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NELLIE M. RICHARDSON V. SCOTT'S BLUFF COUNTY.

FILED DECEMBER 19, 1899. No. 9,055.

Compensation of Lobbyist: VALIDITY OF CONTRACT. A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill, an appropriation act, is procured—if successful, the fees not fixed, but to be liberal—is vicious, illegal and void; and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a *quantum meruit* for the services performed.

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

The facts are stated in the opinion.

M. B. Reese, C. A. Robbins and *F. I. Foss,* for plaintiff in error:

The services rendered by the plaintiff for the defendant before the legislature in securing the passage of the bill for the relief of the defendant were lawful. See *Foltz v. Cogswell,* 86 Cal., 542; *Kansas P. R. Co. v. McCoy,* 8 Kan., 538; *Stanton v. Embrey,* 93 U. S., 548; *Chesebrough v. Conover,* 140 N. Y., 382; *Yates v. Robertson,* 80 Va., 475; *Barry v. Capen,* 151 Mass., 99; *Dillon v. Darst,* 48 Nebr., 803.

The county board had the power and authority to employ the plaintiff, as attorney or agent, to present the merits of the county's claim against the state to the legislature. See *Smith v. Mayor,* 13 Cal., 531; *Hornblower v. Duden,* 35 Cal., 670; *Clarke v. Lyon County,* 8 Nev., 181; *Ellis v. Washoe County,* 7 Nev., 291; *Tatlock v. Louisa County,* 46 Ia., 138; *Memphis v. Adams,* 9 Heisk. [Tenn.], 518; *Gandy v. State,* 27 Nebr., 707; *Fuller v. Madison County,* 33 Nebr., 422; *Huffman v. Commissioners,* 23 Kan.,

281; *Commissioners of Hamilton County v. Webb*, 47 Kan., 104.

The defendant is estopped to claim that the contract of employment was irregular. See *Lincoln Land Co. v. Grant*, 57 Nebr., 70; *Grand Island Gas Co. v. West*, 28 Nebr., 852; *State v. Lancaster County*, 20 Nebr., 419; *State Board v. Citizens S. R. Co.*, 47 Ind., 407; *Brown v. Merrick County*, 18 Nebr., 355; *Northampton County's Appeal*, 30 Pa. St., 305; *City of Natchez v. Mallery*, 54 Miss., 499; *Argenti v. City of San Francisco*, 16 Cal., 255; *Clark v. Dayton*, 6 Nebr., 192; *Hull v. Kearney County*, 13 Nebr., 539; *Fister v. La Rue*, 15 Barb. [N. Y.], 323; *Power v. May*, 114 Cal., 207; *Huffman v. Greenwood County*, 23 Kan., 281; *Commissioners of Hamilton County v. Webb*, 47 Kan., 104; *City of Ellsworth v. Rossiter*, 46 Kan., 237; *City of Cincinnati v. Cameron*, 33 O. St., 336; *Ward v. Town of Forest Grove*, 20 Ore., 355; *Hawk v. Marion County*, 48 Ia., 472; *Kneeland v. Gilman*, 24 Wis., 39; *Allegheny City v. McClurkan*, 14 Pa. St., 81; *Beers v. Dalles City*, 16 Ore., 334; *Brown v. City of Atchison*, 39 Kan., 49.

J. H. Broady, also for plaintiff in error.

References: *State v. Moore*, 40 Nebr., 854; *Omaha & R. V. R. Co. v. Brady*, 39 Nebr., 49; *Foltz v. Cogswell*, 25 Pac. Rep. [Cal.], 60; *State v. City of Des Moines*, 65 N. W. Rep. [Ia.], 818; *Hall v. Hooper*, 47 Nebr., 111; *Thomas v. City Nat. Bank*, 40 Nebr., 506; *Ragoss v. Cuming County*, 36 Nebr., 375; *Brown v. Board*, 103 Cal., 531; *Fister v. La Rue*, 15 Barb. [N. Y.], 323.

M. J. Huffman, *T. W. Morrow* and *George W. Heist*, *contra:*

The alleged contract upon which plaintiff seeks to recover, as set up in her petition and explained by the evidence introduced by her in support of her claim for work performed thereunder, is void, as against public policy. See *Clippinger v. Hepbaugh*, 5 Watts & S. [Pa.], 315;

Harris v. Raof, 10 Barb. [N. Y.], 489; *Rose v. Truax*, 21 Barb. [N. Y.], 361; *Marshall v. Baltimore & O. R. Co.*, 16 How. [U. S.], 314; *Trist v. Child*, 21 Wall. [U. S.], 441; *Mills v. Mills*, 40 N. Y., 543; *Sweeney v. McLeod*, 15 Pac. Rep. [Ore.], 275.

HARRISON, C. J.

There was filed in this action in the district court of Scott's Bluff county a petition, which was in part as follows: "The plaintiff complains of the defendant and alleges that on or before the 1st day of January, 1893, the plaintiff was a duly authorized attorney at law, and admitted to practice in the courts of the state of Nebraska, and as such attorney at law was engaged in the practice of her profession in accepting retainers, and prosecuting and defending such claims and cases as came within her employment as such attorney at law; that prior to said date and time, to-wit, on or about the 1st day of September, 1889, a criminal action was tried in said county of Scott's Bluff, wherein the state of Nebraska prosecuted one George S. Arnold for the crime of murder in the first degree, and such proceedings were had therein as resulted in a conviction of said Arnold; that the whole costs of said prosecution and trial amounted to about the sum of $7,016.01; that at said time the said county of Scott's Bluff had but recently been organized, and being compelled to pay said costs, the same became a heavy burden upon the people and taxpayers of said county, and the said county determined to make an attempt to obtain back the said expenses from the state by means of an appropriation by the legislature, and to do all things necessary or available to that result. Accordingly, thereupon, about the 14th day of January, 1893, two of the county commissioners of said Scott's Bluff county, being a majority of all the county commissioners of said Scott's Bluff county, for and on behalf of said county orally employed this plaintiff to prepare a suitable appropriation bill appropriating and paying to the

said county sufficient funds from the treasury of the state of Nebraska to reimburse the said Scott's Bluff county the money so paid out and expended by the said county, and to argue the merits of said bill before the proper legislative committees, and to do all things needful and proper to procure the passage thereof and the money sought, and agreed to pay plaintiff on condition of success a very liberal fee and compensation for said services. All of which plaintiff agreed to do. Thereupon, at the instance and request of a majority of the county commissioners of said county of Scott's Bluff acting for and on behalf of said county, and in pursuance of the said agreement of employment, on or about the said 16th day of January, 1893, this plaintiff entered upon said employment, and went to the city of Lincoln, the capital of said state, where and when the legislature of the state of Nebraska was in session, and under and by virtue of said employment prepared and drafted said appropriation bill and appeared before the proper committees of the senate and house of representatives, and the various members of said bodies in public, and as attorney and agent of said county presented to said committees and members the merits, legality and justice of said bill, and procured and caused the said bill to be passed, appropriating to said Scott's Bluff county for said purpose the sum of $7,495.73, and which bill, known as 'House Roll 278,' became a law of said state April 6, 1893, and the said sum of money was duly appropriated to and for the use and benefit of said Scott's Bluff county. That at all said times the said Scott's Bluff county and the officers thereof had full knowledge and notice of the services of plaintiff and of her claim to remuneration therefor, and so knowing of her said services and claim under the said contract, received and accepted the money so appropriated by said legislature to the said county; that the board of county commissioners of Scott's Bluff county, with the full knowledge of the said services of plaintiff and that by means thereof

the said appropriation was made, and of her said claim to remuneration, in session accepted and received said money so appropriated by the state as aforesaid, and all the fruits of plaintiff's services in the premises, and thereby ratified the agreement of employment between the members of the board of county commissioners for and in behalf of said county and the plaintiff as aforesaid, and the request of said two members of the board to this plaintiff to perform said services. The said board of county commissioners, in session as a board, have, with full knowledge of the services of the plaintiff in the premises, and that the receipt of said money from the state as aforesaid was the fruit of plaintiff's services in the premises, without which the said money would not have been obtained by said county, appropriated and distributed to the use of said county all the said money received as aforesaid from the state; that in procuring the passage of said act and the appropriation of said money the plaintiff expended a large amount of time, to-wit, about three months, and a large amount of money in the defraying of her expenses, and her services in connection therewith are of the value of $1,500 and more; that plaintiff complied with all the conditions of said contract of employment on her part to be performed, but defendant wholly failed to comply with the conditions thereof on its part, and have paid plaintiff nothing thereon; that the sum of $1,500 is justly due and owing to plaintiff from defendant, with interest thereon at the rate of seven per cent per annum from April 6, 1893."

In the answer there were admissions of the trial of the criminal case alleged in the petition, and that the costs were as stated in the petition; also, that a bill or act for the "relief of Scott's Bluff county" had been prepared. It was pleaded that it was done by "Hon. Wm. Neville," and was introduced by a member of the house of representatives, and in the due course of legislation became a law, and by it there was appropriated to the purpose of the act the sum of $7,495.73, which was after-

wards received by the county. It was further pleaded in the answer: "Defendant further answering alleges that after the passage and approval of the said bill as aforesaid, and before the said money had been paid by the state to the defendant, to-wit, on the 20th day of June, 1893, the plaintiff herein filed a pretended attorney's lien with the auditor of public accounts of the state of Nebraska, claiming the sum of $1,500 as attorney's fees for procuring the passage of said bill through the legislature; that the treasurer of the defendant, the county of Scott's Bluff, was thereby compelled, in order to obtain said money, to sue out of the supreme court of the state of Nebraska a peremptory writ of mandamus at the cost of $369.62 to defendant, directing the auditor to pay the said sum of money over to defendant; that afterwards, on or about the 29th day of June, 1894, plaintiff filed a claim against the defendant with the board of county commissioners of the county of Scott's Bluff, which claim was wholly disallowed, for the reason that defendant was not and is not indebted to plaintiff in any sum whatever, from which disallowance this appeal is taken.

"6th. Defendant further answering denies that it ever at any time, or at any place in any manner, by its board of county commissioners, or any part of said board, in session or out of session, or by any means whatever acting for and on behalf of defendant, employed plaintiff, either orally or in writing, or any other way, to prepare said appropriation bill and present and argue the same before any of the committees of either house of said legislature on behalf of said defendant or any other purpose, and is not indebted to plaintiff in any sum whatever."

The reply was a denial of the new matter in the answer. A trial was had to the court, a jury being waived, and the defendant was given judgment. The plaintiff has prosecuted error to this court.

