upon public moneys in their hands, or under their control, perquisites of office or other compensation, and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the constitution, shall be paid in advance into the state treasury." In our opinion this provision of the constitution so far modified the statute quoted as to require all fees for services rendered by the executive officers created by article 5 of the constitution, including, of course, fees payable by insurance companies under the statute, to be paid in advance into the treasury by the person or company by whom such fees are payable, and to prohibit the receipt thereof by the officer performing the service. It is argued that the effect of the constitution was simply to require the officer performing the services to pay the fees into the treasury, and that the statute is in necessary conflict with the constitution only in so far as it gave the fees to the officer to his own use. In this connection attention is called to section 21 of the same article of the constitution, which provides: "An account shall be kept by the officers of the executive department and of all the public institutions of the state of all moneys received or disbursed by them severally from all sources, and for every service performed, and a semi-annual report shall be made to the governor, under oath." It is said that this section plainly contemplates

the receipt by the executive officers of fees for services to be performed. The executive officers may be, and have been at times, entrusted with money by virtue of legislative appropriations, and as to them section 21 requires an account and report of such moneys. But it is said the section refers specially to fees for services performed. True, but it applies not only to the executive officers provided by the article of the constitution we are considering, but applies also to officers of all public institutions of the state, whereas section 24 is limited to the executive officers named in the first section of the article. It is only they who are prohibited from receiving fees for services performed. The legislature may in its wisdom permit officers of other state institutions to receive fees. Until 1881, the university had its own treasurer who received matriculation and other fees. Now we have a bureau charged with the inspection of oil and gasoline, and the inspectors in that bureau receive the fees fixed for the services performed by them. The provision in section 21 with reference to fees manifestly refers to fees received by those officers within the scope of section 21, and not within the prohibition of section 24. In no other way can the two sections be so construed as to give force to every part of each and create no conflict. Two former decisions of this court, *State v. Leidtke*, 12 Neb. 171, and *State v. Wallichs*, 16 Neb. 110, have some relevancy to this question, but they require more extended notice at another period of this discussion, and their effect will be considered later. Under the old constitution salaries were fixed for the various executive officers which seem parsimonious and ridiculously small even when compared with the present salaries of such officers. There was, however, no inhibition against an allowance of fees by way of further compensation, and the legislature, in imposing new duties, in several instances provided for the payment of fees to the officer as compensation for their performance. It is needless to say that this system opened the door for abuses, and section 24 of article 5

of the present constitution, having in view the vices of the old system, sought to correct it by giving to the state all such fees. This object was accomplished by the first language quoted from section 24; and if that had been the only object in view, section 24 would certainly have ended with the prohibition against the officers described receiving fees to their own use. But it was evidently thought that a better system, and one more consonant with the supervision and safety of public funds, could be established by prohibiting the executive officers, other than the treasurer, from receiving any fees at all. It was therefore provided that all fees for services by them performed should be paid in advance into the treasury. This could conveniently be required in the case of the executive offices, because they are all maintained at the seat of government, where the treasury is located. Thus no executive officer except the treasurer was charged in any manner with the collection of fees, and their payment into the treasury was secured by requiring that such payment should be made in advance of performing the services. In only one of two ways can the construction contended for by the state be supported. One of those demands that we should neglect altogether the requirement that the fees shall be paid in advance; the other is to assume that it was the intention of the constitution to require an executive officer, when a service is demanded of him, to exact payment of the fee, then act the role of a messenger by carrying the money to the treasurer, then return to his own office and perform the service. The former construction would violate the letter of the constitution; the latter is too absurd to be entitled to serious consideration. The rule is invoked that before the court will hold a statute unconstitutional, a construction will be given it in harmony with the constitution, although that construction be not the most natural or obvious one. But this is not a question of the constitutionality of a statute. The statute was enacted before the present constitution took effect and was in

every respect valid when passed. The schedule of the new constitution provides (article 16, section 1) that in order "that no inconvenience may arise from the revisions and changes made in the constitution of this state, and to carry the same into effect, it is hereby ordained and declared that all laws in force at the time of the adoption of this constitution, not inconsistent therewith, * * * shall continue," etc. Even if such a result would not follow in the absence of that provision, it is clear that its effect was to abrogate all existing laws in so far as they were inconsistent with the constitution. We are asked, in effect, not to give a strained construction to a statute in order to render it in harmony with the constitution, but to give a strained construction to the constitution in order to prevent its working a repeal or amendment of an antecedent statute which happened to be in conflict with the letter and policy of the constitution itself. The question is merely one of an implied amendment of a statute, and the purpose of the inquiry is simply to ascertain the intention of the constitution. We have no hesitation in holding that the intention is clearly evidenced of prohibiting the executive officers from receiving the fees payable for their official acts, and to require the persons paying such fees to pay them into the treasury.

The state asserts that if that be the effect of the constitution, the defendant was nevertheless charged with the safe-keeping and transfer of these fees, he having in fact received them. It is said that the embezzlement statute does not require that the person charged should be charged with the duty by statute, but that he may be charged in any one of four ways—by the constitution, by decisions of this court on equitable grounds, by the common law, and by statute. It will be seen that this is only another method of saying that he must in some way be charged by law. Let us assume the correctness of this analysis and see to what result it leads; for convenience, however, not proceeding exactly in the order indi-

cated. The defendant, we have seen, was not charged by the constitution with the safe-keeping or the transfer of the money, but was forbidden thereby even to receive it. He was not charged by statute. The statute originally gave him the money to his own use, and the constitution, when it deprived him of the right to so hold it, also took away the right to receive it. After the constitution took effect that part of the statute was as if it had not existed, and neither its retention by the compilers in the compilations of statutes, nor the fact that the auditor undertook to act under it, gave it renewed vitality. We do not understand just what counsel mean by saying that an officer whose office and duties are alike created and limited by statute can be charged with the receipt, safe-keeping, or transfer of money by the common law; but assuming that thereby is meant that common-law principles will be applied in ascertaining and enforcing those duties, that subdivision becomes a part of the second, whereby it is claimed that he may be charged by decisions of the supreme court grounded on equitable considerations. The supreme court by its decisions creates no duties; it merely enforces existing duties, and by the two heads of argument adverted to it must be meant that a duty may arise from a consideration of the established principles of law and equity. So treated the argument under this head may be analyzed into two propositions: First, that the defendant having, although unlawfully, received the money, it did not thereby become his, but belonged thenceforth to the state, and that it was his duty to pay it to the treasurer; secondly, that he is estopped by the receipt of the money to deny the lawfulness of his act or the validity of the statute whereunder he acted.

The first proposition receives, at first impression, support from the cases of *State v. Leidtke* and *State v. Wallichs*, already referred to. Both were original applications for writs of mandamus, addressed to this court, both were submitted without briefs, and both serve to

illustrate the dangers attendant upon a hasty examination of questions presented in original cases not properly prepared by counsel and decided without the benefit of full discussion. *State v. Leidtke* was an application by the attorney general for a writ of mandamus to compel the auditor to pay into the treasury certain fees designated as "office fees," and certain fees received as were the fees in this case, together with other fees paid by life insurance companies for preparing and publishing statements. The only defense alleged in the return was that the office fees had been paid into the treasury and that the fees received from insurance companies were paid for services performed as agent for the companies and not by virtue of his duties as auditor. No suggestion was made that if the services were a part of his official duties he was entitled to retain the fees, nor was it suggested that if the fees belonged to the state mandamus was not the proper remedy, because he was not enjoined as such officer with the duty of transferring them to the treasury. On this record the court stated that the only question involved was whether the insurance fees belonged to the state or to the auditor. The court then proceeded to give the constitution the same construction which we have given it, but to decide that the auditor having received the fees he held them in trust for the state and not to his own use. With this conclusion we are satisfied, with the reservation that the state is not bound to so treat them; but it does not follow that because an officer or a private individual owes the state money or holds money in trust for the state that he is therefore charged with its receipt, safe-keeping, transfer, or disbursement. It is not to the ordinary legal obligations flowing from express or implied contracts and the duty of fulfilling them that either the law relating to mandamus or the statute with regard to embezzlement of public funds applies; and the court did not in the case referred to otherwise decide. Whether the actual question which should have been decided was the public character of the serv-

ices, as the record shows, or the ownership of the money, as the opinion states, the question was correctly decided; and the court was not asked to consider, and did not consider, whether the payment of the money was a duty enjoined by law upon the respondent as auditor, and one appropriate to be enforced by mandamus. We cannot give any force to the case as an implied decision of that point when the record shows that it was not in fact considered. *State v. Wallichs, supra,* was an application by the commissioners of Gage county to require the auditor to register certain refunding bonds issued by that county. The auditor based his refusal on the fact that he had demanded fees and that payment had been refused. As already said, there are no briefs in the case, but an inspection of the opinion discloses that the county contended it had the right to have the bonds registered free of expense. A statute passed prior to the adoption of the constitution provided that "the auditor shall be entitled to a fee * * * for each bond so registered, to be paid by the holder thereof." (Session Laws 1875, p. 170, sec. 3.) The court said that this statute had not been repealed, but, citing *State v. Leidtke,* that such fees are not for the use of the auditor, but it is nevertheless his duty to collect them. If *State v. Leidtke* was to be followed as holding that they must be turned in by the auditor to the treasury—a question not involved in the *Wallichs Case*—the court should not have overlooked the other statement in the *Leidtke Case* that the fees should be paid into the treasury in advance, the treasurer giving proper vouchers therefor. Here again the only question really decided was that the fees must be paid; that the county was for that purpose to be deemed the holder of the bonds. No fees had been tendered either auditor or treasurer; so that whether they should be paid to the treasurer or auditor the writ had in either case to be denied, and the remark of the court as to the duty of the auditor to collect them was purely *obiter.* We must decline to accept either case as authority for the propo-

sition that this court has established a law imposing on the auditor a duty in conflict with the constitution.

That where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee, is established by many cases.

San Luis Obispo County v. Farnum, 108 Cal. 562, was an action on the bond of a county auditor to whom a tax collector had paid money which should have gone to the treasurer. The court said: "That the money in question, having been collected by the tax collector for licenses, belonged to the county is not questioned; but that it came to the hands of the defendant Farnum as auditor is a conclusion of law wholly unsupported by the facts found. * * * Having received the money, it was Farnum's duty to pay it over to the treasurer; but such duty did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen not holding any county office." (See also *People v. Pennock*, 60 N. Y. 421; *Orton v. City of Lincoln*, 41 N. E. Rep. [Ill.] 159; *Lowe v. City of Guthrie*, 44 Pac. Rep. [Okla.] 198; *Warswick v. State*, 35 S. W. Rep. [Tex.] 386; *State v. Johnson*, 49 Ia. 141; *People v. Cobb*, 51 Pac. Rep. [Colo.] 523; *People v. Hilton*, 36 Fed. Rep. 172; *Rex v. Thorley*, Moody C. C. [Eng.] 343; *State v. Moeller*, 48 Mo. 331; *Rex v. Hawtin*, 7 C. & P. [Eng.] 281.)

A case very similar arose in Kansas, the question there being whether a certificate issued to an insurance company was valid where the auditor had made a draft for the money, then issued the certificate, and, after the proceeds of the draft were received, paid the money into the treasury. The court held that the certificate was void, saying: "The much more serious error is found in the declaration that the auditor acted as the agent of the state in drawing the draft, or in receiving the money when it was paid. The limits of an officer's authority are

found in the law. * * * If the corporation chose to pay this through the auditor, then for that purpose the auditor was the agent of the corporation and not of the state." (*Hartford Fire Ins. Co. v. State*, 9 Kan. 210.). It is asserted that a distinction exists between that case and the present, in that the law of Kansas made the payment of the money into the treasury a condition precedent to the performing of the services. The language of the statute there was: "Before the auditor shall issue any certificate of authority * * * there shall be paid into the state treasury by the corporation," etc. Our constitution says that the fees shall be paid into the treasury in advance. We can see no difference. To pay in advance means precisely the same as to pay before the services are rendered. We are not unmindful that the Kansas court, in *State v. Spaulding*, 24 Kan. 1, sustained a conviction of embezzlement where a city clerk by custom had received certain license moneys which should properly, under an ordinance, have been paid to another officer. While there is some language in the opinion indicating that the court deemed a principle of estoppel applicable, the conviction was sustained under a count charging the receipt of the money by the defendant as an agent of the city and not as clerk, the court holding that while its receipt was no part of his official duties, there was nothing to prevent the city by custom from appointing an agent for that purpose, and that he was to be deemed such agent. The court cited *State v. Heath*, 8 Mo. App. 99, which was afterwards reversed by the supreme court (70 Mo. 565), and where the conviction was in a like case sustained on the ground of agency, but not on the ground of official station or duty, there being counts charging the offense in each manner.

The statute of Ohio was precisely like ours with reference to embezzlement of public funds, and the supreme court of that state held that it did not extend to a county auditor because he was not as such charged with the collection and receipt of money. (*State v. Newton*, 26 O. St.

265.) In a later case, but after some amendments of the statute not material to the present inquiry, it was held that a deputy treasurer was not within its provisions. (*State v. Meyers*, 47 N. E. Rep. [O.] 138.) These cases are precisely in point. The distinction urged by the state, that in Ohio there was no law, valid or invalid, authorizing the officer to receive the money, does not exist, but in effect concedes away the conviction here, because after a law has been repealed it no longer exists so as to impose future duties or confer future rights. *State v. Bolin*, 19 S. W. Rep. [Mo.] 650, is another case in point.

Nor do we think that there is any principle of estoppel whereby the defendant is forbidden to deny that he is within the class against which the penalties of the statute are denounced. For the purposes of this case we need not inquire whether the same rules apply as to estoppel in civil and in criminal cases, or whether a man may ever be estopped to plead the law. The cases cited as applying estoppels are for the most part cases where an officer charged by law with the duty of collecting taxes has actually collected them and then refused to turn them over because illegally levied. There the general duty of collecting the money was imposed by law on the officer. The money was paid. The legality of the tax was a question solely between the public and the taxpayer, and the latter having voluntarily paid the tax, it was no affair of the collector whether he might have resisted the payment or not. The matter was not one of an estoppel. The issue was merely immaterial. No one could defend a charge of embezzlement as the agent of an individual, on the ground that a third person had paid money which he did not owe and could not have been compelled to pay; but there is a multitude of cases holding that he may defend if he had no authority to receive payment at all. Akin to these cases are those where a foreign corporation is prohibited from doing business except on compliance with certain requirements, and an agent embezzles its funds, and alleges in defense that the princi-

pal had no right to make the contracts leading to the collection of the money. This is really a case of an immaterial issue, or if it be one of estoppel, it is an estoppel to deny the facts giving the principal a right to do business. Where a criminal statute applies only to persons of a certain class, the doing of the acts which the statute forbids does not estop the defendant from denying that he belongs to the class which is alone subjected to the penalties. Yet that is at the last analysis the argument of the state on this branch. A statute of this state makes it rape for a male person of the age of eighteen or upwards to carnally know a female child under the age of eighteen. Should it appear that a man had so carnally known a female child, he would not by that fact be estopped from asserting that he was himself under the age of eighteen. The description of the persons in such statutes is a substantive element of the crime, and devolves upon the state to prove that the defendant is within the class punishable. In *State v. Meyers, supra*, the court, speaking of a statute essentially like this, said that a statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms, although they appear to be within the spirit and reason of the statute. In *State v. Lovell*, 23 Ia. 304, Judge Dillon, after confessing that the criminal jurisprudence of this country is blemished with over-technical niceties, said: "But the faults of the common-law tribunals in this regard are more than redeemed by their stern determination not to admit or create constructive crimes. This is among their noblest monuments." And Chief Justice Marshall said in *United States v. Wiltberger*, 5 Wheat. 76, "To determine a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enu-

merated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." The remark about "cases of considerable irritation" is aptly characteristic, we think, of the few cases called to our attention invoking principles of estoppel to prevent a man's defending on the ground that there is no law to convict him. It is precisely those cases of "considerable irritation" in which the courts should be particularly careful that the bulwarks of liberty are not overthrown, in order to reach an offender who is, but who perhaps ought not to be, sheltered behind them. The principle announced in the last cases cited is incorporated into the Criminal Code in order that the courts may not possibly depart from it. Section 251 provides that "no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." To hold that the auditor is a person charged with the collection, receipt, safekeeping, transfer, or disbursement of the public money, when the law expressly forbids him to receive it or handle it, would certainly go beyond the plain import of the words of the statute, and create a crime by construction in the plainest violation of the law.

REVERSED AND DISMISSED.

SULLIVAN, J., dissenting.

I do not concur in the conclusion of the majority and give here the reasons for my dissent.

The constitution of 1875 not only repealed that part of section 32 of the insurance law which authorized the auditor to appropriate to his own use the fees therein specified, but repealed, as well, so much of the section as authorized him to receive such fees for any purpose. These fees were, by the provisions of the constitution, required to be paid into the treasury of the state in ad-

vance of the rendition of the service which the statute made it the auditor's duty to perform. The money then, it must be conceded, was received without authority of law. Being so received, is the defendant guilty of embezzlement under section 124 of the Criminal Code, by reason of having converted it to his own use? Resolved into its elements the proposition is this: (1) Did this money belong to the state, and (2) does the defendant fall within the class of persons against whom the penalties of the section are denounced?

It is settled by a long line of decisions in other states that taxes or other public revenues collected by an officer acting under color of an unconstitutional law or void ordinance belong not to himself, but to the municipal or political corporation whose commission he bears. (*Chandler v. State*, 1 Lea [Tenn.] 296; *Village of Olean v. King*, 116 N. Y. 355; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Waters v. State*, 1 Gill [Md.] 302; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497; *Middleton v. State*, 120 Ind. 166; *Mayor v. Harrison*, 30 N. J. L. 73.) Here the defendant, acting under color of a statute originally valid, but repealed in part by implication on the adoption of the present constitution, collected fees due the state for official services rendered by him as auditor of public accounts; and now, after having rendered services to the insurance companies as the agent of the state, and after having assumed to act for the state in collecting the fees due for such services, he cannot be heard to deny that the fees so collected and received belong to, and are the property of, the state. The application of the doctrine of estoppel to the facts in this case has made the money in question the money of the state; and it must be so regarded whether its title be drawn in question in a civil or in a criminal case. The law does not require us to hold to-day in a criminal action that it is not the state's money, and to-morrow in a civil action that it is. In the case of *State v. Spaulding*, 24 Kan. 1, it was held that where a city officer, pursuant to a custom

of long standing, but without any other color of right, collected fees due to the city for services rendered by him, such fees belonged to the city, and that by their appropriation to his own use he was guilty of embezzlement.

But was the defendant one of the persons against whom section 124 of the Criminal Code is directed? Whatever may be the rule in other jurisdictions, the question is no longer an open one in this state. It has been effectually set at rest by the decision in the case of *State v. Leidtke*, 12 Neb. 171. The language of the section, "any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money," etc. (Criminal Code, sec. 124), is, unquestionably, descriptive of the persons who may be punished under its provisions, and is, therefore, descriptive of the offense. It is, of course, true that the defendant was not charged by any valid law with the collection or receipt of the moneys here in question, but having collected and received them under color of his office, it became his duty to safely keep them and transfer them to the treasury of the state. And this was not, as intimated in the case of *San Luis Obispo County v. Farnam*, 108 Cal. 562, 41 Pac. Rep. 445, a duty due from him as a private citizen, but one arising out of, and resulting from, his official station. Upon this point the *Leidtke Case* is direct authority; for, by the judgment of this court, a peremptory writ of mandamus was awarded against Leidtke to compel him to pay to the state treasurer fees collected by him as auditor under the provisions of section 32 aforesaid. The writ could not have issued against him as a mere private debtor of the state. It could have issued only to coerce the performance of an official duty. (*Thatcher v. Adams County*, 19 Neb. 485; *Laflin v. State*, 49 Neb. 614.)

I am not prepared to say that I should agree to the rule established by the *Leidtke Case* were the question now presented for the first time. But that decision has stood unchallenged for nearly twenty years. It may be contrary to the weight of authority, but it has the support of

sound reason; and, to say the least, it is not so serious an impediment in the way of justice as to call for a judicial repeal. The principle on which it rests has the sanction of very eminent authority. It is precisely the same principle which controlled the decision in the case of *State v. Spaulding, supra.* In that case the conviction was not sustained because Spaulding was agent of the city to collect license moneys. In truth he was not, and could not have been, such agent,—an exclusive agency for that purpose was, by ordinance, vested in the city treasurer; but having by an assumption of authority obtained the money which he embezzled, he was estopped from denying that such assumption was false. From the opinion written by Brewer, J., now of the supreme court of the United States, I quote as follows: "We do not affirm that the city was concluded by the defendant's acts, nor indeed that any one is estopped but himself. But we hold that when one assumes to act as agent for another, he may not, when challenged for those acts, deny his agency; that he is estopped not merely as against his assumed principal, but also against the state; that one who is agent enough to receive money is agent enough to be punished for embezzling it. An agency *de facto,* an actual even though not a legal employment, is sufficient. The language of the statute is, 'If any officer, agent, clerk, or servant of any corporation, or any person employed in such capacity.' * * * He [the defendant] voluntarily assumed full charge of this entire matter, including the receipt of the money and the issue of the license. The money was paid to him because of his office and to induce his official action, and he may not now say that it was not received 'by virtue of his employment or office,' or that its receipt was not one of the prescribed legal duties of such office. * * * He may not enter into the employment and then deny its terms or responsibilities. He is estopped from saying that this money which he embezzled is not the money of the city." It is no more true as a legal proposition that Spaulding was the agent

of the city, or, in the language of the Kansas statute, "employed in such capacity," than it is that the defendant in this case was "charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money." Nevertheless, he was convicted and the conviction sustained because the law did not permit him to assert the truth and rely on it as a defense. So it seems to me that the defendant Moore, having obtained the money in question for the state by the exertion of his official authority, should not be permitted to deny that he held it in his official capacity. The remarks of Mr. Bishop in his work on criminal law are pertinent here. The author says: "In reason, whenever a man claims to be a servant while getting into his possession the property to be embezzled, he should be held to be such on his trial for the embezzlement. This proposition is not made without considering what may be said against it. And a natural objection to it is that when a statute creates an offense which by its words can be committed only by a 'servant,' an extension of its penalties to one who is not but only claims to be such, violates the sound rule of statutory interpretation whereby the words, taken against defendants, must be construed strictly. But why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally in the criminal? If it is applied here, then it settles the question; for by it when a man has received a thing of another under the claim of agency, he cannot turn around and tell the principal, asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.' When, thereafter, the principal calls the man under these circumstances to account, he is estopped to deny the agency he professed, why also, if he is then indicted for not accounting, should he not be equally estopped on his trial upon the indictment?" (2 Bishop, Criminal Law [7th ed.], ch. 16, sec. 364.) The rule thus stated has been recognized and approved in *State v. Spaulding, supra*, *State v. O'Brien*, 94 Tenn. 79, and *People*

v. Royce, 106 Cal. 173, 37 Pac. Rep. 630. It has also received recent recognition from this court. In the case of *Bartley v. State*, 53 Neb. 310, the contention of the defendant that the depository act is unconstitutional is answered in the following language: "It is urged that the court erred in assuming in the tenth, eleventh, and fifteenth paragraphs of the charge the validity of the depository law. An elaborate argument is made in the briefs against the validity of that piece of legislation on grounds other than those heretofore considered by this court. We must be excused from entering upon a discussion of the subject at this time, as the defendant is in no position now to assert that the public moneys of the state were not rightfully on deposit in the Omaha National Bank. He recognized the validity of the statute by placing the moneys of the state in said bank, and it would indeed be a reproach upon the law to permit him to assail the depository law in a prosecution for the embezzlement of the public funds so deposited by him. It was the money of the state that went into the bank, and it was likewise the money of the state that paid the check, whether the bank was a lawful state depository or not." From these citations it appears that the *Leidtke Case* does not stand solitary and alone. The principle on which it was decided is not a pernicious one, to say the least, and it should, in my judgment, be adhered to. The defendant, by his plea of guilty, has confessed that he received the money embezzled as auditor of public accounts, and I do not think we should either directly or by necessary implication overturn one of our own decisions in order to hold that his confession is false.

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4. After judgment had been entered for defendant an order requiring plaintiff, on a motion filed before trial, to give security for costs, *held* not prejudical error where plaintiff did not comply with the order. *Elliott v. Carter White-Lead Co.* 462

5. Where costs have been illegally taxed, the remedy is by motion to retax in the court where the mistake occurred. *Citizens Nat. Bank v. Gregg*..... 760

Councilmen. See MUNICIPAL CORPORATIONS, 3.

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See COUNTY TREASURER. STATUTES, 5. TAXATION, 7, 8.

1. A county board, in examining the reports and adjusting the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently brought to recover moneys unlawfully withheld by the officer. *Trites v. Hitchcock County*..... 79

2. A county board in passing on claims against the county acts judicially, and its judgment is final unless reversed on appeal. *Id.*

3. A county board may not delegate to its chairman and clerk the power to audit claims against the county. *Wilson v. State* 113

Counties—*concluded.*

4. A claim against a county cannot be audited and allowed in advance of the furnishing of the items or the rendition of the services therein charged. *Id.*
5. It is only after the allowance of a claim upon the treasury of a county that a warrant in payment thereof may be properly drawn. *Id.*
6. A county board has power to require the county treasurer to give an additional bond or to give additional sureties. *Holt County v. Scott* 176
7. The discretion and action of a county board in levying taxes to the constitutional limit should not be controlled by the court. *State v. Sheldon* 365
8. An affirmative vote of two-thirds of all those cast on the proposition is sufficient to carry county bonds issuable under chapter 24, Session Laws 1897, for the purpose of making a county exhibit at an interstate exposition. *State v. Cornell,* 556
9. One whose claim against a county has been duly allowed by the county board may compel by mandamus the issuance of a warrant for its payment. *State v. Board of County Com'rs* 767

County Attorney.

A county attorney, without directions from the auditor of public accounts, may institute a criminal proceeding against a state treasurer for embezzlement of the state's money. *Bartley v. State* 310

County Board. See COUNTIES.

A question of fact determined by a county board cannot be reviewed on error in absence of a statute providing a method for preserving the evidence. *Keens v. Buffalo County,* 1

County Courts. See COURTS, 3, 4. EXECUTORS AND ADMINISTRATORS, 2.

County Treasurer. See COUNTIES, 1, 2, 6. EMBEZZLEMENT, 5, 6. OFFICE AND OFFICERS, 1, 2.

An incoming county treasurer accepting from his predecessor a bank check in payment of public funds, *held* chargeable with the amount of the payment, under circumstances stated in opinion. *Whitney v. State* 288

Courts. See EMINENT DOMAIN, 7, 8. RECORDS.

1. Jurisdiction of subject-matter cannot be conferred upon a court by consent. *Anderson v. Story* 259
2. A county court has no jurisdiction of an accounting by a guardian who was appointed by a surrogate in New York and afterward removed with his ward into the state. *Id.*
3. The county court has no jurisdiction of an action brought under section 602 of the Code to vacate a condemnation proceeding on the ground that the award of damages was procured by fraud. *Mattheis v. Fremont, E. & M. V. R. Co* 681

Courts—*concluded.*

4. The county court has no jurisdiction of a suit in equity to vacate a condemnation proceeding. *Id.*

Covenants. See VENDOR AND VENDEE, 2.

Evidence *held* to sustain a finding that recitals of a deed did not express the contract between the parties. *Williamson v. George* 503

Creditors' Bill. See CORPORATIONS, 10.

Where a wife with consent of her husband bought the farm upon which they resided and paid for it with money earned by her, the court *held* that the land should not be subjected to payment of the husband's debts contracted before the date of such purchase, though, by inadvertence or mistake, the title was taken in the name of the husband. *Cleghorn v. Obernalte* 687

Criminal Law. See EMBEZZLEMENT. INDICTMENT AND INFORMATION. INSTRUCTIONS. INTOXICATING LIQUORS, 1. JURY, 7-10. REVIEW, 61, 62. STATUTES, 7. TRIAL, 3.

Objection to Verification of Information.

1. After arraignment and plea it is too late to object to the verification of the information, unless the plea has been withdrawn. *Johnson v. State* 103

Sufficiency of Evidence. Parties to Crime.

2. To warrant a conviction in a criminal prosecution it is not essential that the evidence adduced on the trial should exclude every possible hypothesis but the guilt of the accused. *Id.* 104

3. It will not defeat a criminal prosecution for the evidence to show that all perpetrators of the crime were not made defendants. *Id.*

Fugitive. Failure to File Information.

4. One who has been admitted to bail after a preliminary examination, and who becomes a fugitive, is not, after his return or apprehension, entitled to be discharged because no information was filed against him at the term at which he was recognized to appear, and while he was a fugitive. *Ex parte Trester* 148

Counsel for Accused.

5. An order overruling a motion for appointment of counsel to defend a prisoner cannot be reviewed in the supreme court where the evidence on the hearing was not preserved by a bill of exceptions. *Durfee v. State* 214

State's Evidence. Conviction of Accomplice.

6. The fact that an accomplice gave state's evidence pursuant to a promise of immunity made by the prosecutor without consent of the court, does not constitute a legal defense to a prosecution against the accomplice. *Whitney v. State* 288

Criminal Law—*concluded.*

Abatement.

7. In a prosecution for embezzlement, the pendency of a former information in another county, charging accused with the embezzlement of the same property, within that county, is no ground for abatement. *Bartley v. State*..... 310

Names of Witnesses.

8. Where a married woman is to be called as a witness in a criminal case her name may be indorsed on the information by writing thereon the abbreviation "Mrs." and her husband's name. *Carrall v. State*..... 431

9. The name of a married woman who is to be called as a witness in a criminal case may be indorsed on the information by writing thereon the abbreviation "Mrs." and the second Christian name and the surname of her husband, where he is thus known. *Id.*..... 432

Opinion of Attorney General.

10. A conviction will ordinarily be reversed where the attorney general declines to file a brief on the ground that the evidence is insufficient to sustain the judgment. *Lorenz v. State* 463

Description of Offense. Estoppel.

11. To punish one as for a crime, the offense must be within the plain import of the words of the statute creating or defining the crime. *Moore v. State*..... 831

12. An offense not within the words of the statute creating or defining a crime cannot be adjudged a crime because within the reason or spirit of the statute. *Id.*

13. When a penal statute is made to apply to a certain class of persons, the description of the class is so far descriptive of the offense, and that a person charged is within the class is a substantive element of the crime itself. *Id.*

14. One committing an act denounced as a crime when committed by a particular class of persons is not estopped from denying that he is within that class. *Id.*

Crops. See DAMAGES, 2.

Damages. See DEATH BY WRONGFUL ACT. EMINENT DOMAIN. EXECUTIONS, 22-24. INSURANCE, 10.

1. Special damages to be recovered must be specially pleaded. *Chicago, B. & Q. R. Co. v. Emmert*..... 237

2. Where the negligent construction of a railroad embankment results in the flooding of adjoining land, injuring it and the crops thereon, the measure of damages is the difference in the value of the land immediately before and after such flooding and the fair value of the crops destroyed at the time of their destruction. *Id.*

3. A verdict for plaintiff for $850 *held* not excessive in a suit

Damages—*concluded.*

against a saloon-keeper by one whose husband was killed while under the influence of liquor furnished by defendant. *Schiek v. Sanders* 664

Death by Wrongful Act.

1. Petition *held* to state a cause of action for death by wrongful act under chapter 21, Compiled Statutes. *City of Friend v. Burleigh* 674
2. Carlisle tables *held* admissible in evidence in an action for death by wrongful act. *Id.*
3. In an action for death by wrongful act exclusion from evidence of a declaration that the injury resulted from the carelessness of the person injured, *held* not prejudicial. *Id.*

Declaration of Intention. See ALIENS.

Declarations. See EVIDENCE, 11.

Dedication.

1. Where land is surveyed and platted into an addition to a city, the fee simple title to the streets and alleys of the addition vests in the public. *Jaynes v. Omaha Street R. Co.*... 631
2. The title to streets in a platted addition to a city is held by the public in trust for the use for which such streets were dedicated. *Id.*
3. The dedication of streets in a platted addition to a city contemplates the right of the public to use them for the purpose of passage by such means as it may see fit to employ, but the grant does not contemplate that one may exclusively and permanently appropriate a portion of a street to the exclusion of the remainder of the public. *Id.*..... 632

Deeds. See ACKNOWLEDGMENT. COVENANTS. ESTOPPEL, 2-5. INSANITY, 2, 3.

Deficiency Judgment. See HUSBAND AND WIFE, 9.

Demurrer. See PLEADING, 9.

Depositions.

Where an answer contained both competent and incompetent testimony, an objection to the entire answer was *held* properly sustained. *Brinckle v. Stitts*..... 11

Depositories. See EMBEZZLEMENT, 5-7.

Depository law (Session Laws 1891, p. 347, ch. 50) *held* valid. *Holt County Bank v. Holt County*..... 828

Deposits. See BANKS AND BANKING, 3-8.

Descent and Distribution. See PARENT AND CHILD.

1. The lands of an intestate descend to his heirs subject to his unsecured debts. *Motley v. Motley*..... 375
2. Undevised lands of which one dies seized descend to the heirs, and title vests in them subject to the ancestor's debts. *Lewon v. Heath* 707

Descriptio Personae. See ESTOPPEL, 4.

Description. See CRIMINAL LAW, 13. INSURANCE, 18.

Discretion of Court. See JURY, 1.

Dismissal. See NEW TRIAL, 6. REVIEW, 56.