Evidence was introduced for plaintiff, but none on

part of defendant. The theory of the county in the trial court, gathered from the arguments in the brief filed, was and is now that there may have been some talk between the plaintiff and individuals of the county board with reference to a proposed application of the county to the state or the legislature for relief in the matter of the costs in the criminal case which was alluded to in the pleadings, but no negotiations or agreements with the board; that the plaintiff could not recover, for the reason the contract asserted by plaintiff was illegal and void, and the services rendered were in lobbying for the passage of the bill, and no recovery could be had for them. For the plaintiff it is argued, to the contrary, that the contract was made, was valid and enforceable. If not properly made with the board, there was in effect a ratification by the board; and there was an acceptance of the services and fruits and benefits thereof, and the county must pay for the work done by plaintiff. The application to the legislature, as is disclosed by the petition, was not predicated upon matter of claim which had a legal basis. It was said in *State v. Moore*, 40 Nebr., 854, in regard to this appropriation, that it was "in the nature of a donation." "A gift in fact." In regard to the services to be performed by the plaintiff, as we have seen, the petition stated she was to do all things needful and proper to procure the passage of the bill, and her fee was to be a liberal one, contingent, however, and dependent upon her procuring the passage of the bill. The plaintiff testified as follows:

"Q. You are the plaintiff in this case?

"A. Yes, sir.

"Q. You may commence at the beginning and tell what took place between you and the commissioners with reference to obtaining an appropriation from the legislature, and tell what occurred between you and the commissioners.

"A. In the spring or first of the year 1893, Elmer Morse, one of the board of commissioners, chairman of

the board of commissioners of Scott's Bluff county, I think he was, spoke to me about going to Lincoln and asked me if I thought I could procure the passage of a reimbursing bill. I told him I thought I could, but asked why Mr. Huffman, the county attorney, could not go. He said he thought Mr. Huffman—

"Defendant objects to what was said about Mr. Huffman. Overruled. Exception.

"He said he wished me to go because Mr. Huffman said he would have no influence with an independent legislature, while, if I wanted to go, he thought I could get a bill through the legislature. We talked about the matter of fee. He desired that if I went down that my expenses should all be paid, and said that while he would hardly be willing to pay a fixed amount, I could have a very liberal percentage if I secured the passage of the bill. There was no amount agreed upon. The contract between him and myself was that I should have a very liberal fee.

"Q. What if you did not obtain any appropriation?

"A. I was not to receive anything. Mr. Decker agreed to the same thing."

One of the county commissioners testified as follows:

"January, 1893, I made a verbal contract with the plaintiff, as an attorney and agent of Scott's Bluff county, Nebraska, to procure the passage of a bill by the legislature of Nebraska, for the purpose of reimbursing Scott's Bluff county for the expense incurred in the trial of one George S. Arnold for the crime of murder. Said plaintiff was to prepare said bill, procure its introduction to the legislature, to argue the merits of said bill as agent and attorney of said Scott's Bluff county, Nebraska, and to do whatever was necessary to secure the passage of said bill.

"Q. For what compensation was the plaintiff in this case to carry out this contract on her behalf?

"A. There was no specified sum mentioned. If the bill passed for only a part of the original sum sought,

she was not to receive as much; but in any event she was to receive a very liberal fee in the event of success, which fee to be proportioned to the amount secured. The plaintiff was to pay all expenses, the county not to be held liable for any expense or compensation in the event that no amount sought in the bill was secured. On account of plaintiff's taking the case conditionally she was to receive a larger fee in case she succeeded in securing the passage of the bill mentioned than she would have received if Scott's Bluff county had guarantied her expenses or a fee in any case."

A member of the senate at the time the appropriation bill referred to herein was passed testified as follows:

"Q. Do you know the amount of work and labor that Mrs. Richardson actually expended in the matter of procuring a favorable report from the committee of claims in the houses, and also the same committee in the senate, and in procuring the passage of said bill through both branches of the legislature?

"A. I know she was there when the session opened, and was there continuously until after the bill was passed and approved by the governor and became a law, as far as was necessary for the legislature and its approval was concerned, which was very near the close of the session, and that she worked continuously for that bill. I know that she went to every member of the senate time and time again in working for the bill, and I also know that the sentiment of the senate was against the bill until turned the other way by her."

A party who was a member of the house when the bill passed stated in testimony in this case:

"I myself with other members was asked to listen to her narrative of the case and circumstances very early in the session, I think the first week—and it continued until the passage of the bill, the date of which I don't remember, but it was very late in the session. She was constantly interviewing myself and other members of the house by urging us to look into the merits of the bill

and in advancing her arguments to show the merits of the case.

"Q. State if you remember any of the difficulties and adverse report that had to be overcome to get the bill through.

"A. Why, the committee on claims reported once, the first time that they reported to allow one-half of the claim. She fought the report after it came back to the house and got it recommitted. The committee were not satisfied. The members of the committee expressed themselves dissatisfied with her refusal to take one-half of the claim, and finally reported it back to be indefinitely postponed. She then came upon the floor and mustered members enough to defeat it—the report for indefinite postponement—and had it ordered to the general file, and later she secured enough members to call it up out of its regular order, and considered it in open house, and finally secured the passage of the bill for the full amount asked.

"Q. Speaking from your experience as a legislator, what would you say about the efficiency of her work and the legality of her means employed?

"A. It was the shrewdest piece of work I ever saw done in the way of legislation, and the fact of her being a woman created a great deal of comment. She was the most persistent worker I ever saw, and the argument she made both before the committee and the members individually were such as would have done credit to any attorney in the state."

In regard to contracts of the nature of the one which is herein asserted by plaintiff it was stated in *Wood v. McCann*, 6 Dana [Ky.], 366, quoted in Cooley, Constitutional Limitations [6th ed.], 163, 164, and in an article by Samuel Maxwell in 28 Am. Law Review, p. 211, on the subject of "Necessity for the Suppression of Lobbying": "A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before the legislature or a committee thereof; but the

law should not help him, or any other person, to a recompense for exercising any personal influence in any way in any act of legislation. It is certainly important to just and wise legislation, and, therefore, to the most essential interests of the public, that the legislature should be perfectly free from any extraneous influence which may either corrupt or deceive the members or any of them." The contract declared upon, and especially as shown by the evidence, was both specific and general in its terms relative to what was to be done by the plaintiff; and, moreover, it provided for a contingent fee—an indefinite sum, but a liberal one, if the act passed, nothing if it failed. The contract, if ever made, was vicious and illegal, and there could be no recovery under it, nor as upon an implied contract, nor upon a *quantum meruit.* See *Wood v. McCann, supra; Marshall v. Baltimore & O. R. Co.*, 16 How. [U. S.], 314; *Coquillard v. Bearss*, 21 Ind., 479; *Harris v. Roof*, 10 Barb. [N. Y.], 489; *Weed v. Black*, 2 MacArthur [D. C.], 268; *Chippewa V. & S. R. Co. v. Chicago, S. P., M. & O. R. Co.*, 75 Wis., 224, 44 N. W. Rep., 17. It was decided in the cases just quoted that a contract, the nature of the one in suit, which provided for contingent fee or compensation is illegal and void, because such fee or compensation is a "direct and strong incentive to the exertion of not merely personal but sinister influence upon the legislature." It follows that the judgment of the district court must be

AFFIRMED.

B. F. MINZER V. WILLMAN MERCANTILE COMPANY.

FILED DECEMBER 19, 1899. No. 9,067.

1. **Pleading:** NEW MATTER IN ANSWER: REPLY: TRIAL: REVIEW. If, during the trial of an action, new matter pleaded in the answer is treated by the parties as denied or placed in issue, it will be so considered in this court, although no, or an imperfect, reply was filed.

2. **Failure to File Instructions:** EXCEPTIONS: REVIEW. The charge of a trial court should be filed with the clerk before read to the jury; but that it was not done is not available error, unless the complainant excepted to such omission at the time.

3. **Action on Account:** SUFFICIENCY OF PETITION. Objections to the petition herein *held* not well grounded, and not available.

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

James McNeny and *Chaney & Walden*, for plaintiff in error.

James S. Gilham and *Robert T. Potter, contra.*

HARRISON, C. J.

In this action in the district court of Webster county the defendant in error declared upon an account and demanded judgment against the plaintiff in error for the stated sum. The answer admitted the existence of the account, and alleged matters of counter-claim. There was filed what was no doubt intended for a reply. A trial resulted in a verdict and judgment for the defendant in error.

It is urged for the plaintiff in error that there was no reply, and that the pleas of new matters in the answer were admitted. What was evidently intended for a reply was filed, and appears in the record as follows: "Comes now the plaintiff, and denies each and every allegation of new matter therein contained." We need not consider the availability of this as a plea to the answer, for the reason that, to the extent it is disclosed by the record, the parties participated in a trial and treated the averments of the answer as denied, and, under such circumstances, the objection that no reply was filed was waived. See *Western Horse & Cattle Co. v. Timm*, 23 Nebr., 526; *Missouri P. R. Co. v. Palmer*, 55 Nebr., 559.

It is argued that the instructions were not filed with the clerk. It is not shown that the plaintiff in error ob-

jected to the instructions on the ground now urged; and this renders the complaint at this time unavailable. See *Fry v. Tilton*, 11 Nebr., 456.

It is also contended that the petition was defective, for that in the copy of the account attached thereto there was no dollar mark at head of any column or at any place in the account. While it is true that there was not a dollar mark in or on the copy of the account, some of the columns of figures were made in such manner and used in connection with terms which clearly and unmistakably indicated the import of the figures. Moreover, the account, as shown by the copy, was admitted in the answer. It follows that the judgment of the district court will be

AFFIRMED.

JOSEPH PALMER V. FIRST BANK OF ULYSSES.

FILED DECEMBER 19, 1899. No. 9,073.

1. **Instructions:** ASSIGNMENTS OF ERROR. Error in regard to giving or refusing to give instructions must be separately assigned in the motion for a new trial and petition in error. See *Graham v. Frazier*, 49 Nebr., 90.

2. ———: ———. An assignment of error that the verdict is contrary to an instruction, if not presented by the motion for a new trial, is not available on error to this court.

3. **Ruling on Motion.** A motion which can not be sustained substantially as made must be overruled.

4. **Ruling on Evidence:** OBJECTION: REVIEW. Alleged errors in the admission of testimony can not prevail if, during the trial, there was no objection made to the introduction of said testimony.

5. ———: ASSIGNMENTS OF ERROR. An assignment of error of the action of the trial court in refusing to strike out testimony should specifically designate the portion of the record to which it is sought to challenge attention.

6. ———: SALE OF LAND: CONTENTS OF LETTER. Alleged errors in regard to the admissions of testimony examined, and determined not well grounded.