Plaintiff may dismiss his action any time before final submission of the cause, subject alone to conditions imposed by the court. *Beals v. Western Union Telegraph Co*..... 601

District Attorney. See COUNTY ATTORNEY.

Divorce.

A decree for alimony in favor of the wife is a lien on the family homestead, the title to which is in the husband. *Best v. Zutavern*..... 604

Documents. See EVIDENCE, 12-26.

Dower. See ACKNOWLEDGMENT, 1.

1. The lands of a husband, during his life, are subject to his wife's inchoate right of dower. *Motley v. Motley*..... 375
2. At the instant of a husband's death intestate the law transmutes the wife's inchoate dower lien into an absolute dower estate, subtracts it from the lands of the intestate, and vests the right thereto in his widow. *Id.*
3. The lands of an intestate descend to his heirs subject to his unsecured debts, but his widow's dower estate is not incumbered with such debts. *Id.*
4. By statute the barring of dower is made to depend upon the voluntary acts of the widow. *Id.*
5. Administrator's sale of lands of intestate to pay debts allowed against the estate does not of itself divest the widow of her dower estate in such lands. *Id.*
6. The conduct of a widow in receiving part of the proceeds of an administrator's sale as her "distributive share of the estate," payment not being made nor received in lieu of her dower estate, did not estop her from claiming her dower estate in the lands thus sold. *Id*..... 376
7. The conduct of a widow in attending an administrator's sale, in failing to object thereto, and in neglecting to advise the bidders that she had a dower estate in the lands offered for sale, did not estop her from claiming such dower. *Id.*
8. A widow by failing to appear in a proceeding by an administrator to sell the lands of intestate to pay debts allowed against the estate did not estop herself from claiming her dower as against the purchaser of the lands, though she was a defendant in such proceeding. *Id.*

Easements. See EMINENT DOMAIN.

Ejectment. See ADVERSE POSSESSION. IMPROVEMENTS.

1. Evidence to prove adverse possession is admissible under a general denial of plaintiff's title. *Oldig v. Fisk*..... 156

Ejectment—*concluded.*

2. An heir may maintain ejectment for undevised lands of which his ancestor died seized, except as against the administrator and those claiming under him. *Lewon v. Heath*.... 707

Election of Remedies. See INDICTMENT AND INFORMATION, 7-9.

Elections. See COUNTIES, 8.

1. Though a declaration of intention to become a citizen may constitute a resident alien an elector, this status does not extend to his son because the declaration was made before the son attained his majority. *Haywood v. Marshall*..... 220
2. The intention of an elector must be ascertained from his ballot, and any inaccuracies in the preparation thereof cannot be urged for the first time after election, to defeat the clearly expressed intention of the voter. *Tutt v. Hawkins*.. 367

Electric Railways. See EMINENT DOMAIN, 2-5.

Embezzlement. See PAYMENT, 2.

Prosecution.

1. A county attorney, without directions from the auditor of public accounts, may institute a criminal proceeding against a state treasurer for embezzlement of the state's money. *Bartley v. State*..... 310

Definitions. Elements of Crime.

2. Under section 124 of the Criminal Code, any person who advises, aids, or participates in an officer's embezzlement of public money is himself guilty of embezzlement. *Mills v. State* 263
3. The words "any person," used in section 124 of the Criminal Code relating to embezzlement of public money, are not confined in meaning to a person or persons, or officer or officers, in some manner intrusted with the collection, handling, or care of public money. *Id.*
4. Instructions in a prosecution for embezzlement *held* applicable to the evidence. *Id*..... 261
5. The law for depositing state and county funds in banks (Session Laws 1891, p. 347, ch. 50) did not repeal section 124 of the Criminal Code, relating to the embezzlement of public money. *Whitney v. State*..... 288
6. A county treasurer's deposit of public funds in a depository, pursuant to section 6, chapter 50, Session Laws of 1891, is not embezzlement. *Id.*
7. A state treasurer, who for an unauthorized purpose draws a check on a state depository bank having money of the state therein, which he delivers to the payee with intent to defraud the state, and the bank, on presentation of the check, places the amount thereof to the credit of a third party, whom the payee represents in the transaction, and at the same time charges the account of the state with a like

Embezzlement—*continued.*

sum, is guilty of embezzlement of the state's money. *Bartley v. State*..... 311

8. Section 124 of the Criminal Code relating to embezzlement of public moneys, applies only to officers or persons charged by law with the collection, receipt, safe-keeping, transfer, or disbursement of such moneys and to those who aid or abet such officers or persons. *Moore v. State*..... 831

9. The auditor of public accounts is not charged with the collection, receipt, safe-keeping, transfer, or disbursement of any part of the public moneys, and is therefore not within the descriptive terms of section 124 of the Criminal Code relating to embezzlement of such moneys. *Id.*

Indictment and Information.

10. Information *held* to sufficiently designate the owner of the money embezzled. *Whitney v. State*..... 287

11. An information for embezzlement is sufficient if it sets forth the crime in the language of the statute, without averring the particular acts in which the offense consisted. *Bartley v. State*..... 310

12. An indictment against a state treasurer, which charges the embezzlement to his own use of a certain sum of money belonging to the state, is sufficient without an allegation that a demand for the money was made upon him by his successor in office. *Id.*

Allegations and Findings as to Value.

13. An allegation of the information that the embezzlement was of the sum of $6,000 in money, *held* a sufficient expression of value. *Mills v. State*..... 263

14. A verdict finding the amount of money embezzled to be a specified number of dollars is a sufficient finding of value, under an information charging defendant with the embezzlement of money. *Bartley v. State*..... 312

Estoppel.

15. One who served his entire term of office cannot be heard to urge as a defense to the charge of embezzlement that when the embezzlement took place he was not an officer *de jure*. *Id*..... 311

Evidence.

16. Identification of accused's receipt for the money embezzled *held* sufficient to justify the admission of the receipt in evidence. *Mills v. State*..... 264

17. Failure and refusal of a county treasurer to promptly pay to his successor any of the public moneys is *prima facie* evidence of embezzlement. *Whitney v. State*..... 287

18. Correspondence of a bank in negotiating for the state treasurer a warrant owned by the state *held* admissible in evidence in a prosecution against him for the embezzlement

Embezzlement—*concluded.*

of the amount subsequently used to take up the warrant. *Bartley v. State*..... 311

19. Evidence *held* sufficient to sustain a conviction. *Mills v. State* 264

20. Evidence *held* sufficient to sustain a conviction of accused for embezzlement of the state's money. *Bartley v. State*.... 311

21. Evidence *held* sufficient to authorize a conviction for the embezzlement of public money. *Whitney v. State*..... 288

Eminent Domain.

1. The method of reviewing judgments of the district court in proceedings by railroad companies in exercising the right of eminent domain is by petition in error and not by appeal. *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co*..... 246

2. Whether a use made of a street is an additional burden upon the easement does not depend upon the motive power which moves the vehicles employed in such use, but depends upon whether the vehicles and appliances used in and necessary to effectuate the purpose permanently and exclusively occupy a portion of the street to the continued exclusion of the rest of the public. *Jaynes v. Omaha Street R. Co*..... 632

3. In a suit by a lot owner against an electric railway company a petition alleging that the continued existence in the street, opposite his property, of poles and wires interfered with his ingress to and egress from his premises and depreciated the value thereof, *held* to state a cause of action. *Id.*

4. What acts, omissions, facts, and circumstances are competent evidence of damage to be considered by a jury are questions of law for the court, but whether such acts, omissions, facts, or circumstances affect an owner's property and damage it and the amount of such damage are questions for the jury. *Id.*

5. Under section 21, article 1, of the constitution it is not essential that the poles and wires of an electric railway should be held, as a matter of law, an additional burden upon the easement, to entitle an abutting lot owner to compensation for depreciation to his realty caused by the permanent presence in the street in front of his lot of such poles and wires. *Id.*

6. The proceeding under section 97, chapter 16, Compiled Statutes, for condemning realty for right of way of a railroad company is not instituted in nor conducted by the county court, but is conducted by the county judge, the sheriff, and the appraisers selected by the county judge. *Mattheis v. Fremont, E. & M. V. R. Co*..... 681

7. Under section 97, chapter 16, Compiled Statutes, the county judge, the sheriff, and the appraisers selected by the county judge constitute a tribunal to assess the damages which a

Eminent Domain—*concluded.*

land owner will sustain by reason of the appropriation of his land for the right of way of a railroad company. *Id.*

8. The powers conferred upon the county judge and the duties required of him by the act relating to condemnation proceedings (Compiled Statutes, ch. 16, sec. 97) are not judicial powers and duties, but ministerial ones. *Id.*
9. An application to a county judge to set aside an award in a condemnation proceeding on the ground of fraud and inadequacy of damages, should not be entertained, under the facts stated in the opinion, where the application was made more than five years after the date of the proceeding assailed. *Id.*
10. The necessary expense of filling residence lots to grade *held* a proper subject of inquiry in condemnation proceedings. *Farwell v. Chicago, R. I. & P. R. Co*..... 706

Equity. See COURTS, 3, 4. INJUNCTION. JUDGMENTS, 5, 6. NEW TRIAL, 1. QUIETING TITLE. REVIEW, 51.

1. An adequate remedy at law is one that is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Bankers Life Ins. Co. v. Robbins* 45
Warlier v. Williams..... 143
2. A district court sitting in equity may submit to a jury any question of fact in the case. *Alter v. Bank of Stockham*..... 223
3. An appeal under section 675 of the Code, relating to appeals in equity, does not present for review the correctness of a ruling of the trial court in excluding evidence, but such a ruling may be presented under section 584 *et seq.* of the Code providing for review by proceedings in error. *Ainsworth v. Taylor*..... 484

Error. See REVIEW.

Estoppel. See ACTIONS, 4. CORPORATIONS, 2, 3. DOWER, 6-8. EMBEZZLEMENT, 15. EVIDENCE, 25. MECHANICS' LIENS, 3. PRINCIPAL AND SURETY, 4.

1. One who claims an interest in chattels by virtue of his bid therefor upon the foreclosure of a mortgage thereon by sale at public auction cannot be heard to question the regularity of a subsequent sale of the same chattels rendered necessary by his own refusal, by payment, to make good his bid. *Undeland v. Stanfield*..... 120
2. An ordinary quitclaim deed vests in the grantee only such title or estate as the grantor is at its date possessed of, and does not operate by estoppel to convey an after-acquired interest. *Hagensick v. Castor*..... 495
3. A recital in a deed conveying real estate, whatever be its form, that grantor is seized or possessed of a particular estate, estops the grantor and those claiming under him, from afterward denying that he was so seized. *Id.*

Estoppel—*concluded.*

4. A recital in a quitclaim deed, grantor "being one of the three heirs of George H. Ohler," was not mere *descriptio personæ* of grantor, but an assertion that grantor was then an heir at law of Ohler, and estopped him from asserting against his grantee his title acquired by inheritance on the decease of said Ohler at a subsequent date. *Id.*

5. An estoppel by recital in a deed of the particular estate conveyed, operates upon the estate and binds an after-acquired title as between parties and privies. *Id.*

6. Where land conveyed to a husband was purchased with his wife's money, she is not estopped, as against his creditors, from claiming the land, unless her conduct induced them to believe that her husband was the owner of the land and to extend credit on the strength of such ownership. *Cleghorn v. Obernalte* 687

7. A defendant signing and verifying as plaintiff's attorney a petition averring that he owed plaintiff a certain sum and praying for judgment against himself cannot, on appeal from a decree as prayed, be relieved in the supreme court. *Troup v. Horbach* 796

8. One committing an act denounced as a crime when committed by a particular class of persons is not estopped from denying that he is within that class. *Moore v. State*..... 831

Evidence. See ATTACHMENT, 5. BILL OF EXCEPTIONS. BURGLARY, 2, 4. CRIMINAL LAW, 6. EJECTMENT, 1. EXECUTIONS, 6. INSTRUCTIONS, 7. INSURANCE, 1, 9, 10. NEW TRIAL, 2. REVIEW, 26-38. VENDOR AND VENDEE, 1.

1. Evidence that surgeons informed their patient that they would not return unless requested to do so, that they received no such request, and did not return, *held* relevant under the pleadings in an action for malpractice. *Van Skike v. Potter* 28

2. Rulings on evidence in an action of replevin *held* not prejudicially erroneous. *Otis v. Claussen*..... 100

3. Rulings on evidence as to the measure of damages for overflowing plaintiff's land *held* erroneous. *Chicago, B. & Q. R. Co. v. Emmert* 237

4. The order of introducing testimony rests largely in the discretion of the trial court. *Whitney v. State*..... 287

5. Rule as to what shall constitute *indicia* of adverse possession. *Lewon v. Heath* 707

Carlisle Tables.

6. Carlisle tables *held* admissible in evidence in an action for death by wrongful act. *City of Friend v. Burleigh*..... 674

Check for Baggage.

7. A carrier's check for baggage is *prima facie* evidence that the baggage was delivered to the carrier, and when such a

Evidence—*continued.*

check has been introduced in evidence the burden of proof is on the party alleging non-delivery. *Chicago, B. & Q. R. Co. v. Steear* 95

Circumstances.

8. Fraud may be inferred from circumstances, but the inference must be the rational and logical deduction from the circumstances proved. *Alter v. Bank of Stockham*..... 223

Conclusions.

9. Conclusion of witness on vital issue *held* inadmissible and prejudicially erroneous. *Peck v. Tingley*..... 172

Credibility of Witnesses.

10. The rule that the credibility of a witness is a matter for the determination of triers of fact does not require the supreme court, on appeal, to accept the statement of a witness, where it is demonstrated to be false. *Linton v. Cooper*..... 404

Declaration.

11. A declaration to be a part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved. *City of Friend v. Burleigh*..... 674

Documents. Writings. Text-Books. Deeds. Records.

12. In a suit for damages against a surgeon for alleged negligence in operating upon and treating plaintiff's fractured kneecap, text-books on surgery, though standard authority, cannot be read to the jury as independent evidence. *Van Skike v. Potter* 29

13. Text-books on surgery cannot be read to the jury as independent evidence under section 342 of the Code providing that books of science are presumptive evidence of facts of general notoriety or interest. *Id.*

14. It is not error to exclude from evidence a written instrument, the making and contents whereof are admitted by the pleadings. *Holt County v. Scott*..... 176

15. In a prosecution for embezzlement, identification of accused's receipt for the money embezzled *held* sufficient to justify the admission of the receipt in evidence. *Mills v. State* 264

16. Correspondence of a bank in negotiating for the state treasurer a warrant owned by the state *held* admissible in evidence in a prosecution against him for the embezzlement of the amount subsequently used to take up the warrant. *Bartley v. State* 311

17. In a criminal prosecution, where books of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts of items involved are in the court room subject to inspection of accused, an expert accountant who examined the books may be allowed to testify to the result of his examination. *Id.*..... 312

Evidence—*continued.*

18. Where the acknowledgment is valid a deed may be received without further proof. *Linton v. Cooper*..... 400

19. An unacknowledged conveyance may be received in evidence upon proof of its execution and delivery. *Id.*

20. Stipulation *held* not an admission that a purchaser at a tax sale was assignor of one claiming to be owner of the tax sale certificate. *Johnson v. English*..... 530

21. Under an offer to introduce a tax sale certificate the admission thereof does not carry with it as evidence an assignment indorsed on the certificate. *Id.*

22. In a suit to cancel a deed executed by a lunatic, the erroneous admission of the record of proceedings under a commission of lunacy *held* harmless. *Wager v. Wagoner*..... 513

23. The fact that defendant was a licensed saloon-keeper may be shown by the proceedings of the city council and the license records, production of the license issued not being essential. *Schiek v. Sanders*..... 664

24. To render written instruments admissible in evidence their execution or genuineness, unless admitted, must be established by proof, except in cases within statutory exceptions. *Sloan v. Fist* 691

25. An insurer denying in its answer that it contracted for the issuance of a policy in any form cannot introduce in evidence a blank policy in usual form to show existence and breach of certain conditions. *Phenix Ins. Co. v. Slobodisky*.. 782

26. Where a druggist charged with keeping beer for unlawful sale introduced evidence that he did not keep beer and that bottles found in his possession by the sheriff contained a non-intoxicating tonic, a search-warrant stating informer's belief that defendant kept beer and the return of the sheriff that he found bottles of beer in defendant's possession are inadmissible as independent evidence. *Nelson v. State*..... 790

Hearing of Motion.

27. Permitting oral testimony on hearing of a motion is in the discretion of the trial court. *Bartley v. State*..... 345

Offer to Compromise.

28. An offer to compromise a matter in dispute cannot be given in evidence against the party by whom such offer was made. *Wright v. Morse* 3

Parol Evidence.

29. As between the immediate parties to a negotiable instrument the form of an indorsement is not conclusive, but the nature of the contract may be proved by parol evidence *United States Nat. Bank v. Geer*..... 68

Presumptions.