7. Conveyance of Land as Security for Debt: SALE BY GRANTEE: ACTION BY GRANTOR FOR ACCOUNTING: VERDICT FOR DEFENDANT. **The evidence determined sufficient to sustain the verdict.**

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

Matt Miller, for plaintiff in error.

A. J. Evans and *Sheesley & Aldrich, contra.*

HARRISON, C. J.

For the plaintiff there was commenced this action in the district court of Butler county, and in the petition presented it was pleaded that on or about February 5, 1894, he was and became indebted to the defendant in certain stated sums, and to evidence each item of said indebtedness he executed and delivered to the defendant his promissory note; also, that he was then the owner of a half section of land in Butler county, which, as security for the payment of the sums he owed defendant, he caused to be conveyed to defendant by deed, or to its cashier for it, the understanding being that, if the notes were not paid at maturity, the cashier was authorized to sell the land for the sum of $11,500, subject to a mortgage of $7,000, and apply the proceeds of the sale to the satisfaction of the amount which plaintiff owed the defendant; that prior to the maturity of any of the aforesaid notes the cashier sold the land for a consideration of $11,600, from which was deducted the $7,000, the amount of an incumbrance on the land and to which it was sold subject, and applied the money received from the sale in payment of the matters of plaintiff's indebtedness to the bank, some taxes and interest, and paid to plaintiff the sum of $500. It was also pleaded that plaintiff had delivered to defendant for collection two promissory notes in his favor, in the aggregate $40, of which it had made the collection and had accounted for and paid to plaintiff but a part. For the aggregate of the sums alleged to be his due from the land sale, and

the collection, judgment was demanded. The answer of the defendant pleaded the indebtedness of the plaintiff to it in various sums; the transfer by deed to it of the land described in the petition; that such conveyance was by one George L. Smith, to whom it had been transferred by plaintiff as security for the payment of the debt of plaintiff to said Smith; that the last mentioned party held the land under an agreement that he was to manage it and to lease it, in all respects as if it belonged to him, to sell it if possible, and account to plaintiff in regard to all things which he might do of and concerning the land; that the bank loaned plaintiff a sufficient amount to pay his debt to Smith at the time the title to the land was conveyed by Smith to the cashier of the bank. It was further answered that, at the time the title to the land was transferred to the cashier of the defendant, it was agreed that he should, at the first opportunity to obtain a reasonable and fair price for the land, sell it, and any surplus of the purchase-money, after paying the incumbrances and expenses of sale, was to be paid to the plaintiff. A sale was pleaded, of which it was alleged the plaintiff was informed and of which he approved, and in the proceeds of which he shared. It was further answered that the defendant had fully accounted to plaintiff for all it had received from the sale of the land. Of the amounts derived from the collections which plaintiff had alleged as one cause of action, payment was pleaded. There was a reply which joined the issues. The trial resulted in a verdict and judgment for defendant. The plaintiff has removed the case to this court by petition in error.

It is urged that the trial court erred in its refusals to, in its charge to the jury, give instructions requested for the plaintiff. These were all grouped in one assignment in the motion for a new trial, and the refusal of the court as to one or more of them was without error; and this being true, the assignment must be overruled. See *Graham v. Frazier*, 49 Nebr., 90.

It is contended that the verdict of the jury was contrary to an instruction. This was not assigned for error in the motion for a new trial, and can not now be of any avail.

Of the evidence introduced was a written instrument, which was of date February 5, 1894, and read as follows:

"Article of agreement between Joseph Palmer and Geo. Dobson. Said Geo. Dobson agrees to deed to Joseph Palmer the N. E. ½ 30 and S. E. ¼ of sec. 19, T. 13, R. 2 east, when said Joseph Palmer shall cause to be paid three certain promissory notes in favor of First Bank of Ulysses when said notes become due. If said notes are not paid, then this agreement to be null and void and of no effect or force. Notes as below:

$1,090.54. Dated February 5, '94, due April 5, '94.
605.00. Dated February 5, '94, due Mar. 5, '94.
1,029.25. Dated February 5, '94, due June 5, '94.

"When said notes are paid, rent notes to go to J. Palmer."

This, it was and is asserted for plaintiff, was the only contract in regard to the land and its future disposal which was made or became of effect between the plaintiff and defendant at the time the title thereto was conveyed to the cashier of the latter, and it is argued, in the brief filed for plaintiff, that the trial court erred when it admitted, as it did during the trial, testimony of any other agreement in regard to any after-disposition to be made of the land by the cashier than was provided for in the written matter which we have just quoted. The plaintiff, in his petition, pleaded that when the notes which evidenced his debts to the bank matured, if not paid, the cashier was, by agreement of the time of the deed to him, authorized to then sell the land for the sum of $11,500, and apply the proceeds of the sale to the payment of the plaintiff's debts to the bank. The defendant also alleged the authority to the cashier to sell the land, but that the authority was to do so at any time after he acquired the title, and to continue as long

as he retained the title. The defendant also pleaded that there was no price fixed by the stipulation of the parties. Unquestionably, under the pleadings, the testimony relative to the agreement for the sale of the land was admissible.

Another argument is of an asserted error of the district court in the admission of some testimony in regard to what were known or referred to during the trial as "rent notes." To the question to which the brief refers there was no objection; and if any error was committed, it is not available.

One assignment of error is in the following terms: "The court erred in not sustaining plaintiff's motion to strike out the answer of witness George Lord where it states what their books show." This is too indefinite to call for notice or examination. It does not specifically point out any particular portion of the record by page, question or answer, and the argument in the brief is no more definite; but we find in the record a question and answer by the witness George Lord, and a motion to strike out the answer "as not responsive and not the best evidence." A portion of the answer was responsive to the question, and not open to the further objection of the motion. This being true, the motion could not be sustained to all the answer, and was properly overruled.

It is contended that the trial court should not have allowed testimony of any other than a cash sale of the land, and that it did so was error. If not admissible in any other connection, this testimony was entirely competent in conjunction with that of the approval of the sale by the plaintiff after he had been informed of it and its terms.

It is urged that a witness was allowed to state the contents of a letter, no sufficient foundation having been laid for the reception of such testimony. If it be conceded that there was no sufficient evidence shown to warrant the court in allowing the witness to detail the contents of the letter in his testimony, the plaintiff was

not prejudiced, as he, in testifying, gave a similar statement in regard to the main subject-matter of the letter.

It is of the assignments argued that the evidence was insufficient to sustain the verdict. There was a conflict in the evidence upon the principal points of the issues, but there was sufficient in support of the verdict.

We have noticed all the assignments to which attention was challenged in arguments, and it follows from what has been decided that the judgment must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOHN F. CORNELL, V. WILLIAM A. POYNTER.

FILED DECEMBER 19, 1899. No. 10,961.

1. **Constitutional Law:** VALIDITY OF STATUTES. The judiciary may not declare an act of the legislature unconstitutional, unless it is clear that it contravenes some provision of the fundamental law.
2. ———: TAXATION. By section 1, article 9, of the constitution, the public revenues are required to be imposed by the levying of a tax by valuation, "so that every person or corporation shall pay a tax in proportion to the value of his, her or its property and franchises."
3. ———: ———: DISCRIMINATION. The rule of uniformity prescribed by section 1, article 9, of the constitution, inhibits the legislature from discriminating between taxpayers in any manner whatever.
4. ———: ———: RELEASE OF TAXES. Under section 4, article 9, of the constitution the legislature is powerless to pass a law releasing or discharging any individual or corporation or property from the payment of any portion of the taxes to be levied for state or municipal purposes.
5. ———: ———: ———: INSURANCE COMPANIES. Sections 36 and 37, chapter 47, Session Laws, 1899, in so far as they attempt to exempt the property of insurance companies from taxation, or to release or commute the taxes of such companies, are inimical to sections 1 and 4, article 9, of the constitution, and void.
6. **Statutes:** INVALID PORTIONS. When the invalid part of an act influenced or induced the passage of the residue, the entire act will be declared void.

7. ———: ———: INSURANCE. The unconstitutional provisions of sections 36 and 37, chapter 47, Session Laws, 1899, induced the passage of the remainder of said chapter, and invalidate the entire act.

ORIGINAL action in the nature of quo warranto to test the validity of chapter 47, Session Laws of 1899, creating an insurance bureau with the governor as commissioner. *Act held void.*

W. B. Price and *Robert Ryan*, for relator:

Section 1, article 9, of the constitution of Nebraska contains this requirement: "The legislature shall provide such revenues as shall be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." By section 4 of the same article it is provided as follows: "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." These provisions are violated by sections 36 and 37 of chapter 47, Session Laws of 1899, whereby, in consideration of the payment of certain fees, insurance companies are relieved from payment of taxes which other corporations are required to pay. See *City of New Orleans v. St. Charles S. R. Co.*, 28 La. Ann., 497; *Louisiana Cotton Mfg. Co. v. City of New Orleans*, 31 La. Ann., 498; *Neary v. Philadelphia, W. & B. R. Co.*, 7 Hous. [Del.], 419; *Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch., 600; *State Bank v. People*, 4 Scam. [Ill.], 303; *Le Roy v. East Saginaw C. R. Co.*, 18 Mich., 233; *Dauphin & L. S. R. Co. v. Kennerly*, 74 Ala., 583; *City of New Orleans v. La Fayette Ins. Co.*, 28 La. Ann., 756; *Life Ass'n v. Board of Assessors*, 49 Mo., 512; *Hogg v. Mackay*, 23 Ore., 339;

City of Austin v. Austin Gaslight & Coal Co., 69 Tex., 180; *Altgelt v. City of San Antonio*, 81 Tex., 436; *In re Taxes*, 73 N. W. Rep. [Minn.], 970.

Wilbur F. Bryant, contra:

The constitutional provisions relating to taxation were copied from the constitution of the state of Illinois. In adopting those provisions the state of Nebraska adopted also a judicial construction adverse to the contention of counsel for relator. Under the construction thus adopted, sections 36 and 37, chapter 47, Session Laws of 1899, relieving insurance companies from the payment of certain taxes, do not violate sections 1 and 4, article 9, of the constitution, relating to taxation. See *Illinois C. R. Co. v. County of McLean*, 17 Ill., 291.