30. A similar presumption of delivery results, from the entrust-

Evidence—*concluded.*

ing to a telegraph company for transmission of a message properly addressed, to that which follows from the posting of a letter for transmission by the United States mail. *Perry v. German-American Bank* 89

31. Possession of intoxicating liquors *held* presumptive evidence of guilt in a prosecution against one for keeping such liquors for unlawful sale. *Durfee v. State*..... 215

Secondary Evidence.

32. Secondary evidence of the contents of an instrument is admissible upon proof that it once existed and was last seen in possession of the adverse party who, under oath on the trial, denied its existence. *Whitney v. State*..... 287

Exceptions. See INSTRUCTIONS, 8. REVIEW, 52.

Exchange of Property. See CORPORATIONS, 9, 10. VENDOR AND VENDEE, 3.

Executions. See EXEMPTION. SHERIFFS AND CONSTABLES.

1. One purchasing property at execution sale and paying the purchase price at request of defendant, to whom the property was subsequently delivered, may recover from the latter the amount thus paid, though the execution sale was void. *Wright v. Morse* 3

2. Evidence *held* to sustain a finding that an execution creditor did not cause realty to be levied upon and sold contrary to a valid agreement between him and defendant. *McMurtry v. Columbia Nat. Bank*..... 21

3. The only matter adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making, and returning of the sale. *Best v. Zutavern* 619

4. A sale of lands by an administrator to pay the debts of his intestate is a judicial sale, and the doctrine *caveat emptor* applies to a purchaser thereat. *Motley v. Motley*..... 375

Appraisement.

5. To make error available, objections that property is appraised too high, or too low, should be made and filed, with a motion to vacate the appraisement, before sale, and a ruling obtained on the motion. *McMurtry v. Columbia Nat. Bank* 21

6. To sustain an objection that an appraisement is fraudulent, where no actual fraud is shown, the discrepancy between the appraised value of the property and the value shown in support of the objection must be so great as to raise a presumption of fraud. *Iowa Loan & Trust Co. v. Stimpson*... 536

7. It is not necessary to give the debtor notice of the making of an appraisement. *Id.*

Executions—*continued.*

8. Evidence *held* sufficient to sustain the overruling of an objection that the appraisement was too low. *Northwestern Mutual Life Ins. Co. v. Mulvihill*..... 538

9. The finding of a district court upon conflicting evidence that an appraisement was not fraudulent will ordinarily be sustained on review. *Amoskeag Savings Bank v. Robbins*..... 776

10. Where there was no error in the appraisement of land sold under a decree of foreclosure, the owner cannot complain because the clerk's certificate of incumbrances includes the mortgages upon which the decree is based. *Id.*

Confirmation.

11. Objection to confirmation of sale on the ground of irregularity in the appraisement comes too late when first urged after the sheriff's return of completed sale. *Best v. Zutavern*, 619

12. The homestead right of exemption of realty is not a proper subject for consideration in proceedings for confirmation of a sale of an alleged homestead on execution. *Id.*

13. It is not a good objection to the confirmation of a judicial sale of realty that the notice of sale did not accurately state the sum for which the land would be sold. *Amoskeag Savings Bank v. Robbins* 776

14. A mortgage-foreclosure sale may be confirmed though the sheriff did not return the order of sale within sixty days from its date. *Id*..... 777

15. Title of defendant is not divested by a judicial sale until it has been confirmed. *Slobodisky v. Phenix Ins. Co*..... 816

Master Commissioner.

16. A decree foreclosing a real-estate mortgage may contain an appointment of a master commissioner to sell the realty. *Northwestern Mutual Life Ins. Co. v. Mulvihill*..... 538

17. A master commissioner in performing the duties of his appointment may administer an oath to the appraisers. *Id.*

18. The statutes do not require a master commissioner making a sale to take, subscribe, and file an oath. *Id.*

19. If the taking of an oath by a master commissioner is an essential requirement, compliance therewith will be presumed, in absence of a showing to the contrary, on motion to set aside the sale. *Id.*

20. Should the district court require a master commissioner to take an oath and give a bond? *Id.*

Purchase by Appraiser.

21. A sheriff's deed to realty sold on execution should not be canceled merely because the purchaser was one of the appraisers. *Best v. Zutavern* 605

Wrongful Seizure.

22. The seizure and retention of property known by the officer

Executions—*concluded.*

to be exempt, and after its exempt character has been legally established, constitute an abuse of process for which the officer is liable. *Castle v. Ford*..... 507

23. A judgment plaintiff knowing property to be exempt is liable for its wrongful seizure and retention where the officer acted under the former's advice. *Id.*

24. In an action against a sheriff for the wrongful seizure and retention of exempt property, the ultimate return of the property goes in mitigation of damages, but is no defense. *Id.*

Executors and Administrators.

1. Where the letters of an administrator or executor have been revoked, such *quondam* personal representative has no standing in the supreme court to question the correctness of a judgment rendered by the district court in an action wherein he was a party when such revocation took place. *Edney v. Baum*..... 116

2. Entry of an order allowing a claim against an estate *held* not fatally defective for lack of the signature of the county judge. *McCormick v. McCormick*..... 255

3. An order of a county court allowing a claim against an estate *held* sufficient in form and substance. *Id.*

4. *Caveat emptor* applies to an administrator's sale. *Motley v. Motley*..... 375

5. Where the record of a proceeding in which an administrator was licensed to sell lands of intestate discloses that he left a widow, it is notice to the purchaser at the sale of the widow's dower estate in the lands. *Id.*

6. Evidence *held* sufficient to sustain a judgment for plaintiff in an action by him as executor to recover money which had been entrusted to defendant by testatrix. *Ainsworth v. Taylor*..... 485

7. A cause of action for death by wrongful act is not an asset of decedent's estate. *City of Friend v. Burleigh*..... 674

8. One sued by an administrator is not authorized to petition the county court to revoke plaintiff's letters of administration. *Missouri P. R. Co. v. Jay*..... 747

9. An application for administration must be regarded as abandoned where no action by the court is taken for nearly two years after the date fixed in the notice of the time and place of hearing. *Elgutter v. Missouri P. R. Co*..... 748

10. The appointment of an administrator may be collaterally attacked where the record affirmatively shows that the court granting the letters acted without jurisdiction. *Id.*

Exemption. See EXECUTIONS, 22-24. HOMESTEAD.

1. Under section 521 of the Code a judgment debtor who is the

Exemption—*concluded.*

head of a family, and has no homestead, may claim as exempt from sale on execution personalty to the value of $500. *Widemair v. Woolsey* 468

2. Sixty days' wages of a laborer are exempt from enforced application to payment of his debts. *Karnes v. Dovey*..... 725

3. Where a claim against a laborer was assigned and his exempt wages applied in a foreign court to payment of the debt, the *bona fides* of the assignment was *held* a question for the jury in an action by the laborer against the assignor for the amount recoverable under the statute (Code, sec. 531*f*) relating to the violation of exemption laws. *Id.*

Exhibits. See PLEADING, 3, 7, 8.

Factors and Brokers.

Ordinarily a real-estate broker, who, for a commission, undertakes to sell land on certain terms within a specified period, is not entitled to compensation for his services unless he produces a purchaser, within the time limited, who is able and willing to buy upon the terms prescribed in the contract of employment. *Langhorst v. Coon*..... 765

Fee Bill. See INJUNCTION, 6.

Fees. See OFFICE AND OFFICERS, 6.

Fires. See INSURANCE.

Fixtures. See INSURANCE, 10.

Forcible Entry and Detainer. See INJUNCTION, 2.

Foreclosure. See EXECUTIONS.

Franchises. See MUNICIPAL CORPORATIONS, 6, 7.

Fraud. See BANKS AND BANKING, 4. CORPORATIONS, 9. EXECUTIONS, 6. STATUTE OF FRAUDS.

1. Fraud cannot be presumed, but must be proved. *Alter v. Bank of Stockham* 223

2. Direct evidence is not essential to establish fraud. *Id.*

3. Fraud may be inferred from circumstances, but the inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved. *Id.*

4. Where, from the entire evidence, good faith or an honest mistake may be as rationally and reasonably inferred as fraud, the law leans to the side of innocence. *Id.*

5. Evidence *held* not to support a finding that cattle sold were falsely weighed. *Id.*

Fraudulent Conveyances. See ATTACHMENT, 6, 8. HOMESTEAD, 1.

1. Evidence *held* to sustain findings that conveyances were not fraudulent as to creditors. *Sheldon v. Russell*..... 26

Fraudulent Conveyances—*concluded.*

2. Evidence *held* insufficient to sustain the verdict of a jury in finding that a conveyance was fraudulent as to the transferor's creditors. *Nash v. Costello*..... 614

Fugitives. See CRIMINAL LAW, 4.

Garnishment. See ATTACHMENT. EXEMPTION, 2, 3.

Gas Companies. See MUNICIPAL CORPORATIONS, 6, 7.

Gifts. See MUNICIPAL CORPORATIONS, 1, 2.

Guardian and Ward. See PARTIES, 2.

1. A county court has no jurisdiction of an accounting where the guardian was appointed by a surrogate in the state of New York and afterward moved with the ward to Nebraska. *Anderson v. Story* 259
2. A proceeding to vacate erroneous orders against an infant may be maintained by the guardian before the infant reaches his majority. *Martin v. Long* 694

Harmless Error. See REVIEW, 39-42.

Highway-Signals. See INFANTS, 2.

Homestead.

1. A debtor may acquire a homestead, and hold it exempt from execution for debts created before its acquisition, but not then reduced to judgment, and this although the homestead was obtained by exchange for property which was liable for the payment of such debts. *Paxton v. Sutton*..... 81
2. The homestead exemption cannot be claimed as against a judgment recovered before the land became a homestead. *Id.* 83
3. The words, "subject to exemption as a homestead," used in section 521 of the Code do not refer to houses alone, but apply to lands and town lots as well. *Widemair v. Woolsey*.. 468
4. In a suit by a wife for a divorce a decree for alimony in her favor is a lien on the family homestead, the title to which is in the husband. *Best v. Zutavern*..... 604
5. A homestead not exceeding $2,000 in value after deducting incumbrances is exempt from seizure and sale for the satisfaction of the owner's ordinary debts. *Bank of Bladen v. David* 608
6. A statutory homestead when conveyed by a husband to his wife does not become liable for his then existing debts by subsequently losing its homestead character. *Id.*
7. The homestead right of exemption of realty is not a proper subject for consideration in proceedings for confirmation of a sale of an alleged homestead on execution. *Best v. Zutavern* 619

Homicide.

Conviction reversed on the ground that the evidence was insufficient to support the verdict. *Lorenz v. State*..... 463

Husband and Wife. See ACKNOWLEDGMENT.

Mortgage by Wife.

1. A wife may pledge her separate estate to secure an indebtedness of her husband, but there must be a new consideration to sustain a mortgage to secure his antecedent debt. *Linton v. Cooper* 400
2. The making of further advances to the husband is a sufficient consideration to sustain a mortgage by the wife of her separate property to secure an antecedent debt, and in such case repayment of the subsequent advances does not discharge the mortgage. *Id*..... 401

Agency of Husband.

3. A wife who accepted the benefits of a transaction by her husband was charged with the burdens of his contract. *Perkins v. Tilton* 440

Contracts of Wife. Notes.

4. The common-law disability of a married woman to make contracts is in force, except as abrogated by statute. *Grand Island Banking Co. v. Wright*..... 574
5. A married woman may make contracts only in reference to her separate property, trade, or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate. *Id.*
6. Whether a contract of a married woman was made with reference to her separate estate is a question of fact. *Id*... 575
7. Where a married woman signed a note, there is no presumption that she intended thereby to fasten a liability upon her separate estate. *Id.*
8. In an action on a note signed by a married woman, where coverture is pleaded as a defense and proved, the burden is on plaintiff to establish that the note was made with reference to, and upon the credit of, her property, and with the intent to bind the same. *Id.*

Deficiency Judgment.

9. Where a wife signs a note as surety for her husband and, as security, executes a mortgage on her own realty, a personal judgment cannot be rendered against her on foreclosure for any deficiency after sale of the premises, where it is not disclosed that in executing the note and mortgage it was the intention to bind her property generally. *Id.*

Homestead.

10. The husband's right to an exempt homestead cannot be asserted against the wife, where, by his aggression, she has been forced to leave his domicile. *Best v. Zutavern*..... 606

Husband and Wife—*concluded.*

Trusts. Title to Realty.

11. Where a wife with consent of her inebriate husband bought the farm upon which they resided and paid for it with money earned by her, it was *held* to be her property, though, by inadvertence or mistake, it was conveyed to the husband. *Cleghorn v. Obernalte* 687

Improvements.

After revivor in name of plaintiff's devisee of an action to quiet title, to obtain possession of realty, and to recover rents, a decree for plaintiff was *held* proper though the land was charged with the fair value of defendant's improvements, some of which were made after commencement of the suit. *Thompson v. Thompson*..... 490

Incompetent Persons. See INSANITY.

Indemnity. See LOST INSTRUMENTS.

Indictment and Information. See BURGLARY, 4.

Verification.

1. After arraignment and plea it is too late to object to the verification of the information, unless the plea has been withdrawn. *Johnson v. State* 103

Participants in Crime.

2. All participants in a crime may be jointly charged in the same information, or they may be informed against separately, as the prosecutor may elect. *Id*..... 104

Variance from Complaint.

3. The information and complaint must charge the same offense. *Mills v. State*..... 263

4. Where the charge in the information is substantially the same as that alleged in the complaint, a plea of no preliminary examination on the ground of variance is without force. *Id.*

5. Where the identity of the offense charged in the complaint is preserved in the information, the statement in the information may be varied from that of the complaint, to meet a possible state of proof. *Id.*

Uncertainty.

6. Information for embezzlement *held* not fatally defective for uncertainty. *Id.*

Election as to Counts.

7. Prosecutor's election to proceed under a single count does not destroy the effect of a reference to other counts as to time and place. *Bartley v. State*..... 310

8. No election is required between counts charging the same offense. *Id*..... 311

9. Where different felonies of the same character are charged in different counts of an information, it is within the dis-

Indictment and Information—*concluded.*

cretion of the trial court to require an election as to counts. *Id.*

Nolle Prosequi.

10. Error cannot be predicated upon the overruling of a demurrer to a count subsequently eliminated by *nolle prosequi.* *Id.* 310

Place of Crime.

11. Where the county and state are named in the caption and venue of an information charging that defendant "in the county aforesaid, then and there being in said county," did commit a crime, the information sufficiently alleges that the offense was committed in the county stated in the caption and venue. *Id.*

12. The place of the commission of an offense charged in a count is sufficiently set forth by an averment that defendant, "in the county aforesaid," did commit the acts constituting the offense, where the county and state are stated in a former count. *Id.*

Motion to Quash.

13. On motion to quash an information, the court will not inquire into the validity of the warrant issued by the examining magistrate. *Id.*

Names of Witnesses.

14. Where a married woman is to be called as a witness in a criminal case her name may be indorsed on the information by writing thereon the abbreviation "Mrs." and her husband's name. *Carrall v. State*..... 431

15. The name of a married woman who is to be called as a witness in a criminal case may be indorsed on the information by writing thereon the abbreviation "Mrs." and the second Christian name and the surname of her husband, where he is thus known. *Id.*

Indorsements. See NEGOTIABLE INSTRUMENTS, 3.

Infants.

1. An infant's suit instituted by a next friend may be discontinued by the court where it is against plaintiff's interest to proceed further, or another person may be substituted as next friend. *Wager v. Wagoner*..... 512

2. In an action against a railroad company for injuring an infant at a highway-crossing, it is error to instruct the jury that the question whether highway-signals were given is immaterial in case they find the infant, by reason of tender age, could not understand the meaning of such signals. *Palmer v. Missouri P. R. Co*..... 611

3. An infant is not obliged to postpone until he reaches his majority proceedings to vacate erroneous orders against him. *Martin v. Long*..... 694

Information. See INDICTMENT AND INFORMATION.

Inheritance. See PARENT AND CHILD.

Injunction. See JUDGMENT, 1, 3, 6.

1. A litigant cannot successfully invoke the extraordinary remedy of injunction to enforce a legal right unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate. *Warlier v. Williams*.... 143
   Gillick v. Williams 146
2. A plaintiff is not entitled to a mandatory injunction to remove from his real estate one who has without color of title unlawfully and forcibly entered and wrongfully remains thereon, though such trespasser be insolvent. *Id.*
3. One not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax. *Harmon v. City of Omaha* 164
4. A court of equity may enjoin the collection of a void tax. *Chicago, B. & Q. R. Co. v. City of Nebraska City*..... 454
5. Issuance of municipal bonds voted for the benefit of persons who agreed to erect a mill in the city may be restrained, where they failed to comply strictly with the terms of the contract. *George v. Cleveland*..... 716
6. Collection of a fee bill will not be enjoined where all the legal costs included therein have not been paid or tendered. *Citizens Nat. Bank v. Gregg*..... 760

Insanity.

1. One who is insane, but who has not been so adjudged, and who has no guardian, may sue by next friend. *Wager v. Wagoner* 511
2. To avoid the deed of an insane person it is unnecessary to prove that there was fraud or other wrong-doing inducing its execution. *Id.*
3. The deed of an insane person may be set aside without return of consideration, at least when it does not appear that a return in specie is practicable. *Id.*

Insolvency. See BANKS AND BANKING, 2-7. CORPORATIONS, 5-7.

Instructions. See INFANTS, 2. REVIEW, 12-15. WITNESSES, 5.

Burglary.

1. Instructions in a prosecution for burglary *held* not erroneous. *Carrall v. State* 432

Conflicting Paragraphs.

2. A faultless instruction will not cure a misstatement of the law in another paragraph of the court's charge to the jury. *Bergeron v. State* 752

Construction.

3. Where the charge is correct when considered as a whole, it is sufficient. *Mills v. State*..... 264

Instructions—*continued.*

4. Where instructions construed together correctly announce the rule applicable to the issues and the evidence, they should be upheld, though a paragraph, standing alone, is faulty. *Bartley v. State* 312

5. Instructions must be read and construed together. *Mack v. Parkieser* 528

6. Where instructions construed together state the law applicable to the case without confusion or conflict, a single paragraph incomplete in itself should not be held erroneous. *Id.*

Evidence.

7. An instruction that the acts constituting a crime may be proved by circumstances and any other competent evidence, *held* proper when preceded by a direction that the jury must be governed by what had appeared in evidence. *Mills v. State* 264

Exceptions.

8. One failing to except to the refusal to give an instruction requested by him cannot complain, in the supreme court, of the ruling. *Brinckle v. Stitts* 11

Failure to Request.

9. Mere non-direction by the trial court will not work a reversal where proper instructions covering the point were not requested. *Johnson v. State* 104

10. Mere non-direction is not reversible error unless proper instructions were requested and refused. *Mills v. State* 264

11. One cannot predicate error upon a failure to instruct the jury on a particular feature of a case where he failed to request an instruction on such feature. *Weber v. Whetstone* ... 371

12. Mere non-direction by the trial court affords no ground for reversal, where a proper instruction covering the point is not requested. *Reynolds v. State* 761

Harmless Error.

13. The conviction of a criminal should not be reversed for the giving of an erroneous instruction not prejudicial to him. *Whitney v. State* 288

Issues.

14. An instruction purporting to cover the whole case is erroneous, which fails to include all the elements necessarily involved in the issues and within the evidence. *Bergeron v. State* 752

Negligence.

15. Discussion of instructions relating to evidence and negligence, in a suit against a railroad company for injuries inflicted at a highway-crossing. *Chicago, B. & Q. R. Co. v. Pollard* 730

Presumption of Innocence.

16. Instruction quoted in opinion *held* equivalent to the rule

Instructions—*concluded.*

that the presumption of innocence is a matter of evidence, to the benefit of which accused is entitled. *Bartley v. State*, 312

Quotations from Statute.

17. An instruction quoting portions of the statute under which the prosecution was instituted, *held* not improper or misleading. *Mills v. State*..... 264

Reasonable Doubt.

18. Instructions defining reasonable doubt *held* correct. *Whitney v. State* 288

19. An instruction *held* not to deny accused the benefit of a reasonable doubt arising from the lack of evidence. *Bartley v. State* 312

20. It was not error to instruct the jury: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." *Id.*

Repetitions.

21. An instruction may be refused where its substance has already been given. *Whitney v. State*..... 288

22. It is not error to refuse instructions the substance of which has already been given. *Carrall v. State*..... 432

Insurance.

1. Where there was evidence which showed that the property had been totally destroyed and that its value before such destruction was of a certain amount, the jury was justified in accepting this testimony as the basis for a recovery by the plaintiff, notwithstanding the fact that there was evidence contradictory of each of these propositions. *Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co*..... 123
Providence-Washington Ins. Co. v. Buckstaff Bros. Mfg. Co.... 127

2. An insurer which paid, and took an assignment of, a policy on partially insured property negligently fired by a railroad company, *held* not precluded, by knowledge of an action in which said company permitted insured to recover judgment for the remainder of the loss, from afterward maintaining suit against said company for the amount of insurance so paid. *Omaha & R. V. R. Co. v. Granite State Fire Ins. Co*..... 514

3. An insurer denying in its answer that it contracted for the issuance of a policy in any form cannot introduce in evidence a blank policy in usual form to show existence and breach of certain conditions. *Phenix Ins. Co. v. Slobodisky*.. 782

Actions.

4. A cause of action, or some part thereof, on a life insurance policy arises, within the meaning of section 55 of the Code, in the county where the insured died. *Bankers Life Ins. Co. v. Robbins* 44

Insurance—*continued.*

Agency. Authority of Agent. Compensation.

5. Section 8, chapter 16, Compiled Statutes, declaring what conduct on part of a person shall be conclusive evidence of the fact that he is the agent of a foreign insurance company, does not apply to an agent of an insurance company created under the laws of the state. *Id.*

6. The fact that a bank collects and remits to a domestic insurance company premiums due from its policy holders, but transacts, and is authorized to transact, no other business for it, is not evidence which will, of itself, sustain a finding that such bank is the agent of such company within the meaning of section 74 of the Code relating to service of summons on an agent. *Id.* 45

7. Construction of a contract providing for compensation of an insurance agent. *Bankers Life Ins. Co. v. Stephens* 660

8. Whether an agent had authority to waive payment of premium in cash and extend credit therefor is a question of fact. *Slobodisky v. Phenix Ins. Co.* 816

9. Authority of an agent to waive payment of premium in cash and extend credit therefor may be inferred from the fact that he is authorized to make contracts of insurance, fill out and deliver policies, receive and receipt for premiums, and make settlements with his principal for premiums collected. *Id.*

Proofs of Loss. Realty and Personalty.

10. The general allegation in a petition that certain insured property, otherwise fully described, was real property, does not require that the insured, in making proofs of loss in an action on a policy, should show that the property was real property and totally destroyed and thereupon rely upon the provisions of the valued policy law; but he may show the value as it was just before the fire, and its value just after, as affording data for the assessment of his damages, without attempting to classify the property as real or personal. *Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.* 123
Providence-Washington Ins. Co. v. Buckstaff Bros. Mfg. Co. 127

Attorneys' Fees.

11. One making a demand for an attorney's fee in an action on a policy of insurance should insert it in the petition and present it to the court. *Hartford Fire Ins. Co. v. Corey* 209

12. In an action on a policy plaintiff's written demand for allowance of an attorney's fee, at the time of rendition of judgment, may be treated as an amendment of the prayer of the petition. *Id.*

Delivery of Policy.

13. Evidence *held* sufficient to show a waiver of a condition precedent with respect to the delivery of a policy, the existence

Insurance—*concluded.*

of such condition not having been communicated to assured. *Life Ins. Clearing Co. v. Altschuler* 481

Directing Verdict.

14. In a suit on a policy the action of the court in withdrawing from the jury the defense that the house was vacant, in violation of the policy, was *held* erroneous. *State Ins. Co. v. Hunt* 603

Insurable Interest.

15. One may still have an insurable interest in realty sold at a judicial sale which has not been confirmed. *Slobodisky v. Phenix Ins. Co.* 816

16. Facts stated in opinion *held* to justify the presumption that the company insured plaintiff's interest in the property. *Phenix Ins. Co. v. Fuller* 811
Milwaukee Mechanics Fire Ins. Co. v. Fuller 815
Slobodisky v. Phenix Ins. Co. 816

Occupancy.

17. The fact that the property, without insurer's knowledge, was unoccupied when the risk was taken constitutes no defense to an action on the policy. *Slobodisky v. Phenix Ins. Co.* 816

18. The fact that an insured building is described in the policy as a dwelling-house is not a representation of insured that the house is occupied. *Id.*

Title to Property.

19. Under facts stated in opinion *held* that insurer cannot escape liability because insured was not invested with an absolute and unincumbered title to the insured property. *Phenix Ins. Co. v. Fuller* 812
Milwaukee Mechanics Fire Ins. Co. v. Fuller 815
Slobodisky v. Phenix Ins. Co. 816

Fees Payable to State.

20. Section 32, chapter 43, Compiled Statutes, was, by the constitution of 1875, modified so as to require insurance companies to pay in advance into the state treasury fees for services performed for them by the auditor of state, and to prohibit the latter from receiving such fees. *Moore v. State,* 831

Interest. See USURY.

1. Interest is allowable on trust funds withheld by the receiver of an insolvent bank. *Higgins v. Hayden* 61

2. Where an instrument provides for interest at a lawful rate from date until maturity, and for a higher lawful rate thereafter, the latter provision is not in the nature of a penalty, but is enforceable in an action on the contract. *Crapo v. Hefner* 251

Internal Improvements. See MUNICIPAL CORPORATIONS, 1, 2.

Interstate Expositions. See TAXATION, 7, 8.

Intoxicating Liquors.

1. In prosecuting one for keeping intoxicating liquors for unlawful sale his possession of such liquors is presumptive evidence of guilt, in the district court, as well as before the examining magistrate. *Durfee v. State* 215
2. The council of a city of the second class having less than 5,000 inhabitants, when authorized by ordinance, may entertain a complaint against a saloon-keeper and, for proper cause, revoke his license, though he has not been convicted of a violation of the law relating to the sale of liquors. *Miles v. State* 305
3. A licensed saloon-keeper and the sureties upon his bond are liable for loss of support sustained by the widow and children of one whose death was contributed to by the drinking of intoxicating liquors furnished by the saloon-keeper. *Schick v. Sanders*..... 664
4. The fact that defendant was a licensed saloon-keeper may be shown by the proceedings of the city council and the license records, the production of the license issued not being essential. *Id.*
5. In a suit against a saloon-keeper for damages, evidence *held* to sustain a finding that plaintiff's husband was killed while under the influence of liquor sold by defendant, and that the latter was a licensed saloon-keeper at the time of the sale. *Id.*
6. Where a druggist charged with keeping beer for unlawful sale introduced evidence that he did not keep beer and that bottles found in his possession by the sheriff contained a non-intoxicating tonic, a search-warrant stating informer's belief that defendant kept beer and the return of the sheriff that he found bottles of beer in defendant's possession are inadmissible as independent evidence. *Nelson v. State*..... 790

Joinder. See NEW TRIAL, 3. PARTIES, 1. VENDOR AND VENDEE, 3.

Journal Entries. See EXECUTORS AND ADMINISTRATORS, 2. REVIEW, 58.

Judgments. See COURTS, 3, 4. DIVORCE. EXECUTORS AND ADMINISTRATORS, 1. HUSBAND AND WIFE, 9. MECHANICS' LIENS, 2. RECORDS.

Proceedings to Vacate.

1. Enforcement of a judgment by default, which is void for want of jurisdiction, should not be restrained by injunction on application of defendant unless he pleads and proves that he has a meritorious defense, has no adequate remedy at law, and was not negligent. *Bankers Life Ins. Co. v. Robbins* 45
2. In an action to restrain the enforcement of a void judgment, the remedies at law available to the party assailing the judgment, the adequacy of such remedies, and whether he was negligent, are discussed in the opinion. *Id.*

Judgments—*concluded.*

3. Where judgment was rendered in the county court, transcript filed in the district court, and lands of defendant seized on execution before he knew of the suit, to which he has a good defense, injunction is the proper remedy. *Radzuweit v. Watkins* 413
4. A court of equity in granting relief against judgments is not restricted to cases where the court entering the judgment was without jurisdiction. *Id.* 412
5. A judgment defendant who, without fault or negligence on his part but by accident or misfortune, was prevented from making a defense may have relief in equity, where it is shown that he has a good defense. *Id.*
6. A court of equity will not afford relief against a judgment or decree obtained against a party through his attorney's negligence. *Funk v. Kansas Mfg. Co* 450
7. Evidence *held* insufficient to support a decision vacating a former decree in another action between the same parties. *Id.*

Sufficiency of Evidence.

8. Judgment based upon a finding without sufficient evidence to sustain it is erroneous, but not void. *Lubker v. Grand Detour Plow Co* 111

Release of Lien.

9. Decree for defendant *held* sustained by the evidence in an action to require him to execute an agreement to release certain lands from the lien of a judgment. *Halmes v. Dovey,* 254

Deficiency Judgment.

10. Deficiency judgment *held* properly denied. *Aultman v. Bishop* 545

Correction of Entry.

11. Where a judgment was rendered but not journalized, the court any time afterward, in a proper proceeding and upon a proper showing, may render such judgment *nunc pro tunc. Gund v. Horrigan* 794

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COURTS. EXECUTORS AND ADMINISTRATORS, 10. MUNICIPAL CORPORATIONS, 5. REVIEW, 33.

Jury.

Examination of Jurors.

1. In examining a juror to ascertain whether a ground for challenge for cause exists, what questions may be asked, or what scope the examination may take, rests in the discretion of the trial court, and its rulings will not be disturbed unless there has been an abuse of discretion prejudicial to the party complaining. *Van Skike v. Potter* 29
2. A party has a right to examine a juror for the purpose of ascertaining whether a ground for challenge exists. *Id.*

Jury—*concluded.*

3. In the examination of jurors refusal of the court to require them to state whether they were members of a church or secret society *held* not an abuse of discretion. *Id.*..... 28

4. Examination of juror *held* to justify the court in overruling a challenge based on the ground of bias and prejudice. *Id.*. 29

5. *Voir dire* examination of jurors *held* not a part of the trial of the cause. *Durfee v. State*..... 214

Submission of Question.

6. A district court sitting in equity may submit to a jury any question of fact in the case. *Alter v. Bank of Stockham*..... 223

Ruling on Challenge.

7. Error cannot be predicated upon the overruling of a challenge to a juror for cause, where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Bartley v. State*..... 311

Additional Jurors.

8. Where a crime is committed and an information filed during a term of court for which no panel of jurors has been provided, the court may order jurors to be summoned under section 664 of the Code. *Carrall v. State*..... 431

9. Section 664 of the Code in regard to summoning jurors is broad enough to cover all reasons for which, at any term of court, there is no panel present for trial of causes. *Id.*

10. The provisions of section 664 of the Code in regard to summoning jurors is applicable to criminal causes. *Id.*

Laches. See BILL OF EXCEPTIONS, 3. EMINENT DOMAIN, 9. PLEADING, 14, 15.

Landlord and Tenant.

The attornment of a tenant to a stranger is void and does not affect the possessory rights of the landlord. *Perkins v. Potts*, 444

Larceny. See EMBEZZLEMENT. STATUTES, 7.

Evidence *held* sufficient to sustain a conviction. *Carrall v. State*, 433

Levy. See EXECUTIONS, 22-24.

License. See INTOXICATING LIQUORS, 2.

Liens. See ANIMALS. DIVORCE. MECHANICS' LIENS. TAXATION. VENDOR AND VENDEE, 4.

Limitation of Actions. See ADVERSE POSSESSION. EMINENT DOMAIN, 9. MECHANICS' LIENS, 4, 5. STATUTES, 5.

1. Where injury to crops and lands is caused by the negligent construction of a railway embankment, the cause of action for damages accrues at the date of the injury and not at the date of the negligent construction of the embankment. *Chicago, B. & Q. R. Co. v. Emmert*..... 237

2. It is ground for demurrer that an action is barred, only

Limitation of Actions—*concluded.*
where it affirmatively so appears on the face of the petition. *Best v. Zutavern* 605

3. An infant is not obliged to postpone until he reaches his majority proceedings to vacate erroneous orders against him. *Martin v. Long*..... 694

Lis Pendens. See IMPROVEMENTS.

Lord Campbell's Act. See DEATH BY WRONGFUL ACT.

Lost Instruments.
Where a note payable to order, but neither indorsed nor transferred, is lost before maturity, the execution of an indemnity bond is not essential to plaintiff's recovery in a suit on the note. *Palmer v. Carpenter*..... 394

Malpractice. See PHYSICIANS AND SURGEONS.

Mandamus.
1. Mandamus will not lie to review the revocation of a liquor license by a city council, where it has not exceeded its jurisdiction. *Miles v. State*..... 305
2. One whose claim against a county has been duly allowed by the county board may compel the issuance of a warrant for its payment. *State v. Board of County Com'rs*..... 767
3. The discretion and action of a county board in levying taxes to the constitutional limit should not be controlled by the court. *State v. Sheldon*..... 365

Married Women. See CRIMINAL LAW, 8, 9. HUSBAND AND WIFE.

Master Commissioners. See EXECUTIONS, 16-20.