"I do not believe this question of taxation is reached in this case. Even were it possible for a court to hold this law unconstitutional, in face of the authorities hereinafter cited, such decision, it seems to me, could certainly not strike at this section as a whole. The objection would only lie to the clause: 'And shall be in full of all fees and taxes except taxes on real estate.' This clause is divisible from the remainder of its section. The exempting of property from taxes could hardly be an inducement for the passage of the act. But it is unnecessary to resort to this argument. The relator has quoted and cited numerous authorities. We could do the same, but find it unnecessary. It is a well and long settled principle of law that where one state has adopted a written law, and another state copies and adopts that written law, it adopts, likewise, with said law, the judicial interpretation which the former state had placed upon the same. No authorities need be cited upon this proposition. Now, let us apply this principle to the case in hand. The state of Illinois has substantially the same provisions in her constitution as are here quoted from the constitution of Nebraska. See Illinois Constitution, art. 9, secs. 1, 6. In 1855 this same question was before the

supreme court of Illinois. This was twenty years before our constitution was adopted. The case was one where Abraham Lincoln was of counsel; and took the same position on this question that is now taken by the respondent, who will quote his case in support of our position. The constitutional question is discussed at great length, in this case, and numerous authorities cited: 'It is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum. The provisions, in the charter of the Illinois Central Railroad Company, exempting its property from taxation, upon the payment of a certain proportion of its earnings, are constitutional.' See *Illinois C. R. Co. v. County of McLean*, 17 Ill., 291. The court will see upon examination that the reasoning in *Illinois C. R. Co. v. County of McLean* will apply to our constitution just as well as to theirs. Both constitutions provide that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Our constitution adds 'franchises.' A refined hypercaution, truly! Both constitutions deny the legislature, or general assembly, the power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof (Our constitution adds the words, 'or corporation'), or the property therein, from their, or its, proportionate share of the taxes to be levied for state purposes (Our constitution adds the words, 'or due any municipal corporation'); and deny authority to make any commutation whatever in any form. It will be seen that these constitutional provisions are equally strong and comprehensive; and that they are substantially identical; and, as before stated, that the reasoning in the Illinois case, hereinbefore cited, applies equally to both constitutions. There is a different classification of the persons and things upon which the legislature, or general assembly, can impose a tax. But our supreme court has held that the legislature is not bound by the classification in section 1, article 9, of our constitution. See

State v. Lancaster County, 4 Nebr., 537; *State v. Ream*, 16 Nebr., 681; *Shaw v. State*, 17 Nebr., 334. These decisions follow the principle laid down in the Illinois case already cited. The words, 'or corporation,' were probably inserted by our constitutional convention, because of a doubt as to whether the word 'inhabitants' includes an artificial person. Taxes 'due' a municipal corporation are taxes which have been levied upon property which has been assessed, and which are due under the statute. See, also, Winfield's Adjudged Words & Phrases. But it is profitless to speculate, as these interpolations do not, in any manner, affect the construction of our constitution. Illinois passed a reciprocity insurance law, similar to section 40 of the 'Weaver Act.' In passing upon this act the supreme court of Illinois held that this law could not be regarded as in any sense the enforcing of the laws of a foreign state by the courts of Illinois. But the court compared it to the enforcement of a foreign contract. Number 5 of the *syllabi* is as follows, and is borne out in the opinion: 'Nor is that section (29) in conflict with section 1, article 9, of the constitution of 1870, which authorizes the legislature to tax peddlers, auctioneers, insurance business, etc., in such manner as it may, from time to time, direct by general law uniform as to the class upon which it operates, as it does not follow that all foreign insurance companies are, for the purpose of assessment or taxation, to be deemed of the same class, within the meaning of the constitutional provision. The constitution has left the power with the legislature to classify such companies for taxation, as is done by the act in question.' See *Home Ins. Co. v. Swigert*, 104 Ill., 653. The same principle in regard to uniformity of taxation is held by this court in *Pleuler v. State*, 11 Nebr., 547."

C. J. Smyth, Attorney General, W. D. Oldham, Deputy Attorney General, and *Arthur J. Weaver*, also for respondent.

The argument of the attorney general was upon the same lines as in *Telephone Co. v. Cornell*, 59 Nebr., 737.

Arthur J. Weaver filed no brief, and made no argument.

The case was argued, for the relator, by *Robert Ryan;* and by *Willis D. Oldham, Deputy Attorney General,* and *Wilbur F. Bryant,* for the respondent.

Oldham said that, though the tax feature of the law might be unconstitutional, the law as a whole should be sustained, citing *State, ex rel. Field,* 119 Mo., 593; *Gordon v. Cornes,* 47 N. Y., 608; *Allen v. Louisiana,* 103 U. S., 80.

Ryan cited the Illinois constitution of 1870 and decisions made thereunder which appear in the opinion of the court.

Bryant, in reply to relator's counsel, said: "The question of the constitutionality of the taxation commuted in the 'Weaver Law' is not raised in this case. For reasons stated in the brief heretofore filed, it can not, in any manner, affect the constitutionality of the transfer from the auditor to the governor. As Brother Oldham says, it could have been no inducement to the passage of the act. For the taxation would be as unconstitutional in the auditor's office as in the governor's. The counsel for the relator have attacked the construction of our constitution, based upon *Illinois C. R. Co. v. County of McLean,* 17 Ill., 291, cited in the brief; and claim that it was the constitution of 1848 which was construed in that case. Granted. What then? Let us see what the Illinois constitution of 1848 says: 'The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property,' and so forth. See section 2, article 9. 'Corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to

persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law.' See section 5, article 9. Counsel should remember that the Illinois cases, which they cited, were decided long after the adoption of our constitution. Have they forgotten the rule? So much for the Illinois constitution of 1848. My brethren are welcome to the cold comfort. But this taxation question has been sufficiently discussed for matter not in the case. When it comes up in the way it did in *Hawkeye Ins. Co. v. French*, cited by counsel, it will be time enough to decide it. In such a case the insurance companies will have an opportunity to fight their own battles. In that case, they had paid the tax provided by the insurance law; and were seeking to avoid the municipal tax."

NORVAL, J.

The legislature of 1899 passed an act, which received executive approval, by its terms, *inter alia*, creating a state insurance bureau, naming the governor as commissioner in charge of such bureau, charging him with the duty of enforcing the laws relative to insurance and the supervision of insurance companies, and providing for the organization and incorporation of insurance companies, for their admission from other states and counties, and to regulate their conduct. See Session Laws, 1899, p. 207, ch. 47. Prior to said act, for more than a quarter of a century, the state insurance department was under the supervision and control of the auditor of public accounts, which department was by the said act of 1899 attempted to be wrested from the auditor and placed under the supervision of the chief executive of the state. This is an original action in quo warranto, in the name of the state, on the relation of John F. Cornell, auditor of public accounts, against William A. Poynter,

as governor, to test the validity of said chapter 47, Session Laws, 1899. Our attention has been challenged to numerous alleged infirmities and imperfections on the face of the act in question, which, it is confidently asserted by counsel for relator, invalidate the whole law; but we do not deem it essential that we should now consider them, since questions of graver import have been urged upon our attention. The act has been assailed as unconstitutional upon various points; among others, that sections 36 and 37 of said chapter 47 contravene sections 1 and 4 of article 9 of the constitution, which are as follows:

"Section 1. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, by general law, uniform as to the class upon which it operates.

"Sec. 4. The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

Sections 36 and 37 of the act assailed follow:

"Sec. 36. Insurance companies shall pay fees in this state as follows: Domestic companies organized or incorporated under this act, shall pay fifty dollars ($50.00) for charter and all the necessary filings and papers to complete their incorporation. Domestic companies so incorporated, and those incorporated under any act re-

pealed by this act, or in any way complying with this act, shall pay for filing each annual statement, twenty dollars ($20.00). For each agent's certificate, fifty cents. Two certificates of publication, one dollar. The company's annual license, or copy of same, one dollar. Each and every such domestic insurance company shall also be taxed upon the excess of premium received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business properly proportioned by the company at the same rate that all other personal property is taxed, and the said agent shall render the list and be personally liable for the tax; and if he refuse to render the said list or to make affidavit that the same is correct the amount may be assessed accordingly to the best knowledge and discretion of the assessor. The fees and taxes herein provided for shall be in lieu of all fees and taxes, except taxes upon real estate and other taxes, provided in the general revenue law. Also an occupation tax or volunteer fire department tax not to exceed ($5.00) five dollars per annum for each agency, which any city, town or village in this state may impose by ordinance for the support of such fire department.

"Sec. 37. Every other state company shall pay one hundred dollars ($100.00), for depositing copy of charter, statement, and all the papers necessary to comply with this act, and the certificate of admission from the insurance commissioner. For filing copy of amended charter, seventy-five dollars ($75.00). Filing annual statement, fifty dollars ($50.00). Each agent's certificate, two dollars ($2.00). Companies doing a life and accident business, shall file separate statements for each department of their business, and pay one hundred dollars ($100.00) each year for filing the two statements. Life insurance companies that also transact industrial business, shall file separate statements for each department of their business, and pay one hundred dollars ($100.00) each year for filing the two

statements. Miscellaneous companies shall report all their transactions on one statement, and pay the one fee of fifty dollars ($50.00) each year. Every other state insurance company, and every such miscellaneous company shall each year in the month of January, report under oath, to the insurance commissioner, the gross amount of premiums received for the preceding calendar year, upon or on account of life, accident, fire or miscellaneous business, or insurance affected on property located within this state; such report shall be sworn to by the president and treasurer, or other chief fiscal officer. Such companies shall pay two per cent of their gross premiums so reported, as an additional license fee to the state treasurer, and shall not be relicensed for the year, until this payment is made. Provided, Any such life or accident company, which is, under reciprocal provisions in this act, obliged to pay more than two dollars for the annual license hereinafter provided in this section, or is required to pay any sum into the state treasury for the school fund, shall be allowed to deduct such excess over two dollars, from its bill for taxes before paying the same. Every other state company shall annually pay two dollars for two certificates of publication, two dollars for annual license of the company, or copy of same. For every copy of paper filed, as herein provided, the sum of ten cents per folio, and one dollar for certifying the same and affixing the seal of the office thereto. The taxes and fees above provided shall be paid to the state treasurer, and shall be in full of all fees and taxes, except taxes on real estate, which may be imposed by any county, municipality or the state, unless otherwise provided by this act. Provided, That in cities of the first class having more than ten thousand inhabitants and in cities of the second class having more than five thousand inhabitants that maintain a fire department, the city council may by ordinance impose an occupation tax on all fire insurance companies maintaining an agency in, or doing business in such city, not to exceed ten dollars per annum; for

the benefit of such fire department. Provided further, that in cities of the second class having less than five thousand inhabitants and in villages that maintain a fire department, the city council or board of trustees may, by ordinance impose an occupation tax on all fire insurance companies maintaining an agency or doing business in such city or village not to exceed five dollars per annum, for the benefit of such fire department."