Maxims.
Caveat emptor applies to an administrator's sale. *Motley v. Motley* 375

Mechanics' Liens. See BONDS, 4-6.
1. Where two contractors furnish labor and material under separate contracts, and one of them files a claim for a lien and brings a foreclosure suit, the other contractor is a necessary party. *Wakefield v. Van Dorn*..... 23
2. Where two contractors furnish labor and material under separate contracts, and one of them files a claim for a lien and brings a foreclosure suit without making the other contractor a party, a decree rendered in the case is a nullity as to the latter who may maintain a suit to foreclose his own lien. *Id.*
3. Where two contractors furnish labor and material under separate contracts, and one of them files a claim for a lien and brings a foreclosure suit without making the other contractor a party, the latter's knowledge, at the time of filing his claim, of the pendency of the suit does not estop

Mechanics' Liens—*concluded.*
him from maintaining an action to foreclose his own lien. *Id.*

4. Under an agreement requiring a contractor to deliver machinery free on board of cars at a certain place for a stipulated sum, it is furnished when delivered on the cars pursuant to contract, and a claim for a lien must be filed within four months from that time. *Congdon v. Kendall*..... 282

5. By gratuitously supplying new articles instead of defective ones previously furnished, a contractor cannot extend the time for perfecting a lien. *Id.*

6. The lien of one furnishing material for the erection of a house on land in possession of a vendee under an executory contract of purchase is subordinate to the lien of a vendor who retains title to secure purchase money, except where vendor promotes the improvement or causes it to be made. *West v. Reeves* 472

Misconduct of Attorney. See REVIEW, 27.

Mistake. See CREDITORS' BILL.

Money.
Money is the standard or measure of value. *Bartley v. State*.. 363

Money in Court. See PAYMENT, 2.

Money Paid.
One purchasing property at execution sale and paying the purchase price at request of defendant, to whom the property was subsequently delivered, may recover from the latter the amount thus paid, though the execution sale was void. *Wright v. Morse*..... 3

Mortgages. See EXECUTIONS, 9-14, 16-20. HUSBAND AND WIFE, 1, 2, 9. RECEIVERS, 2.

1. After commencement of a foreclosure-suit, not prosecuted to judgment, mortgagee's deposit of debt and costs with the clerk in vacation without an order of court does not extinguish the mortgage, where the clerk embezzles the money and absconds. *Commercial Investment Co. v. Peck*.... 204

2. Evidence *held* to show delivery of a mortgage executed by a wife to secure her husband's debt, and a valid consideration therefor. *Linton v. Cooper*..... 401

3. Payment of mortgage to mortgagee's agent *held* not shown by evidence. *Thompson v. Kyner*..... 625

4. Evidence *held* insufficient to establish authority in a third person, to whom money was paid, to act for the holder of the note and mortgage. *Chandler v. Pyott*..... 786

Municipal Bonds. See MUNICIPAL CORPORATIONS, 1, 2. TAXATION, 7, 8.

Municipal Corporations. See DEDICATION. EMINENT DOMAIN, 2-5.

Bonds.

1. Where village bonds have been voted for the benefit of one agreeing to erect a mill in the village, strict performance of the contract may be required before the bonds are delivered. *George v. Cleveland*..... 716
2. Issuance of municipal bonds voted for the benefit of one who agreed to erect a mill in the city may be restrained by injunction where he united with other persons in the enterprise. *Id.*

Councilmen.

3. In cities of the second class having less than 5,000 inhabitants, councilmen must be electors. *Haywood v. Marshall*.. 220

Damages.

4. Judgment against a city for negligently causing the death of one who fell from a sidewalk affirmed. *City of Friend v. Burleigh* 674

Intoxicating Liquors.

5. The council of a city of the second class having less than 5,000 inhabitants, when authorized by ordinance, may entertain a complaint against a saloon-keeper and, for proper cause, revoke his license, though he has not been convicted of a violation of the law relating to the sale of liquors. *Miles v. State* 305

Lighting Streets.

6. Subdivision 15, section 68, article 2, chapter 13*a*, Compiled Statutes, is not a restriction upon subdivision 16, but a concurrent provision relating to another subject—the former to laying mains on the streets; the latter to lighting the streets. *Sharp v. City of South Omaha*..... 700
7. It is within the power of cities of the first class having less than 25,000 inhabitants to grant the right to a gas company to lay and maintain its pipes and mains under the streets and other highways of the city for the purpose of supplying inhabitants with gas, and to regulate the charge therefor; and the authority to grant such a franchise is not restricted to persons or companies authorized to erect works within the city for the manufacture of gas, nor need such franchise be limited to the period of five years. *Id.*

Taxation. Annexation of Territory.

8. Void special assessments to pay for improving streets cannot be enforced solely on the ground of benefits by the improvement to the owners of abutting land. *Harmon v. City of Omaha* 164
9. A city cannot levy a tax on property the situs of which is not within the corporate limits. *Chicago, B. & Q. R. Co. v. City of Nebraska City*..... 454
10. An ordinance of the city of Nebraska City *held* ineffectual to annex adjacent territory or to extend the territorial limits of the municipality. *Id*..... 453

Names. See INDICTMENT AND INFORMATION, 14, 15.
The names "Mrs. Fred Steinburg" and "Mrs. Fred Steenburg" are *idem sonans*. *Carrall v. State*..... 431

Naturalization. See ALIENS.

Negligence. See DEATH BY WRONGFUL ACT. INSURANCE, 2. RAILROAD COMPANIES, 1.
1. A person is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. *Downs v. Kitchen*..... 423
2. The owner of realty has no right to construct a building which, by reason of defects or weakness, is liable to fall and injure adjoining owners or the public. *Id.*
3. The owner of a building, a wall of which fell and killed a fireman who was climbing a ladder supported by the wall, *held*, under the evidence, not liable on the theory that the building was negligently constructed and dangerous. *Id.*
4. Where evidence on an issue as to negligence is uncontradicted and reasonable men must draw the same inference therefrom, the question is one of law for the court. *Elliott v. Carter White-Lead Co*..... 458
5. The doctrine of comparative negligence is not in force. *City of Friend v. Burleigh*..... 674
6. A traveler on a highway who crosses a railroad track must exercise such care as would be exercised by a prudent man under the circumstances. *Chicago, B. & Q. R. Co. v. Pollard*.. 730
7. Issues as to negligence and contributory negligence, where different minds may reasonably draw different conclusions from the evidence, are for the jury. *Id.*

Negotiable Instruments. See BANKS AND BANKING. HUSBAND AND WIFE, 7-9. INTEREST. LOST INSTRUMENTS. PARTNERSHIP. PRINCIPAL AND AGENT, 4. USURY.
1. In an action by the purchaser of a note sold to him by the receiver of an insolvent bank under an order of court directing such sale, the fact that the entire capital stock of such bank was held by its cashier at the time of the making of such note, or thereafter, constitutes no defense. *Shabata v. Johnston*..... 13
2. Where, upon a sufficient consideration moving to himself, a party has given his promissory note to the cashier of a bank to take up the indebtedness of another person due to said bank, such maker will be held liable to one who subsequently purchases said note, even after maturity. *Id.*
3. The question whether title passes to a negotiable instrument delivered to a bank under a restrictive but ambiguous indorsement, without an express contract, but in pursuance of an established usage, is one of fact rather than law, and depends on the intent of the parties. *United States Nat. Bank v. Geer*..... 67

Negotiable Instruments—*concluded.*

4. In an action on a note where defendants pleaded that they were released upon surrendering the property for which the note was given, evidence *held* sufficient to sustain a finding for plaintiff. *Sickel v. Bishop*..... 141

5. Warrants drawn by the auditor of public accounts upon the state treasury are not negotiable instruments. *Bartley v. State* 311

6. In a petition on a note an allegation that the owner indorsed and delivered the note to plaintiff *held* equivalent to an express averment that the owner thereby transferred the title to indorsee. *Myers v. Farmers State Bank*..... 824

New Trial. See REVIEW, 49-53.

1. A court of equity may grant a new trial, in a proper case, where a party has been deprived of a bill of exceptions through inability of the stenographic reporter to furnish a transcript of the testimony. *Mathews v. Mulford*..... 252

2. To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear that, by reasonable diligence, he could not have discovered and produced such evidence at the trial. *Mills v. State*..... 264

3. A motion for a new trial should be overruled as to all parties joining therein where, as to any one of them, it is not available. *Cortelyou v. McCarthy*..... 479

4. Objections to instructions must be specifically and separately assigned in a motion for a new trial. *Mack v. Parkieser* 528

5. Evidence on which a new trial was granted *held* insufficient. *Gibbons v. Kyner* 626

6. It is proper to dismiss an appeal from an order denying relief in a suit for a new trial of another case wherein the decree was reversed on appeal. *Horbach v. Troup*..... 811

Next Friend. See PARTIES, 2, 3.

Notary Public. See AFFIDAVITS.

Notes. See NEGOTIABLE INSTRUMENTS.

Notice. See ANIMALS, 3. CORPORATIONS, 4. EXECUTORS AND ADMINISTRATORS, 5. TAXATION, 5. VENDOR AND VENDEE, 7.

Oaths. See AFFIDAVITS. EXECUTIONS, 17-20.

A clerk of court cannot make an affidavit before his own deputy. *Horkey v. Kendall*..... 527

Objections. See INDICTMENT AND INFORMATION, 1. TRIAL, 1.

Offer of Proof. See TRIAL, 7.

Office and Officers. See ALIENS. COUNTY TREASURER. PAYMENT, 2.

1. To entitle one to be inducted into office previous approval and filing of his official bond are necessary, but the rule does

Office and Officers—*concluded.*

not apply to an action against an officer for breach of the conditions of his official bond. *Holt County v. Scott*..... 177

2. Statutory provisions for approval of official bonds are for the benefit of the public, and not directly for the benefit of the officers and their sureties. *Id.*

3. One who holds an office and performs the duties and receives the fees and emoluments thereof by virtue of an election or an appointment, or under color of right, is a *de facto* officer. *Id.*

4. Approval of an official bond does not of itself constitute or establish delivery and acceptance of the bond. *Id*..... 178

5. One who served his entire term cannot be heard to urge as a defense to the charge of embezzlement of public moneys that when the embezzlement took place he was not an officer *de jure*. *Bartley v. State*..... 311

6. Section 24, article 5, of the constitution prohibits all executive officers, except the state treasurer, from receiving fees for services, and requires such fees to be paid in advance into the state treasury. *Moore v. State*..... 831

7. The auditor of public accounts is not charged with the collection, receipt, safe-keeping, transfer, or disbursement of any part of the public moneys. *Id.*

Official Bonds. See BONDS, 1.

Opening and Closing. See TRIAL, 9.

Opinion of Court. See REVIEW, 59.

Parent and Child.

Under articles of adoption providing that if the infant should remain with her foster parents until her majority she should receive $500, and bestowing on her "equal rights and privileges of children born in lawful wedlock," *held* that on the death of the foster parents intestate, before the child reached her majority, she was entitled to inherit as if their own. *Martin v. Long*..... 694

Parol Evidence. See EVIDENCE, 29.

Parties. See ACTIONS, 2, 4. BONDS, 2, 3. CHATTEL MORTGAGES, 3. EXECUTORS AND ADMINISTRATORS, 1. INDICTMENT AND INFORMATION, 2. MECHANICS' LIENS, 1, 2. NEW TRIAL, 3. SUBROGATION, 3. VENDOR AND VENDEE, 3.

1. A defect of parties plaintiff appearing on the face of the petition must be objected to by demurrer on that ground, or it will be waived. *Castile v. Ford*..... 507

2. One who is insane, but who has not been so adjudged, and who has no guardian, may sue by next friend. *Wager v. Wagoner*..... 511

Parties—*concluded.*

3. An infant's suit instituted by a next friend may be discontinued by the court where it is against plaintiff's interest to proceed further, or another person may be substituted as next friend. *Id.* 512

Partnership.

A note executed by a member of a firm in the firm name *held* to be the obligation of the partnership. *Peck v. Tingley*..... 171

Payment. See CORPORATIONS, 9. COUNTY TREASURER. SUBROGATION, 3. VENDOR AND VENDEE, 1.

1. Where a debtor remits money to his creditor without a request or instruction on what particular debt to apply the same, the creditor may apply the money upon any debt. *Lenzen v. Miller* 137
2. After commencement of a foreclosure-suit not prosecuted to judgment, mortgagee's deposit of debt and costs with the clerk in vacation without an order of court does not extinguish the mortgage, where the clerk embezzles the money and absconds. *Commercial Investment Co. v. Peck*.... 204
3. The giving of credit as a deposit for the amount of a check, by the bank upon which it is drawn, is, in contemplation of law, a payment of the check in money. *Bartley v. State*.... 311
4. Payment of mortgage to mortgagee's agent *held* not shown by evidence. *Thompson v. Kyner*..... 625
5. Evidence *held* insufficient to sustain a plea of payment. *State v. Board of County Com'rs*..... 763
6. Evidence *held* insufficient to establish authority in a third person, to whom money was paid, to act for the holder of a note and mortgage. *Chandler v. Pyott*..... 786

Penalty. See INTEREST, 2.

Personal Injuries. See RAILROAD COMPANIES, 1.

Petition in Error. See REVIEW.

Physicians and Surgeons.

1. The law does not require of a surgeon absolute accuracy either in his practice or in his judgment. *Van Skike v. Potter*, 28
2. The law does not hold a surgeon to the standard of infallibility, nor require of him the utmost degree of care or skill. *Id.*
3. The law requires that a surgeon, in the practice of his vocation, shall exercise that degree of knowledge and skill ordinarily possessed by members of his profession. *Id.*
4. In an action against surgeons for malpractice, evidence *held* to sustain findings that defendants did not contract with plaintiff to effect a permanent cure; did not contract to visit and treat him until he was cured; that defendants

Physicians and Surgeons—*concluded.*

were not guilty of negligence in the treatment given the plaintiff nor in adopting and pursuing the method of treatment followed by them. *Id.*

5. Evidence that surgeons informed their patient that they would not return unless requested to do so, that they received no such request, and did not return, *held* relevant under the pleadings in an action for malpractice. *Id.*

6. In a suit for damages against a surgeon for alleged negligence in operating upon and treating plaintiff's fractured kneecap, text-books on surgery, though standard authority, cannot be read to the jury as independent evidence. *Id.*.... 29

Pleading. See ATTACHMENT, 4, 6. ATTORNEY AND CLIENT, 2. BONDS, 1, 3. CORPORATIONS, 8. EMINENT DOMAIN, 3. LIMITATION OF ACTIONS, 2. NEGOTIABLE INSTRUMENTS, 6. PARTIES, 1. REVIEW, 45.

1. A petition seeking to charge a trust on property in the hands of the receiver of an insolvent bank may allege that the bank obtained the property as bailee, and at the same time charge that it was obtained by fraudulent concealment of insolvency, and relief may be granted on the latter ground, though the former be not proved. *Higgins v. Hayden* 61

2. One pleading facts sufficient to constitute a cause of action may have proper relief, whether the case is denominated an action at law or a suit in equity. *Alter v. Bank of Stockham*, 225

3. A pleader should state the facts constituting his cause of action or defense. *Holt County Bank v. Holt County*..... 827

Amendments.

4. It is within the discretion of the trial court to allow an amendment of a petition in the course of a trial where such amendment does not change the original cause of action stated by the plaintiff. *Undeland v. Stanfield*..... 120

5. In an action on a policy of insurance, plaintiff's written demand for allowance of an attorney's fee, at the time of rendition of judgment, may be treated as an amendment of the prayer of the petition. *Hartford Fire Ins. Co. v. Corey*.. 209

Answer.

6. Statements in an answer *held* to import an admission of delivery of material for which suit was brought. *Rohman v. Gaiser* 474

Copy of Instrument.

7. In a suit upon a written obligation a copy thereof should be attached to the petition, but this requirement is satisfied where the pleader copies into his pleading the entire instrument upon which his cause of action is based. *Holt County Bank v. Holt County*..... 827

8. A petition does not fail to state a cause of action simply

Pleading—*concluded.*

because the written obligation upon which it is based is copied into the pleading instead of being attached thereto as an exhibit. *Id.* 828

Demurrer.

9. The filing of a demurrer to a petition is a waiver of defendant's right to insist that allegations of the petition should be more definite and certain. *Van Etten v. Medland* 569

Petition. Sufficiency.

10. Petition *held* to state a cause of action on a supersedeas bond. *Cortelyou v. McCarthy* 479

11. In suing on a supersedeas bond it was *held* unnecessary to allege that an execution had been issued and returned "*nulla bona*." *Id.*

12. In an action for the wrongful seizure and detention of exempt property, an allegation of a withholding from the "—— day of December, 1892," to the "—— day of January, 1893," *held* sufficient as against a general objection on the trial. *Castile v. Ford* 507

13. Petition *held* to state a cause of action for death by wrongful act. *City of Friend v. Burleigh* 674

Reply.

14. A defendant who, by leave of court, has been permitted to answer after the time fixed therefor by statute, is in no position to object to the case being placed on trial on the ground that the plaintiff has not replied, no order in reference to a reply having been made by the court. *Hartford Fire Ins. Co. v. Corey* 209

15. The granting of permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court. *Id.*

Special Plea.