Before entering upon a discussion of the constitutional question to which we have alluded, it is important that there ever be kept in view that the judiciary will not declare an act of the legislature unconstitutional, unless it is clear that such act is inhibited by the fundamental law. If a reasonable doubt exists, it must be solved in favor of the validity of the statute. See *Turner v. Althaus*, 6 Nebr., 55; *State v. Lancaster County*, 4 Nebr., 537; *Pleuler v. State*, 11 Nebr., 547; *Board of Directors Alfalfa Irrigation District v. Collins*, 46 Nebr., 411; *Davis v. State*, 51 Nebr., 302. With this principle firmly implanted in our mind, we proceed to the consideration of the constitutional question.

The provisions of the constitution already quoted, which are invoked by the relator, are plain, and the language employed free from ambiguity. Their meaning is involved in no doubt. The public revenues are required to be raised by the imposition of a tax by valuation, "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." See Constitution, art. 9, sec. 1. To the legislature is committed the power of determining the manner for ascertaining the assessed value of property, as well as the authority to tax certain business interests and persons belonging to the avocations enumerated in said section 1, article 9, of the constitution. The rule of uniformity vouchsafed by said section forbids the enactment of any law exempting the property of any person or corporation from taxation, except such as enumerated in section 2, article 9, of the constitution. The property

of insurance companies can not be exempt from taxation. Section 1 of said article has been frequently under consideration by this court. In *Union P. R. Co. v. Saunders County*, 7 Nebr., 228, it was decided that an act of the legislature was violative of said section of the constitution which provided that the sum of $100 be deducted from the assessment of lands for each acre planted and cultivated with forest and fruit trees. It has been ruled that the imposition of a land road tax of $4 per quarter section was inhibited by said section of the constitution. See *McCann v. Merriam*, 11 Nebr., 241; *Dundy v. Richardson County*, 8 Nebr., 508; *Covell v. Young*, 11 Nebr., 511. Corporate stocks are taxable under said section. See *Mortensen v. West Point Mfg. Co.*, 12 Nebr., 197. The rule of uniformity inhibits the legislature from discriminating between taxpayers in any manner. See *State v. Graham*, 17 Nebr., 43. In every instance where this court has spoken upon the subject it has been determined that the legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, but that the constitutional rule of uniformity requires all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. This doctrine is entirely sound, and the language of the constitutional provision we have been considering will not authorize or permit of any other or different interpretation.

By section 4, article 9, of the constitution the legislature, in plain and unequivocal language, is inhibited from enacting any law releasing or discharging any individual or corporation or property from their or its proportional share of taxes to be levied for state or municipal purposes. This court recognized and applied this provision when it held that the lawmaking body could not authorize the sale of tax certificates for sums less than the amount due. See *State v. Graham*, 17 Nebr., 43; *Lancaster County v. Trimble*, 33 Nebr., 121; *State v. Berka*, 20 Nebr., 375; *Lancaster County v. Bush*, 35

Nebr., 119. It will be observed that section 36, chapter 47, Session Laws, 1899, provides that each domestic insurance company organized under said law shall be taxed upon the excess of premiums over losses and ordinary expenses incurred in the state during the preceding year in the county where the agent conducts the business, properly apportioned by the company, at the same rate other personalty is taxed, and that the fees and taxes specified in said section shall be in lieu of all fees and taxes, excepting those upon real estate and other taxes provided in the general revenue law; while by section 37 of said chapter 47 every other state insurance company shall pay certain fees, and in addition two per cent of their gross premiums, into the state treasury, and that the same "shall be in full of all fees and taxes, except taxes on real estate, which may be imposed by any county, municipality or the state." By these two sections all insurance companies are not taxed alike. Under section 36 one method or basis is adopted for the taxation of domestic insurance companies organized under chapter 47; while section 37 adopts another and different basis, or rate, for the assessment of all other state insurance companies. By section 36 the taxes are to be imposed and collected in the several counties where the corporation has agencies established, at the same rate other personalty is assessed; while section 37 requires the taxes to be paid into the state treasury, thereby prohibiting municipal corporations from receiving any portion of the taxes collected from the insurance companies referred to in said section, and such companies are relieved from the payment of all other taxes except those imposed upon real estate; while by section 36 another class of insurance companies are required to pay, not only taxes upon their real estate, but all other taxes provided by the general revenue law of the state. Thus it is plain that the legislature has violated the rule of uniformity prescribed by the constitution as between the different classes of insurance companies. Moreover, sec-

tion 37, if enforced, would relieve one class of insurance companies from taxation upon personal property, while the individual citizen is liable to taxation upon all his personalty within the state. So the rule of uniformity vouchsafed by the constitution has been ignored by the legislation under review, and taxes are attempted to be commuted in violation of the fundamental law.

But it is argued by counsel for respondent that section 1, article 9, of the constitution was borrowed from the state of Illinois, and, having been previously construed by the supreme court of that state, we adopted the provision with the construction placed thereon. It is true our section 1, article 9, is substantially section 2, article 9, of the constitution of 1848 of Illinois, and the supreme court of that state in 1855, in *Illinois C. R. Co. v. County of McLean*, 17 Ill., 291, decided that it was within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum. The decision can not have the extra-territorial force for which counsel contend, for various reasons. The constitution of Illinois of 1848 was not in force at the time our constitution was adopted, it having been superseded by the constitution of that state of 1870; and the superseded instrument did not contain a provision corresponding to our section 4, article 9, which, in express terms, forbids the release, discharge or commutation of taxes. The absence from the constitution of 1848 of a provision similar to our section 4, article 9, alone makes the decision in *Illinois C. R. Co. v. County of McLean, supra*, inapplicable. Besides, such decision is in direct opposition to the decisions of this court, to which we have already called attention. Again, the supreme court of Illinois, both prior and subsequent to rendering of the decision in the case of *Illinois C. R. Co. v. County of McLean*, had placed a different construction on section 2, article 9, of the constitution of 1848 of Illinois. Thus, in construing that section in *Trustees v. McConnel*, 12 Ill., 138, it was ruled that it was not within the power of the legis-

lature to exempt one species of personal property from taxation, while a tax is imposed upon another within the same taxing district. In the opinion in that case the court observed: "The constitution of the state expressly declares that the mode of levying a tax shall be by valuation, 'so that every person and corporation shall pay a tax in proportion to the value of his or her property.' Under this provision the legislature would have no power to exempt from taxation one species of personal property while it collected a tax from another within the same jurisdiction, and it is never to be presumed that the legislature intended to pass a law which should be contrary to the constitution, either in its letter or spirit." In the later case of *Hunsaker v. Wright*, 30 Ill., 146, the same clause of the constitution was again before the supreme court of Illinois, and in the course of the opinion filed therein it is said: "These provisions were manifestly inserted in the fundamental law for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for state, county or municipal purposes. The design was to impose an equal proportion of their burdens upon all persons within the limits of the district or body imposing them. Under these provisions, the legislature has no power to exempt or release a person or community of persons from their proportional share of these burdens." It is plain that if we borrowed our constitutional provisions from the 1848 constitution of Illinois, we adopted the latest construction placed thereon by the highest judicial tribunal of the state, instead of the earlier one in conflict therewith. It is, however, believed that sections 1 and 4, article 9, of our constitution were taken from the constitution of Illinois of the year 1870, which sections were construed by the supreme court of the state of Illinois in *People's Loan & Homestead Ass'n v. Keith*, 153 Ill., 609, and in *Ex parte People's Loan & Building Ass'n*, 153 Ill., 655, and it was ruled that a statute which attempted to exempt from taxation the shares of stock in homestead loan associa-

tions, and notes taken by them on loans, was inimical to the sections of the constitution of that state, corresponding to those of our own which we have been considering.

A similar question was passed upon recently by the supreme court of Iowa in *Hawkeye Ins. Co. v. French*, 80 N. W. Rep. [Ia.], 660. The legislature of that state had passed a law which imposed a tax of one per cent on the gross earnings of certain insurance companies, to be paid into the state treasury, and exempted them from the payment of all other taxes, state or local, except taxes on real estate and special assessment. It was held that said legislation was invalid, since it contravened section 2, article 8, of the constitution of Iowa, which requires the property of all corporations for pecuniary profit be taxed the same as that of individuals. Deemer, J., in the course of the opinion of the court, observed: "It is the provision of the act relieving companies who have paid a tax on gross income from all other state and local taxes that is in issue. Under our law the individual pays taxes for state purposes, for county purposes, for city or municipal purposes, and for the support of the schools. If section 1333 is valid in all its provisions, insurance companies are not required to contribute anything to the county, the city, or the school district. These burdens are removed from their shoulders, although they may have large interests which require protection at the hands of the county and the city. It contributes to the state fund alone, and no part of its contribution ever reaches the smaller subdivisions of government. The objects of the tax are not the same as that collected from individuals, and the burdens are not equally distributed. This is so plain that no amount of argument or exposition will add anything to the statement. Property of corporations is not subject to taxation the same as individuals when the individual is compelled to pay taxes on his property to the county, the city, and the school district, and the corporation is not. Again, it is manifest that the personal property of corporations engaged in the business of insur-

ance is exempt from taxation for all purposes whatever if appellants' contention is correct. Section 1333 provides for a tax on the gross receipts of such companies without reference to the amount of their capital stock, their surplus, or their investments. No account whatever is made of their holdings. If the business of the year should not prove profitable, because of losses and premiums returned, no tax would be required of them under section 1333, notwithstanding the fact that they may have had large amounts of personal property, which, in the hands of an individual, would be subject to taxation. Surely their property is not subject to taxation 'the same as that of individuals' if the only tax they are required to pay is that imposed by this section. It well may be doubted whether a tax on premiums is a tax on property in its proper sense. See *City of Dubuque v. Northwestern Life Ins. Co.*, 29 Ia., 9; *City of Burlington v. Putnam Ins. Co.*, 31 Ia., 102. But however this may be, it is manifest that the personal property of the corporation accumulated from year to year is not subject to taxation under the provision relied upon by appellants. The legislature did not have the power to exempt this property from taxation, and its act in so doing is clearly unconstitutional and void. Neither had it the power to absolve these companies from the payment of county, city, and school taxes." The foregoing argument is unanswerable, and that it is applicable to the case at bar is obvious. See *City of New Orleans v. St. Charles Street R. Co.*, 28 La. Ann., 497; *City of New Orleans v. La Fayette Ins. Co.*, 28 La. Ann., 756; *Life Ass'n v. Board of Assessors*, 49 Mo., 512; *In re Taxes Delinquent in St. Louis County*, 73 N. W. Rep. [Minn.], 970. Upon principle, as well as authority, the conclusion is irresistible that sections 36 and 37 of chapter 47, Laws, 1899, are inimical to the provisions of sections 1 and 4, article 9, of the constitution, and are void.

It remains to be considered what effect the unconstitutional provisions of said sections 36 and 37 have upon the remainder of the act of which they formed parts. The

rule is a familiar one, that when the valid and invalid portions of a legislative enactment are capable of being separated, and the valid part is a complete act and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid. But if it is manifest, from an inspection of the law itself, that the invalid portion formed an inducement to its passage, the entire act will fail. See *State v. Lancaster County*, 6 Nebr., 474; *State v. Lancaster County*, 17 Nebr., 85; *Trumble v. Trumble*, 37 Nebr., 340; *Low v. Rees Printing Co.*, 41 Nebr., 127; *State v. Moore*, 48 Nebr., 870; *German-American Fire Ins. Co. v. City of Minden*, 51 Nebr., 870; *State v. Bowen*, 54 Nebr., 211. It is not necessary that the invalid portion of an act of the legislature should have operated as the sole inducement to the passage of the law to render the same void. It will have that effect if the void part to any extent influenced the legislature in passing the statute. It requires no argument to demonstrate that chapter 47 of the Laws of 1899 would not have received the approval of the legislature had it not contained any provision for the payment of fees and taxes by the insurance companies; and it is equally plain that the same amount of fees and taxes imposed by sections 36 and 37, and the requirement that the same should be paid into the state treasury, would not have been incorporated in the law had the unconstitutional provision exempting insurance companies from taxes been eliminated from the bill prior to the taking of the vote thereon by the legislature. If the motive inducement which prompted the enactment of said chapter 47 was merely a desire to transfer the insurance department of the state from the auditor to the governor, as is suggested by counsel for respondent, it is very evident that the act would most likely have been differently framed, and the provisions of said sections 36 and 37, so far as they attempt to exempt insurance companies from taxation, would have been omitted therefrom. While,

during the investigation of the subject, it has been our desire to sustain the law, we have been irresistibly forced to the conclusion that the entire act must fail by reason of the unconstitutional provisions therein contained, which have been already pointed out.

JUDGMENT ACCORDINGLY.

PENNSYLVANIA COMPANY V. KENNARD GLASS & PAINT COMPANY ET AL.

FILED DECEMBER 19, 1899. No. 9,034.

1. **Review:** PARTIES. A judgment can not be reviewed by one not a party thereto, or who is not affected thereby.

2. **Carriers:** CONTRACTS LIMITING LIABILITY: CONSTITUTIONAL LAW. Under the constitution of this state a common carrier of freight can not lawfully stipulate for the release from liability for loss or damage occasioned by its own negligence, and such a stipulation in a contract of affreightment is illegal and void.

3. **Instructions:** HARMLESS ERROR. Neither the giving of an instruction technically erroneous, nor the refusal of the one stating the law correctly, will work a reversal of a judgment, where it is obvious that the complaining party was not prejudiced thereby.

4. **Allegations and Proof.** Material averments in an answer, which are controverted by the reply, rest upon the defendant to establish by evidence upon the trial.

5. **Evidence:** FOREIGN LAWS: PRESUMPTIONS. The laws of a sister state will be presumed to be the same as our own when the contrary is not shown.

6. **Cross-Examination of Witnesses.** The cross-examination of a witness should be confined to the matter covered by his examination in chief.

7. **Trial:** ORDER OF INTRODUCING TESTIMONY. The order in which testimony shall be introduced is discretionary with the trial court, and its ruling in that regard is no cause for reversal, where no abuse of discretion is shown.

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

The opinion contains a statement of the case.

Will A. Corson and *Winfield S. Strawn*, for plaintiff in error:

In arguing the points that the contract of affreightment was a Pennsylvania contract, and should be construed by the laws of that state, and that in Pennsylvania a carrier, by contract, may limit its liability, reference was made to the following cases: *Missouri P. R. Co. v. Vandeventer*, 26 Nebr., 222; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Nebr., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Nebr., 356; *Omaha & R. V. R. Co. v. Crow*, 47 Nebr., 84; *Missouri P. R. Co. v. Tietken*, 49 Nebr., 130; *Union P. R. Co. v. Metcalf*, 50 Nebr., 452; *Fremont, E. & M. V. R. Co. v. Waters*, 50 Nebr., 592; *Atchison & N. R. Co. v. Washburn*, 5 Nebr., 117; *Chicago, R. I. & P. R. Co. v. Witty*, 32 Nebr., 275; *Union P. R. Co. v. Marston*, 30 Nebr., 241; *Farnham v. Camden & A. R. Co.*, 55 Pa. St., 5; *Grogan v. Adams Express Co.*, 114 Pa. St., 523; *Patterson v. Clyde*, 67 Pa. St., 500; *American Express Co. v. Sands*, 55 Pa. St., 140; *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St., 527; *Forepaugh v. Delaware, L. & W. R. Co.*, 128 Pa. St., 217; *Hart v. Pennsylvania R. Co.*, 112 U. S., 331; *Talbot v. Merchant's Despatch Transportation Co.*, 41 Ia., 247; *Arnold v. Potter*, 22 Ia., 194; *McDaniel v. Chicago & N. W. R. Co.*, 24 Ia., 412; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga., 522; *Cantu v. Bennett*, 39 Tex., 303; *Beard v. St. Louis, A. & T. H. R. Co.*, 79 Ia., 531; *Dike v. Erie R. Co.*, 45 N. Y., 113; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y., 294; *Brooke v. New York, L. E. & W. R. Co.*, 108 Pa. St., 529; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S., 397; *Michigan C. R. Co. v. Boyd*, 91 Ill., 268; *Benton v. German-American Nat. Bank*, 45 Nebr., 850.

The contract of affreightment is one that is perfectly legal, and which may properly be made where not for-

bidden by the law of the place where the contract is entered into. See *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St., 527; *Atchison, T. & S. F. R. Co. v. Mason*, 46 Pac. Rep. [Kan.], 31; *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan., 210; *Pierce v. Southern P. R. Co.*, 47 Pac. Rep. [Cal.], 874; *Loeser v. Chicago, M. & S. P. R. Co.*, 69 N. W. Rep. [Wis.], 372; *Schaller v. Chicago & N. W. R. Co.*, 71 N. W. Rep. [Wis.], 1042; *York County v. Illinois C. R. Co.*, 3 Wall. [U. S.], 107; *Chicago, M. & S. P. R. Co. v. Solan*, 18 Sup. Ct. Rep., 89; *Texas & P. R. Co. v. Payne*, 38 S. W. Rep. [Tex.], 366; *Hoffman v. Cumberland V. R. Co.*, 37 Atl. Rep. [Md.], 214; *Miller Grain & Elevator Co. v. Union P. R. Co.*, 40 S. W. Rep. [Mo.], 894; *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 104 U. S., 146; *Richmond & A. R. Co. v. Patterson Tobacco Co.*, 18 Sup. Ct. Rep., 335; *Smith v. Alabama*, 124 U. S., 465; *Hall v. De Cuir*, 95 U. S., 485; *Welton v. State*, 91 U. S., 275; *Brown v. Houston*, 114 U. S., 622.

The case of *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Nebr., 70, if sound in principle, differs materially from the case at bar, and is in no manner decisive thereof.

Repudiation of the Pennsylvania contract is a violation of section 1, article 4, of the constitution of the United States, and of section 1 of the 14th amendment to said constitution. See *Allgeyer v. Louisiana*, 165 U. S., 578.

Kennedy & Learned and *Montgomery & Hall, contra.*

NORVAL, J.

In 1893 the Kennard Glass & Paint Company of the city of Omaha purchased of the Pittsburg Plate Glass Company a quantity of plate glass of the value of about $3,000. The glass was properly packed in boxes by the vendor, loaded upon a car at Ford City, Pennsylvania, and delivered to the Allegheny Valley Railway Company at said point for transportation to the vendee in the city of Omaha. The glass was carried by said railroad company to Pittsburg, where the same was delivered to the

Pennsylvania Company, and it delivered the freight in the city of Chicago to the Chicago, Milwaukee & St. Paul Railway Company, and the latter corporation transported the freight to the city of Omaha, where the glass was delivered to the consignee in a badly broken and damaged condition. This action was instituted by the Kennard Glass & Paint Company against the Pennsylvania Company and the Chicago, Milwaukee & St. Paul Railway Company to recover damages sustained by reason of the alleged negligence of the defendants in the transportation of said glass, and their failure to safely carry said freight to its place of destination. In the amended petition it was alleged, in substance and effect, that the defendants were common carriers, and for a certain reward received the glass in question at Ford City to be safely carried to Omaha; that the glass was not safely transported to the place of destination, but was broken and damaged in transit to the amount of $433.12. It was also averred that the damage was occasioned by reason of a collision between the car on which the glass was being transported and a car loaded with telegraph poles or timbers. Separate answers were filed by the defendants. That of the Pennsylvania Company admitted only the associate capacity of plaintiff, and the incorporation of the defendant, all other averments of the petition being denied. The Pennsylvania Company, for further answer, alleged that on January 3, 1893, the Pittsburg Plate Glass Company entered into a written agreement with the Allegheny Valley Railway Company, the initial carrier, of which the following is a copy:

"ALLEGHENY VALLEY RAILWAY COMPANY.

"UNIFORM ANNUAL RELEASE.

"FORD CITY STATION, January, 1893.

"Whereas, The Allegheny Valley Railway Company has two different rates of charges for tolls and transportation upon certain articles, viz.: The higher rate, upon the payment of which it assumes the ordinary liability of a common carrier upon its railway for property trans-

ported by it; and another lower rate, at which it transports for all those who release it from all liability, so far as may lawfully be done, for any loss or damage, to property entrusted to it for transportation.

"And Whereas, The Pittsburg Plate Glass Co., the undersigned, has determined to ship all property which they furnish for transportation during the year ending upon the thirty-first day of December, 1893, at the reduced rates above referred to, and in consideration thereof to release so far as it lawfully may, the said company and any and every other railway or transportation company to which the said property may be delivered for transportation to or toward its place of destination, from all liability for any loss thereof or damage thereto, considering that the difference in their favor in the cost is equivalent to the risk of transportation.

"Therefore, In consideration of the premises, the said Pgh. P. G. Co. does hereby release and discharge, so far as they lawfully may, the said railway company and all other railway transportation to or toward its place of destination from all claims, demands or liabilities for any loss thereof or damages thereto howsoever occurring by fire or otherwise, or whether by negligence of said railway or transportation companies, or of their or either of their officers, agents, or employees or otherwise, while the same is in their care, custody, or possession.

"And the said Pgh. P. G. Co. hereby authorize the said railway or transportation company and any such other railway or transportation company as their agent, to deliver the said property to any other railway or transportation company over whose route it may be carried to or toward its place of destination, and they agree that no such railway or transportation company shall be considered as carrier of said property beyond its own road or line or in any event be held liable for loss of or damage to said property while in the possession of any other railway or transportation company to which the said property may be delivered as aforesaid.