16. Special damages to be recovered must be specially pleaded. *Chicago, B. & Q. R. Co. v. Emmert* 237

17. A superfluous special plea does not render irrelevant to a general denial matter which would have been relevant in absence of the special plea. *Horkey v. Kendall* 528

Variance Between Pleading and Proof.

18. Immaterial variance between pleading and proof is not ground for reversal of a judgment. *Lubker v. Grand Detour Plow Co.* 111

19. Plaintiff cannot recover where there is a material variance between his allegations and proof. *Elliott v. Carter White-Lead Co.* 458

Practice. See CRIMINAL LAW, 10.

Preferred Claims. See BANKS AND BANKING, 7.

Preliminary Examination. See INDICTMENT AND INFORMATION, 4.

Presumptions. See EVIDENCE, 30, 31.

Principal and Agent. See BANKS AND BANKING, 7. CORPORATIONS, 4. FACTORS AND BROKERS. HUSBAND AND WIFE, 3. INSURANCE, 9.

1. Whether the relation of principal and agent exists between two parties is generally a question of fact, and, while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom. *Bankers Life Ins. Co. v. Robbins*, 44
2. After commencement of a foreclosure-suit not prosecuted to judgment, a clerk who receives the debt in vacation without an order of court acts in his individual capacity as agent of mortgagee. *Commercial Investment Co. v. Peck*..... 204
3. Construction of a contract providing for compensation of an insurance agent. *Bankers Life Ins. Co. v. Stephens*..... 660
4. One paying money to another to be applied on a note not in possession of the latter assumes the burden of showing his authority to receive payment. *Chandler v. Pyott*..... 786

Principal and Surety. See BONDS. HUSBAND AND WIFE, 9. INTOXICATING LIQUORS, 3.

1. Sureties on bond of a county treasurer *held* not released by the action of a county board in requiring additional sureties. *Holt County v. Scott*..... 176
2. Where the bond of an officer was executed and delivered within the time fixed by statute, though not approved, or not approved until a later date, and he obtained possession of the office and received the fees and emoluments thereof, his sureties cannot escape liability because the bond was not approved, or not approved within the statutory time. *Id.* 177
3. Failure to approve an official bond within the time prescribed by law *held* not a defense for the sureties in an action for a breach of the conditions of the bond. *Id.*
4. Where a county treasurer who was re-elected took the oath of office, filed within the time prescribed by law a bond which was not approved until expiration of the time fixed by statute for such approval, and continued in office, he was an officer *de facto*, and his sureties were estopped from denying that he was in possession of the office. *Id.*
5. The sureties on plaintiff's replevin bond are not liable for the satisfaction of a judgment entered in favor of defendant for the value of the property replevied, and not in the alternative form for a return of the property or its value if a return cannot be had. *Field v. Lumbard*..... 397
6. In a contract between the state and a person contracting with it for the erection of a public building, his sureties may be held liable under a provision imposing on the con-

Principal and Surety—*concluded.*
tractor the duty of paying for materials used in the building. *Rohman v. Gaiser*..... 474
7. Failure of an indorsee of a note secured by chattel mortgage to seize the chattels *held* not to discharge the sureties on the note though they requested him to do so. *Myers v. Farmers State Bank* 824

Proceedings in Error. See REVIEW.

Process. See EXECUTIONS. INSURANCE, 6.

Prosecuting Attorney. See COUNTY ATTORNEY.

Public Funds. See EMBEZZLEMENT.

Questions for Court. See CONTRACTS, 3. NEGLIGENCE, 4.

Questions for Jury. See EMINENT DOMAIN, 4. EXEMPTION, 3. NEGLIGENCE, 7.

Questions of Fact. See HUSBAND AND WIFE, 6.

Quieting Title. See IMPROVEMENTS.
In a suit to quiet title, a sheriff's deed to realty sold on execution should not be canceled because the purchaser was one of the appraisers, fraud not being charged nor offer to reimburse made. *Best v. Zutavern*..... 605

Quitclaim. See ESTOPPEL, 2-5.

Railroad Companies. See DAMAGES, 2. EMINENT DOMAIN, 6-9. INSURANCE, 2.
1. In an action against a railroad company for injuring an infant at a highway-crossing it is error to instruct the jury that the question whether highway-signals were given is immaterial in case they find the infant, by reason of tender age, could not understand the meaning of such signals. *Palmer v. Missouri P. R. Co*..... 611
2. Persons to whom negligence may be imputed are bound to take notice that a railroad-crossing is a place of danger. *Chicago, B. & Q. R. Co. v. Pollard*..... 730
3. In an action against a railroad company for injuries inflicted at a highway-crossing evidence *held* not to establish, as a matter of legal imputation, contributory negligence on part of plaintiff. *Id.*
4. Discussion of instructions relating to evidence and negligence, in a suit against a railroad company for injuries inflicted at a highway-crossing. *Id.*

Real Estate. See ESTOPPEL, 2-5. IMPROVEMENTS.
Possession of land is notice to the world of possessor's ownership or interest. *Best v. Zutavern*..... 604

Real Estate Agents. See FACTORS AND BROKERS.

Reasonable Doubt. See INSTRUCTIONS, 18-20.
Instructions *held* not erroneous. *Carrall v. State*..... 432

Receipt. See EVIDENCE, 15.

Receivers. See CORPORATIONS, 6, 7.

1. An application for the appointment of a receiver is addressed to the sound discretion of the court. *Provident Life & Trust Co. v. Keniston* 86
2. Where it appears that a greater injury would ensue from the appointment of a receiver than from permitting the possession of the property to remain undisturbed, a receiver will not be appointed. *Id.*
3. Mere existence of ill will between joint owners of property is not sufficient cause for appointing a receiver. *Lamaster v. Elliott* 424
4. Evidence *held* insufficient to justify the appointment of a receiver. *Id.*

Receiver's Sale. See NEGOTIABLE INSTRUMENTS, 1.

Receiving Stolen Goods. See STATUTES, 7.

Recitals. See ESTOPPEL, 2-5.

Records. See REVIEW, 33, 60.

1. A court of record has the inherent power to correct its own records, even after appeal, so that such amended record may show correctly the history of the proceedings before the appeal was taken. *Andresen v. Lederer* 128
   Andresen v. Carson 136
2. A trial court, after an appeal has been perfected, has no power to so correct its records that, in fact, a modification of the judgment appealed from shall be effected. *Id.*

Remittitur.

Excessive verdict cured by the filing of a remittitur. *Lenzen v. Miller* 137

Rents and Profits. See IMPROVEMENTS.

Replevin. See CHATTEL MORTGAGES, 1.

1. Rulings on evidence *held* not prejudicially erroneous. *Otis v. Claussen* 100
2. The sureties on a replevin bond are not liable for the satisfaction of a judgment entered in favor of defendant for the value of the property, and not in the alternative for a return or its value if a return cannot be had. *Field v. Lumbard* 397
3. An officer from whom goods held under attachments have been replevied, may prove the attachments under a general denial; and though he adds to the general denial a special plea of one attachment, he may prove other attachments. *Horkey v. Kendall* 522

Rescission. See BANKS AND BANKING, 5. SALES, 2.

Res Judicata.

1. A county board in passing on claims against the county acts judicially, and its judgment is final unless reversed on appeal. *Trites v. Hitchcock County* 79
2. A county board, in examining the reports and adjusting the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently brought to recover moneys unlawfully withheld by the officer. *Id.*
3. In an action on the official bond of a county treasurer, answer *held* to plead an adjudication against the county by the allowance of a claim by the county board in its judicial capacity. *Id.*

Review. See INSTRUCTIONS. REMITTITUR.

1. Error cannot be predicated upon the overruling of a demurrer to a count subsequently eliminated by *nolle prosequi*. *Bartley v. State* 310
2. Error cannot be predicated upon the overruling of a challenge to a juror for cause, where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Id.* 311

Amendment of Record.

3. A court of record has the inherent power to correct its own records, even after an appeal, so that such amended record may show correctly the history of the proceedings before the appeal was taken. *Andresen v. Lederer* 128
Andresen v. Carson 136
4. A trial court, after an appeal has been perfected, has no power to so correct its records that, in fact, a modification of the judgment appealed from shall be effected. *Id.*

Appeal and Error.

5. The method of reviewing judgments of the district court in proceedings by railroad companies in exercising the right of eminent domain is by petition in error and not by appeal. *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co* 246
6. In an equity case an appeal under section 675 of the Code relating to appeals in equity does not present for review the correctness of a ruling of the trial court in excluding evidence, but such a ruling may be presented under section 584 *et seq.* of the Code providing for review by proceedings in error. *Ainsworth v. Taylor* 484

Assignments of Error.

7. Alleged errors must be separately assigned. *Brinckle v. Stitts* 10
8. A joint assignment of errors, in a petition in error made by two or more persons, which is not good as to all who join therein must be overruled as to all. *Shabata v. Johnston* 12
9. Under an assignment that the verdict is not supported by

Review—*continued.*

sufficient evidence, the appellate court cannot deduct from the jury's award in favor of plaintiff the amount of a set-off not interposed as a defense. *Sickel v. Bishop*..... 141

10. Exception to and assignment of error against the admission in evidence of a group of documents offered together are not waived by confining the discussion in the briefs to a single document, the objection urged being good against all. *Sloan v. Fist*..... 691

11. 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. *Brinckle v. Stitts*..... 10
Otis v. Claussen 100

12. Errors in giving or in refusing to give instructions should be separately assigned in the motion for a new trial and in the petition in error. *Peck v. Tingley*..... 171
Karnes v. Dovey 725
Langhorst v. Coon 765

13. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled. *Hoefer v. Langhorst*..... 365
Karnes v. Dovey 725

14. Instructions not assailed in the motion for a new trial will be disregarded in the appellate court. *Farwell v. Chicago, R. I. & P. R. Co*..... 706

15. An assignment of error against an entire charge is unavailing where one of the instructions is faultless. *Langhorst v. Coon* 765

Bill of Exceptions.

16. Assignments of error requiring an examination of a bill of exceptions will be disregarded where the bill is not authenticated according to statute. *Harris v. Barton*..... 568

17. A question of fact determined by a county board cannot be reviewed on error in absence of a statute providing a method for preserving the evidence. *Keens v. Buffalo County*, 1

18. Alleged error in excluding from the jury a book of original entries cannot be considered in the supreme court where the book is not in the bill of exceptions. *Brinckle v. Stitts*.. 11

19. Affidavits used in the court below on the hearing of a motion for continuance are not available on review, unless embodied in a bill of exceptions. *Hartford Fire Ins. Co. v. Corey* 209

20. An order overruling a motion for appointment of counsel to defend a prisoner cannot be reviewed in the supreme court where the evidence on the hearing was not preserved by a bill of exceptions. *Durfee v. State*..... 214

21. A bill of exceptions not authenticated by the clerk of the

Review—*continued.*

district court will be disregarded. *Shaffer v. Vincent*..... 449
Harris v. Barton 568

22. The judgment below may be affirmed where all the questions presented are based on an unauthenticated bill of exceptions. *Olsen v. Jacobson*..... 621

Costs.

23. Taxation of certain costs may be reviewed without a motion to retax where the court determined that a party was liable therefor and rendered judgment accordingly. *Hartford Fire Ins. Co. v. Corey*..... 209

24. Where the question as to liability for costs was directly considered by the trial court, the party against whom they were taxed may have the ruling reviewed without having filed a motion to retax. *Lamaster v. Elliott*..... 424

Estoppel.

25. A defendant signing and verifying as plaintiff's attorney a petition averring that he owed plaintiff a certain sum and praying for judgment against himself cannot, on appeal from a decree as prayed, be relieved in the supreme court. *Troup v. Horbach* 796

Evidence.

26. A verdict or finding reached on consideration of conflicting evidence will not be disturbed on review unless clearly wrong. *Wright v. Morse*..... 3
Shabata v. Johnston 12
Chicago, B. & Q. R. Co. v. Steear..... 96
Halmes v. Dovey 254
Langhorst v. Coon 765

27. Decision as to misconduct of attorney *held* conclusive where the evidence was conflicting. *Bartley v. State*..... 345

28. The finding of a district court upon conflicting evidence that an appraisement was not fraudulent will ordinarily be sustained. *Amoskeag Savings Bank v. Robbins*..... 776

29. Decree affirmed as being the only one which properly could be rendered under the evidence. *Sheldon v. Russell*..... 26

30. Judgment affirmed as being supported by sufficient evidence. *House v. Wren* 369

31. To lay a foundation for review an offer of proof must refer to relevant matter responsive to the question rejected. *Perkins v. Tilton* 440

32. Evidence *held* insufficient to support a decision vacating a former decree in another action between the same parties. *Funk v. Kansas Mfg. Co*..... 450

33. Where the judgment in a former suit is the only part of the record offered in evidence, it will be presumed that the court rendering the judgment had jurisdiction of the parties thereto. *Holt County Bank v. Holt County*..... 828

Review—*continued.*

34. A conviction will ordinarily be reversed where the attorney general declines to file a brief on the ground that the evidence is insufficient to sustain the judgment. *Lorenz v. State* 463

35. The judgment may be affirmed where the only objection relates to the sufficiency of the evidence and is not well taken. *Burkholder v. McKinley-Lanning Loan & Trust Co*..... 488

36. Upon a record presenting no question of law a judgment sustained by the evidence may be affirmed. *Creighton University v. Erfling* 506

37. Evidence *held* sufficient to sustain a judgment for plaintiff in an action by him as executor to recover money which had been entrusted to defendant by testatrix. *Ainsworth v. Taylor* 485

38. Evidence *held* insufficient to sustain a plea of payment. *State v. Board of County Com'rs*..... 768

Harmless Error.

39. Immaterial variance between pleading and proof is not ground for reversal. *Lubker v. Grand Detour Plow Co*..... 111

40. The conviction of a criminal should not be reversed for the giving of an erroneous instruction not prejudicial to him. *Whitney v. State* 288

41. Admission of immaterial testimony is not ground for reversal where it did not prejudice the rights of the party complaining. *Carrall v. State*..... 432

42. In a case tried to a court without a jury a judgment sustained by sufficient competent evidence should not be reversed for the erroneous admission of incompetent or immaterial evidence. *Wager v. Wagoner*..... 511

Infants.

43. An infant is not obliged to postpone until he reaches his majority proceedings to vacate erroneous orders against him. *Martin v. Long*..... 694

Issues. Questions Not Raised Below.

44. Plaintiffs in error *held* not entitled to relief under a defense not pleaded by them below. *Hart v. Mead Investment Co*.... 153

45. In a suit to recover compensation for finding a purchaser for land, an objection that evidence of ability to purchase was a variance from the pleading cannot be urged for the first time in the supreme court. *Hoefer v. Langhorst*..... 364

46. The validity of an order of a county board allowing a claim cannot be raised for the first time in the supreme court on error or appeal. *State v. Board of County Com'rs*..... 767

47. Where a trial court without jurisdiction of the subject-matter proceeds to judgment by consent of the parties, an appeal confers no jurisdiction upon the appellate court. *Anderson v. Story* 259

Review—*continued.*

Order of Reversal.

48. Where there are controverted facts which should be determined by the trial court or by a jury, the cause, upon reversal of the judgment, should be remanded for further proceedings. *Widemair v. Woolsey*..... 472

New Trial.

49. Proceedings in the trial of an equity case cannot be reviewed on error in absence of a motion for a new trial. *Storey v. Burns* 535

50. Errors in the trial or in the rendition of judgment cannot be considered on petition in error, in absence of a ruling below on the motion for a new trial. *Geneva Nat. Bank v. Donovan* 613

51. In reviewing on error a decree in equity not assailed by motion for a new trial the record will be examined no further than to ascertain whether the pleadings state a cause of action or defense and support the decree. *Storey v. Burns*.. 535

52. An exception in the trial court to an order overruling a motion for a new trial is necessary to obtain a review in the appellate court of questions properly included in the motion. *Van Etten v. Medland*..... 570

53. It is proper to dismiss an appeal from an order denying relief in a suit for a new trial of another case wherein the decree was reversed on appeal. *Horbach v. Troup*..... 811

Supersedeas.

54. Petition *held* to state a cause of action on a supersedeas bond. *Cortelyou v. McCarthy*..... 479

55. In suing on a supersedeas bond it was *held* unnecessary to allege that an execution had been issued and returned "*nulla bona.*" *Id.*

Transcript.