"This contract is supplemental to the contract contained in any bill of lading issued in respect to any shipment made by the above named shipper.

"In witness whereof, the said Pgh. P. G. Co. has executed this release in Ford City, Pa., this third day of January, A. D. 1893.

"PITTSBURG PLATE GLASS COMPANY,
"R. W. MCCUTCHEON, *Shipper.*
"*Railway Agent.* D. S. ROBINSON,
"*General Manager Ford City Works.*"

In the answer it was also pleaded that in pursuance of said contract, and in consideration of a lower rate of freight, the Allegheny Valley Railway Company was released by the consignor from all loss or damage to freight shipped during the year 1893, not arising from negligence of said Allegheny Valley Railway Company, its servants and employés; and that the glass in question was carried under said contract, which was valid under the laws of the state of Pennsylvania. The answer of the Chicago, Milwaukee & St. Paul Railway Company admitted its own incorporation and the associate character of the plaintiff; that the glass was delivered to the Pennsylvania Company for safe conveyance from Ford City to Omaha; admitted that the answering defendant received the glass at Chicago from its co-defendant, and that it carried the same to Omaha. Every other allegation of the petition was denied by the answer, and it was specifically averred therein that the defendant handled and transported the glass in a careful and prudent manner, and that it was not damaged or injured while in its possession. Said defendant, in its answer, also pleaded the "Uniform Annual Release," copied above, and alleged that the glass was received and transported under, and in pursuance of, the terms thereof. Plaintiff replied to these answers by a general denial. A verdict was returned in favor of the plaintiff, and against the Pennsylvania Company, for the sum of $433.12 and interest. Judgment was rendered thereon; and the court dis-

missed the action as to the Chicago, Milwaukee & St. Paul Railway Company. The Pennsylvania Company alone has prosecuted a petition in error, making the other parties to the cause defendants in error.

The judgment rendered in favor of the Chicago, Milwaukee & St. Paul Railway Company, it is obvious, can not be disturbed. The plaintiff below, the Kennard Paint & Glass Company, filed no motion for a new trial, nor has it prosecuted a petition in error; therefore, the judgment of the district court is conclusive against the plaintiff below. The Chicago, Milwaukee & St. Paul Railway Company recovered no judgment against the Pennsylvania Company, for its recovery was against the plaintiff below only. The defendants were not jointly liable for the damages sustained by the plaintiff, and the Chicago, Milwaukee & St. Paul Railway Company, it is plain, is not answerable for any injury to the glass while the same was in the possession of the Pennsylvania Company; consequently the latter was in nowise prejudiced by the dismissal of the action as to its co-defendant. See *Burlington & M. R. R. Co. v. Martin*, 47 Nebr., 56. It is but just to counsel for plaintiff in error that we should state that they are not seeking to have reviewed the judgment recovered against the plaintiff below by the Chicago, Milwaukee & St. Paul Railway Company.

The court instructed the jury that the defendants were common carriers, and as such each was an insurer of the safe delivery of goods intrusted to it for transportation, and liable for all loss or damages to such goods not arising from the act of God or the public enemy. The seventh, ninth, tenth and eleventh paragraphs of the court's charge are as follows:

"7. You are instructed that under the laws of the state a contract between a shipper and a common carrier, which by its terms limits the liability of the carrier in transportation of goods, or relieve it entirely or partially from damages for injury or loss to such goods resulting from the negligence and carelessness of such carrier, is void and of no effect.

"9. If you find from the evidence that the plate glass in question was damaged and that such damage occurred on either of the defendants' railway lines, and while being transported by either of the defendants under its contract and over its railway line, although under special agreement as to transportation limiting liability, you will find for the plaintiff and against the defendant which was so transporting said goods when they were so damaged, if either of them were at such time, transporting such goods.

"10. In other words, gentlemen of the jury, in this case you are to determine from the evidence whether or not the goods in question were damaged while being transported by either of these defendants, and if you find the goods were damaged while being transported by either of these defendants, you should find for the plaintiff and against the defendant so transporting such goods when they were damaged, and also determine in your verdict the amount of damage sustained by plaintiff.

"11. If you find from all the evidence in the case that the damage to the glass in controversy occurred before the delivery thereof by the Pennsylvania Company, defendant, to the Chicago, Milwaukee & St. Paul Railway Company, defendant, then your verdict should be in favor of the Chicago, Milwaukee & St. Paul Railway Company, defendant. Likewise, if you find from all the evidence in the case that the damage to the glass in controversy did not occur while being transported by the Pennsylvania Company, then you should find in favor of the Pennsylvania Company."

The Pennsylvania Company tendered, among others, the following instructions, which the court declined to give to the jury, and an exception was taken to such refusal, as well as to the giving of the instructions above set forth:

"5. You are instructed that the contract under which the glass mentioned in the petition herein was agreed to

be carried, and was carried from Ford City, Pennsylvania, over the Allegheny Valley Railway Company road and the Pennsylvania Company's road, was a contract that was made in the state of Pennsylvania and the same is to be construed under and in pursuance of the laws of said state.

"6. You are further instructed that under the laws of Pennsylvania a common carrier can limit its liability for damage to freight in all cases except when said damages was occasioned by the negligence of the carrier, or its agents and servants."

The question is presented whether the Pennsylvania Company was prejudiced by the giving of the instructions quoted or the refusal to give those tendered by said corporation. It will not escape notice that the "Uniform Annual Release" entered into by the consignor with the initial carrier, the Allegheny Valley Railway Company, stipulated, upon the shipment at a lower rate, for the release of the latter by the former from loss or damage to property delivered for transportation to said carrier during the year 1893, howsoever occurring, whether by negligence of said company or that of any other carrier to which the property might be delivered for transportation, or their or either of their agents and employés. The glass was shipped in 1893, and a bill of lading was issued by the initial carrier which contained the word "released," meaning that damages to the property while in possession of the carrier were released or waived. Upon the question as to the right, power or authority of a common carrier to contract for the release of itself from liability or damages to property committed to it for transportation, this court has more than once spoken in language not susceptible of being misunderstood. In the early case of *Atchison & N. R. Co. v. Washburn*, 5 Nebr., 117, the question first came before the court, and it was ruled that the policy of the law forbids a common carrier of freight to stipulate that it shall not answer for damages resulting from its own negligence, and that

such a provision in a contract is illegal and void. In that case GANTT, J., speaking for the court, used this apposite language: "The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is, that 'it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them from negligence in the performance of that duty.'" That case arose before the adoption of our present state constitution. The framers of that instrument incorporated therein that "the liability of railroad corporations as common carriers shall never be limited." See Constitution, art. 11, sec. 4. That provision of the fundamental law was construed in *Missouri P. R. Co. v. Vandeventer*, 26 Nebr., 222, and COBB, J., in the course of his opinion, observed: "This clause expresses the supreme law of the state. If we can divine its meaning, then, as to us, the question is settled. In following that general rule of construction, to consider the old law, and the mischief, in order to arrive at the meaning of a proposed remedy, we here take the old law as construed by the supreme court of the United States in the above case; and I think the mischief may be assumed to have been the facility with which common carriers were enabled, either by deception or downright coercion, to induce shippers to waive their rights under the law and enter into special contracts of shipment. And while I concede as a general proposition that the true office of a state constitution is mainly to limit the powers of the legislature, and not to limit the effect of the contracts between parties, yet nearly all, and ours especially, contain departures from this rule. * * * So I conclude that the object and intent of the convention in proposing, and of the electors in adopting, this provision of the constitution here referred to was

to put it out of the power of the railroads, as common carriers, to limit their liability as such, by special agreements with shippers, and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefrom." That a common carrier can not limit its liability for negligence has been reaffirmed in the following cases: *Chicago, R. I. & P. R. Co. v. Witty*, 32 Nebr., 275; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Nebr., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Nebr., 356; *Omaha & R. V. R. Co. v. Crow*, 47 Nebr., 84; *Missouri P. R. Co. v. Tietken*, 49 Nebr., 130; *Union P. R. Co. v. Metcalf*, 50 Nebr., 452; *Chicago B. & Q. R. Co. v. Gardiner*, 51 Nebr., 70. And in *St. Joseph & G. I. R. Co. v. Palmer, ubi supra*, it was held that the same rule was applicable to contracts for interstate shipments.

The instructions given by the trial court to the jury in this cause were in accordance with the doctrine announced in the decisions of this court already mentioned. But it is argued with marked legal acumen that the contract of affreightment, being a Pennsylvania contract, must be construed according to the laws of that state, and not under those obtaining here. A similar question was presented and decided in *Chicago, B. & Q. R. Co. v. Gardiner, ubi supra.* The decision is fairly reflected in the second paragraph of the syllabus, which reads thus: "2. A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of the state." Ordinarily, the law of the place of the execution of a contract governs and controls; and this court, in *Benton v. German-American Nat. Bank*, 45 Nebr., 850, has so held the rule to be. The exception to this doctrine, which was recognized and applied in the said case of *Chicago, B. & Q. R. Co. v. Gardiner*, is that a contract entered into in a

sister state, though valid there, will not be enforced here, if such contract contravenes, or is opposed to, the public policy of our state. This exception to the rule is vigorously assailed, and it is urged that the refusal to enforce the contract in question is a violation of section 1, article 4, and of section 1 of the fourteenth amendment to the constitution of the United States. It can not be doubted that the effect of the decision in the *Gardiner Case* is to deny a common carrier the benefit of a defense available to it in the state where the contract of affreightment was entered into; but we are not called upon at this time, for the reasons hereafter stated, either to reaffirm or overrule the doctrine of that decision. It was established upon the trial, and we also know from the repeated adjudications of the highest judicial tribunal of the state of Pennsylvania, that in that state a common carrier may not, by special contract, limit its liability as to injury or damages arising from its own or its servants' negligence, although in other respects the carrier may limit its liability. See *Farnham v. Camden & Amboy R. Co.*, 55 Pa. St., 5; *Grogan v. Adams Express Co.*, 114 Pa. St., 523; *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St., 527; *Pennsylvania R. Co. v. Miller*, 87 Pa. St., 395; *Pennsylvania R. Co. v, Raiordon*, 119 Pa. St., 537. Therefore, the Uniform Annual Release was invalid in the state of Pennsylvania, at least to the extent it attempted to release the carrier from liability for its own negligence. The contract being invalid, to the extent indicated at the place where made, the courts of this state violate no provision of the federal constitution, nor ignore any law of Pennsylvania in holding the contract void so far as it undertook to relieve the carrier from liability for its own negligence. The rule that the Pennsylvania Company is liable for its own negligence it asserts, through its counsel, a willingness to have enforced; but it is argued that the law as given to the jury in this case wholly ignores this principle, and made the carrier responsible as an insurer and liable for the safe delivery of the glass,

unless the damages flowed from the act of God or the public enemy. This contention of counsel is entirely sound, and the judgment, for that reason, should be reversed, unless it is manifest no prejudicial error resulted from the charge of the court. If the glass was damaged or injured through the negligence of the Pennsylvania Company, or if it was not shown that the shipment was made under the Uniform Annual Release, it is clear a recovery against it was entirely right, and that no other verdict could have been properly returned. In the answer of the Pennsylvania Company, the making of the Uniform Annual Release was alleged, and that, in consideration of a reduced or lower rate exacted by the initial carrier, the glass was shipped thereunder. It is very evident, since these averments were denied by the reply, that the burden was upon the corporation to establish them by competent evidence upon the trial. This, so far as we have been able to discover from a reading of the bill of exceptions, it did not do. The execution of the Uniform and Annual Release, and the issuance of the bill of lading for the glass, containing the word "released," were proven. But there is not to be found in the record a scintilla of evidence that the glass was shipped at the lower rate of freight, or that the consignor was aware or had any knowledge of the insertion of the word "released" in the bill of lading. Unless the freight was shipped at the lower or reduced rate, there was no consideration for the release of damages.