56. Ruling of the district court reversed in view of the fact, on the one hand, that, if the amendment reciting that the judgment was "upon agreement of parties" was tantamount to a sustantive order after appeal, it was void and should not have been considered by the district court, and if, on the other hand, it was a mere recitation of events which had occurred during the progress of the trial in the county court, the district court should not have held the appeal necessarily to have been vitiated by the amendment, as it did by dismissing the appeal because of the recitation of such amendment. *Andresen v. Lederer*..... 128
Andresen v. Carson 136

57. An order overruling a special appearance may be sustained where the affidavit upon which such appearance was based is not in the record. *Life Ins. Clearing Co. v. Altschuler*..... 482

58. Where the journal entry of the ruling on motion for a new trial is excepted from the clerk's certificate authenticating

Review—*concluded.*

the transcript, such entry must be treated as not appearing therein. *Geneva Nat. Bank v. Donovan* 613

59. In a suit tried without a jury the written opinion of the court filed with other papers, in addition to the finding and judgment, is not an essential part of a record for review. *Phenix Ins. Co. v. Fuller* 812
Milwaukee Mechanics Fire Ins. Co. v. Fuller 815

60. The judgment of the trial court must stand or fall upon the statutory record of the case—the pleadings, the finding, and judgment, and the bill of exceptions. *Id.*

Trial.

61. Error in the proceedings of a trial will not be presumed, but must affirmatively appear from an inspection of the record. *Whitney v. State* 287

62. Error cannot be predicated on proof of a fact subsequently admitted by the parties during the trial. *Id.*

63. In a case tried without a jury, where the court makes a general finding and renders judgment, the appellate court will presume that the trial court considered all the competent evidence before it and decided all material issues, though the contrary may appear from the language of a written opinion filed below in the case. *Phenix Ins. Co. v. Fuller* 812
Milwaukee Mechanics Fire Ins. Co. v. Fuller 815

Waiver of Error.

64. Error in giving an oral instruction not specially excepted to at the time on that ground is not available on review. *Elliott v. Carter White-Lead Co* 458

65. By introducing evidence defendant waives error in the overruling of his motion to direct a verdict in his favor at the close of plaintiff's testimony. *Mack v. Parkieser* 528

Witnesses.

66. Rulings of the trial court in allowing leading questions are not reviewable in absence of an abuse of discretion. *Perry v. German-American Bank* 89

67. The rule that the credibility of a witness is a matter for the determination of triers of fact does not require the supreme court to accept the statement of a witness, where it is demonstrated to be false. *Linton v. Cooper* 404

Revivor. See ACTIONS, 3.

Sales. See ATTACHMENT, 8. CHATTEL MORTGAGES, 2. FRAUDULENT CONVEYANCES. STATUTE OF FRAUDS. VENDOR AND VENDEE.

1. Evidence *held* to show a sale of a certificate of deposit, and not a bailment for collection. *United States Nat. Bank v. Geer* 68

2. The right to rescind a sale for fraud is lost if not exercised

Sales—*concluded.*

before the buyer transfers the property to an innocent purchaser for value, and the rule applies to an attempt to recover a chose in action sold to an insolvent bank in ignorance of its insolvency, as against the claims of a transferee from the bank, who has parted with value on the faith of the bank's title. *Id.*

3. Evidence *held* not to support a finding that cattle sold were falsely weighed. *Alter v. Bank of Stockham*..... 223
4. Under an agreement requiring a seller to deliver machinery free on board of cars at a certain place for a stipulated sum, it was *held* that the title to the machinery passed to the purchaser at the time it was delivered to the carrier pursuant to contract. *Congdon v. Kendall*..... 282
5. A purchaser of live stock is charged with notice of an agister's lien. *Weber v. Whetstone*..... 372
6. Statements in an answer *held* to import an admission of delivery of material for which suit was brought. *Rohman v. Gaiser* 474
7. The purchaser's execution and delivery of a mortgage shortly after receipt of the chattels amount to such an assertion of ownership as will constitute an acceptance of the goods. *Wyler v. Rothschild*..... 566

Search-Warrant. See INTOXICATING LIQUORS, 6.

Set-Off and Counter-Claim.

1. A claim on the part of defendant, which he will be entitled to set off against the claim of plaintiff, must be one upon which such defendant could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff. *Shabata v. Johnston*..... 12
2. Under an assignment that the verdict is not supported by sufficient evidence, an appellate court cannot deduct from the jury's award in favor of plaintiff the amount of a set-off not interposed as a defense. *Sickel v. Bishop*..... 141

Sheriffs and Constables. See EXECUTIONS.

Where an execution or attachment creditor sues a sheriff for the debt because of the latter's failure to seize sufficient property under the writ, the burden is on plaintiff to plead and prove that during the life of the writ the debtor had property subject to levy, which the sheriff negligently failed to seize. *Conway v. Magill*..... 370

Sheriffs' Deeds. See EXECUTIONS, 21.

Skill. See PHYSICIANS AND SURGEONS, 3.

Special Master. See EXECUTIONS, 16-20.

State. See CONTRACTS, 2.

State and State Officers. See OFFICE AND OFFICERS, 6.

State's Evidence. See CRIMINAL LAW, 6.

Statute of Frauds.

1. To take an oral contract for the sale of personalty worth over $50 out of the statute, where no part of the purchase money has been paid, delivery and acceptance of some portion of the property are necessary. *Wyler v. Rothschild*..... 566
2. Under a verbal contract of sale delivery of goods to a carrier, receipt and acceptance by the purchaser at the place of destination, and payment of the freight charges, take the contract out of the statute. *Id.*

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See MUNICIPAL CORPORATIONS, 6. TABLE, *ante*, p. lv. TAXATION, 6-9.

1. The law for depositing state and county funds in banks (Session Laws 1891, p. 347, ch. 50) did not repeal section 124 of the Criminal Code relating to the embezzlement of public money. *Whitney v. State*..... 288
2. Depository law (Session Laws 1891, p. 347, ch. 50) *held* valid. *Holt County Bank v. Holt County*..... 828
3. Special provisions in a law relating to particular subject-matter will prevail over general provisions in other statutes, so far as there is a conflict. *State v. Cornell*..... 556
4. An act complete in itself is not unconstitutional, although it may be in conflict with, or repugnant to, a prior statute not referred to nor in express terms repealed. *Bryant v. Dakota County* 755
5. Section 4, chapter 7, Session Laws of 1889, limiting to thirty days the time within which an action may be brought against a county for damages resulting from a defective highway, does not violate the constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." *Id.*
6. The amendment of section 118 of the Code (Session Laws 1887, p. 646) relating to verification of pleadings and stating that nothing in that section shall be construed to prohibit any attorney who is a notary public from swearing a client to any pleading or affidavit in any proceeding in the courts, cannot be held to apply to affidavits other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, article 3, of the constitution relating to subjects and titles of bills. *Horkey v. Kendall*..... 522
7. The act of 1875 amending certain sections of the Criminal Code, including section 116 relating to stolen goods (Session Laws 1875, p. 1), is void because it contains no provision for the repeal of the sections amended, as required by section 19, article 2, of the constitution of 1866. *Reynolds v. State*.. 761
8. An act merely amendatory of a section of a prior statute must set out the new section and, in addition, contain a

Statutes—*concluded.*

provision for the repeal of the old section sought to be amended. *Id.*

9. Section 32, chapter 43, Compiled Statutes, was, by the constitution of 1875, modified so as to require insurance companies to pay in advance into the state treasury fees for services performed for them by the auditor of state, and to prohibit the latter from receiving such fees. *Moore v. State* 831

Stenographers. See NEW TRIAL, 1.

Stipulation.

Stipulation *held* not an admission that a purchaser at a tax sale was assignor of one claiming to be owner of the tax sale certificate. *Johnson v. English*..... 530

Stock. See CORPORATIONS, 6, 7.

Stockholders. See CORPORATIONS, 3.

Street Railways. See EMINENT DOMAIN, 2-5.

Streets. See DEDICATION. MUNICIPAL CORPORATIONS, 6, 7.

Subrogation.

1. Doctrine of subrogation *held* applicable to case stated in the opinion. *Aultman v. Bishop*..... 545
2. 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. *Id.*
3. The party to whom the debt of another has been paid, the payment of which furnishes the basis of the claim for subrogation, is a proper and necessary party to the action for subrogation. *Id.*

Subscriptions. See CORPORATIONS, 1, 2, 6, 7.

Substitution. See PARTIES, 3.

Summons. See INSURANCE, 6.

Supersedeas. See REVIEW, 54, 55.

Suretyship. See BONDS. HUSBAND AND WIFE, 9. PRINCIPAL AND SURETY.

Surgeons. See PHYSICIANS AND SURGEONS.

Taxation. See COUNTY BOARD.

Void Taxes. Injunction.

1. One not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax. *Harmon v. City of Omaha* 164
Chicago, B. & Q. R. Co. v. City of Nebraska City..... 454
2. Void special assessments to pay for improving streets cannot be enforced solely on the ground of benefits by the im-

Taxation—*concluded.*

provement to owners of abutting lands. *Harmon v. City of Omaha* 164

Constitutional Limit.

3. The discretion and action of a county board in levying taxes to the constitutional limit should not be controlled by the court. *State v. Sheldon*..... 365

Situs of Property.

4. A city cannot levy a tax on property the situs of which is not within the corporate limits. *Chicago, B. & Q. R. Co. v. City of Nebraska City*..... 454

Tax Liens.

5. To maintain an action to enforce a tax lien the purchaser at the tax sale is not required to give the notice to redeem mentioned in section 3, article 9, of the constitution. *Van Etten v. Medland* 569

Public Purposes.

6. A tax imposed for an object in its nature essentially or strictly private is invalid. *State v. Cornell*..... 556

7. Chapter 24, Session Laws 1897, authorizing the issuance of bonds by counties participating in interstate expositions does not contravene the constitution on the ground that the statute is to advance individual interests merely and not to promote public welfare. *Id.*

8. Where county bonds are issued pursuant to chapter 24, Session Laws 1897, authorizing counties to participate in interstate expositions, an appropriation of the proceeds of the bonds for the erection and maintenance of suitable buildings at the Trans-Mississippi and International Exposition and for a county exhibit thereat is for a public purpose and not in violation of the constitution. *Id.*

9. A tax law should not be declared invalid on the ground that the tax is not for the benefit of the public, unless it was imposed for the furtherance of an object or enterprise in which the public has no interest. *Id.*

Telegraph Companies.

The office of a telegraph company is that of a carrier of intelligence, with rights and duties analogous to those of carriers of goods and passengers. *Perry v. German-American Bank* 89

Text-Books. See EVIDENCE, 12, 13.

Time. See BILL OF EXCEPTIONS, 5. EXECUTIONS, 14. LIMITATION OF ACTIONS.

Transcript. See REVIEW, 56-60.

Trans-Mississippi and International Exposition. See TAXATION, 7, 8.

Treasurer. See COUNTY TREASURER.

Trespass. See INJUNCTION, 2.

Under execution the seizure and retention of property known by the officer to be exempt, and after its exempt character has been legally established, constitute an abuse of process for which the officer and the plaintiff participating are liable. *Castile v. Ford*..... 507

Trial. See INSTRUCTIONS. JURY, 7. NEW TRIAL. REVIEW, 42, 61-63.

1. Where, in a deposition, an answer contained both competent and incompetent testimony, an objection to the entire answer was *held* properly sustained. *Brinckle v. Stitts*..... 11
2. *Voir dire* examination of jurors *held* not a part of the trial of the cause. *Durfee v. State*..... 214
3. The order of introducing testimony rests largely in the discretion of the trial court. *Whitney v. State*..... 287
4. An offer of proof must refer to relevant matter responsive to the question rejected. *Perkins v. Tilton*..... 440
5. Where the evidence is uncontradicted, and reasonable men must draw the same conclusion therefrom, the court may direct a verdict. *Elliott v. Carter White-Lead Co*..... 458
6. By introducing evidence defendant waives error in the overruling of his motion to direct a verdict in his favor at the close of plaintiff's testimony. *Mack v. Parkieser*..... 528
7. Under an offer to introduce in evidence a tax sale certificate the admission thereof does not carry with it as evidence an assignment indorsed on the certificate. *Johnson v. English* 530
8. It is error to withdraw from the jury any valid defense which the evidence tends to establish. *State Ins. Co. v. Hunt*, 603
9. The party upon whom rests the burden of proof is entitled to open and close the evidence and the argument. *Brumback v. American Bank of Beatrice*..... 714

Trover and Conversion. See CHATTEL MORTGAGES, 3.

Evidence *held* to sustain a finding for plaintiff in an action for conversion of collateral security. *Perry v. German-American Bank* 89

Trusts. See BANKS AND BANKING, 3, 7.

1. Where land conveyed to a husband was purchased with his wife's money, he holds the title in trust for her. *Cleghorn v. Obernalte* 687
2. Where the powers of a trustee are limited by a trust deed, he has no power to act beyond the limitation. *Chandler v. Pyott* 787

Usury.

1. The defense of usury is available in an action by a national bank for the recovery of unpaid interest where the rate contracted for by it is in excess of that prescribed by the act of congress. *Tomblin v. Higgins*..... 92

Usury—*concluded.*

2. An accommodation note delivered by the holder in payment of a usurious note *held* not a renewal making the defense of usury available in a suit on the accommodation note. *Palmer v. Carpenter* 394

Value. See INSURANCE, 10.

Variance. See INDICTMENT AND INFORMATION, 3-5. PLEADING, 18. 19. REVIEW, 45.

Vendor and Vendee.

1. A party who, under the terms of an executory written contract, is conditionally entitled to receive a good title to real property, upon its being made certain that the other party cannot make such title, may recover such payments as he has meantime made pursuant to the terms of the contract; and it is not competent for defendant in such a suit to show his own solvency, or that he has been empowered by virtue of negotiations with the holders of the outstanding title to make a good and sufficient warranty deed, no such ability or readiness having been averred in his answer. *Maxwell v. Gregory* 5
2. No cause of action arises in favor of a grantee of land, who has been evicted under title paramount, against his vendor who made no covenants or representations as to title and was guilty of no fraud. *Baker v. Savidge*..... 146
3. Where two persons owning separately adjoining tracts of land entered into a joint contract to exchange it for property of vendee, the terms of the contract were *held* equally binding on each of vendors. *Perkins v. Tilton*..... 440
4. A vendor retaining title does not by mere silence and inaction waive his right to a purchase-money lien, in favor of one who furnishes material to improve the realty. *West v. Reeves* 472
5. Interpretation of a contract to convey realty *held* a question for the court and not for the jury. *Ricketts v. Rogers*..... 477
6. Recitals in a deed *held* not to express the contract of the parties. *Williamson v. George*..... 503
7. Possession of land is notice to the world of possessor's ownership or interest. *Best v. Zutavern*..... 604
8. Owners of property have a right, in disposing of it, to place such valuation thereon as they see fit. *Troup v. Horbach*.... 795

Venue.

A life insurance company created under the laws of the state is situated, within the meaning of section 55 of the Code, in any county of the state in which it maintains an agent or servant engaged in transacting the business for which it exists, and may be sued therein. *Bankers Life Ins. Co. v. Robbins* 44

Verdict. See EMBEZZLEMENT, 14. TRIAL, 5.

Verification. See AFFIDAVITS. INDICTMENT AND INFORMATION, 1.

Villages. See MUNICIPAL CORPORATIONS.

Waiver. See BONDS, 6. CORPORATIONS, 2. INSURANCE, 13. PLEADING, 9. REVIEW, 10, 64, 65. TRIAL, 6.

Warrants. See COUNTIES, 5. NEGOTIABLE INSTRUMENTS, 5.

Waters.

1. Rulings on evidence as to the measure of damages for overflowing plaintiff's land *held* erroneous. *Chicago, B. & Q. R. Co. v. Emmert* 237
2. Whether or not water is surface water should be determined from the facts of the case in which the question is presented. *Id.*
3. Flood water of the Nemaha river *held* not surface water, but a part of the stream. *Id.*
4. An allegation that the plaintiff's farm has been damaged by the construction of a railway embankment near thereto, because the farm has thus come to be known in the neighborhood as one liable to overflow, does not state a cause of action. *Id.*

Witnesses.

1. It is within the discretion of the trial court in a proper case to allow leading questions. *Perry v. German-American Bank* 89
2. Conclusion of witness on vital issue *held* inadmissible in evidence and prejudicially erroneous. *Peck v. Tingley*..... 172
3. The main purpose of requiring names of witnesses to be indorsed on an information is to inform accused of the identity of the state's witnesses. *Carrall v. State*..... 432
4. The rule that the credibility of a witness is a matter for the determination of triers of fact does not require the supreme court, on appeal, to accept the statement of a witness, where it is demonstrated to be false. *Linton v. Cooper*, 404
5. An erroneous instruction that a litigant offering in evidence the testimony of a witness is bound by such testimony, *held* not justified by the alleged fact there was no testimony differing from that of the witness. *Coon v. McClure*..... 622

Words and Phrases.

1. "Any person." *Mills v. State*..... 263
2. "Appeal." *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.* 248
3. "Remedy at law." *Bankers Life Ins. Co. v. Robbins*..... 45
4. "Subject to exemption as a homestead." *Widemair v. Woolsey* 468

Work and Labor. See EXEMPTION, 2, 3.

Written Instruments. See EVIDENCE, 24. PLEADING, 3, 7, 8.