Again, by section 5, article 1, chapter 72, of the Compiled Statutes of the state it is provided: "No notice, either expressed or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms, before such limitation shall take effect." This piece of legislation was enacted before the adoption of the present state constitution, and if it has not been repealed or modified

by section 4, article 11, of said instrument, and if a carrier may in this state limit its liability except for damages arising from its own negligence or that of its agents and servants, as contended by counsel for the unsuccessful defendant, it requires no extended argument to show that by reason of said section 5, a contract of a railroad company stipulating for the limitation of its liability will not be upheld where it does "not appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms." In the absence of a showing to the contrary, we must assume that in the state of Pennsylvania there exists a statute similar to section 5 quoted above. See *Haggin v. Haggin*, 35 Nebr., 375; *Stark v. Olsen*, 44 Nebr., 646; *Chapman v. Brewer*, 43 Nebr., 890; *Scroggin v. McClelland*, 37 Nebr., 644; *Smith v. Mason*, 44 Nebr., 610. It, therefore, devolved upon the Pennsylvania Company to establish that the limitation clause was actually assented to by the consignor. No such evidence was adduced upon the trial; and hence there was a failure to establish that any contract was lawfully made which limited the liberty of the carrier. And without the existence of such a contract, the risk assumed was the common-law liability of a carrier. In other words, the safe delivery of the glass was insured, subject only to injuries arising from the act of God or the public enemy. Moreover, there was sufficient evidence of negligence upon which to base a recovery. The injury to the glass was established beyond controversy. It was also shown that the glass was carefully and properly packed in boxes, and properly loaded on the car; that at the time the car was delivered to the Chicago, Milwaukee & St. Paul Railway Company the boxes were out of their original position, with indications that they had been roughly used; that flat cars loaded with timbers were immediately in the rear of the one containing the glass, in the train of the Pennsylvania Company, and that the Milwaukee road, in a careful and prudent manner, carried the freight from Chicago, where

it received the same from the Pennsylvania Company, to its final place of destination. The evidence was sufficient to warrant a finding that the damages resulted from the negligence of the latter company, especially in the absence of any proof that the glass was carefully handled and transported by it. The conclusion is irresistible that the evidence sustains the verdict, and would have supported none other; and hence no prejudicial error resulted in the giving or refusing of instructions.

It is urged that the court below erred in striking out the testimony of Kennard, who was called and examined as a witness on behalf of the plaintiff. Mr. Kennard testified on direct examination that he had examined the boxes containing the glass on their arrival in Omaha, and, after giving a description of them, he was asked to state the dimensions of the glass, and the witness proceeded to answer by reading from an invoice then before him, when Mr. Corson, counsel for the Pennsylvania Company, cross-examined the witness, which questions and answers follow:

"Q. What is the invoice?

"A. It is the invoice rendered.

"Q. Whose handwriting?

"A. It is a typewriting, dictated by myself.

"Q. At what time?

"A. June 15, 1893.

"Q. Under what circumstances?

"A. The conditions were these boxes were found to be demolished, and under the instructions from the agent of the Chicago, Milwaukee & St. Paul Railway Company, I was to open those boxes and take out the glass, and make as much salvage out of it as was possible and credit that to the railroad company and charge them with the value of the glass and they would immediately take steps to have me paid for it, which they have not done."

The last answer was eliminated by the court, which is the ruling now assailed. The testimony was not proper cross-examination relative to the making of the invoice;

besides, the answer was not fairly responsive to the question put to the witness. Moreover, Mr. Kennard had not been interrogated upon his direct examination concerning any conversation with Mr. Preston or any one else; nor had it then been shown that the latter was the agent of the Chicago, Milwaukee & St. Paul Railway Company. The answer was also the statement of a conclusion of the witness, and was properly stricken out.

Edward F. Capron, the freight claim agent of the Chicago, Milwaukee & St. Paul Railway Company, testified on behalf of said company relative to correspondence between it and one Charles L. Cole, the general freight agent of the Pennsylvania Company, pertaining to the damages to the glass in question, and also identified several communications between the two roads relative to said matter, which were produced on the trial and introduced in evidence. From this correspondence it was disclosed that the car containing the glass, while being transported by the Pennsylvania Company, was immediately ahead, in the same train, of two flat cars loaded with long and heavy bridge timbers. Thereupon to the witness Capron was propounded, in substance, the question whether any correspondence had with the Pennsylvania Company prior to that introduced in evidence contained any statement as to what cars were loaded by it behind the one containing the glass. To which question the witness gave a negative answer. Complaint is made of the admission of the answer to said question. The evidence was preliminary in its nature; doubtless, elicited for the purpose of ascertaining whether the witness was in possession of any other letters relative to the handling of the car on which was loaded the glass, so that the same might be called for and produced as evidence. Again, the answer elicited by the question could not have prejudiced the case of the party now complaining.

On rebuttal the plaintiff was permitted to prove the value of the glass at the place of shipment, which it is

claimed is prejudicially erroneous. The order in which evidence shall be adduced rests in the sound discretion of the trial court, and to work a reversal an abuse of discretion must be shown. See *McCleneghan v. Reid*, 34 Nebr., 472; *Consaul v. Sheldon*, 35 Nebr., 247; *Basye v. State*, 45 Nebr., 261. No abuse of discretion is disclosed in this matter, and the assignment relating thereto is overruled.

The assignments that the evidence does not sustain the judgment below, and that the motion of the Pennsylvania Company requesting that a verdict in its favor should have been directed, require no special attention, since they have been disposed of in the consideration of the assignments already noticed. We have, with care, scrutinized this record, and, having failed to discover any reversible error therein, the judgment is

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V. GILBERT L. WIARD, ET AL.

FILED DECEMBER 19, 1899. No. 9,060.

1. **Insurance:** LOSS: UNMATURED PREMIUM NOTE. A policy of fire insurance stipulated that it should be suspended and rendered inoperative, and of no force, during the time the premium note, or any part thereof, remained overdue and unpaid. That the note remained unpaid at the time the insured property was destroyed by fire will not defeat a recovery on the policy in case the note had not then matured.

2. ———: ———: BREACH OF CONTRACT: PLEADING. Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense.

3. ———: PREMIUM NOTE. A premium note executed by the insured is a sufficient consideration for the policy.

4. ———: APPLICATION: RATIFICATION BY INSURER. The evidence is sufficient to show that the application for insurance was not written by the agent of the insured, and that the company accepting the application and premium note ratified the act of the person who prepared and forwarded the same.

5. ———: NOTICE TO AGENT. Notice to an agent is notice to his principal.

6. Constitutional Law: PRESENTING QUESTION. A party desiring the court to pass upon the constitutionality of a statute should point out in his brief the section of the constitution which he claims the law infringes.

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

Halleck F. Rose, Wellington H. England and *Joseph Wurzburg,* for plaintiff in error.

M. F. Harrington, contra.

NORVAL, J.

On June 2, 1892, the Farmers & Merchants Insurance Company, upon a written application therefor of Gilbert L. Wiard, of Holt county, issued to him a policy of insurance upon his dwelling-house and household goods contained therein, and other personal property. The insured, in payment of the premium on the policy, gave to the company his promissory note for $28.50, due January 1, 1893. The dwelling and some of the household goods therein were wholly destroyed by fire in July, 1892. The policy was assigned to the Exchange Bank as security for an indebtedness owing by Wiard to the bank. The company having denied a liability, the insured and the bank brought an action upon the policy in the county court, and recovered judgment. On appeal by defendant, they obtained judgment in the district court, which is before us for review.

The premium note had not been paid at the time the loss occurred; but that fact could not defeat a recovery, since the note had not matured at the time of the fire, and the policy merely provided that it should be suspended and rendered inoperative and of no force and effect during the time such premium note, or any part thereof, remained overdue and unpaid. Moreover, this provision

of the policy was not pleaded as a defense by the company. It is true the plaintiffs set out a copy of the policy in their petition, and averred that the same was issued upon a valuable consideration. The answer expressly denies this allegation; but that did not tender an issue relative to the premium note being unpaid, or whether the policy was invalidated by reason of such non-payment. The giving of the note was a sufficient consideration for the issuance of the policy in question.

The policy was issued upon the written application of the insured stating that the property was incumbered to the amount of $1,800, due in 1893. The policy stipulated that it was based upon the representation contained in the application, that, if the property was or should thereafter become mortgaged or incumbered, or upon the commencement of foreclosure proceedings, it should render the policy void. It was shown that at the time the application for insurance was made and the risk was written, in addition to the $1,800 incumbrance mentioned in the application, there were two other mortgage liens on the premises insured, one for $600 and the other for $270, of which no mention was made in the application, and that a decree had then been entered foreclosing the mortgages. It is contended that the existence of the mortgages not having been specified in the application, and the entry of the decree of foreclosure, rendered the policy inoperative and void. The contention of the plaintiffs is that the agent who wrote the application at the time had knowledge of all of said facts, and the company ratified the same by retaining the application and premium note and issuing the policy. One Hart was the duly authorized soliciting agent of the defendant at Atkinson. A Mr. Crossman had the agency for another insurance company, which did not write farm risks. The two occupied the same office or building. At times Hart would write applications for a policy in Crossman's company, and the latter would also take an application for Hart in the defendant company, and they would divide the commis-

sion. Crossman prepared the application on which the policy in suit was issued, and had knowledge of the incumbrances on the property, and the existence of the foreclosure proceedings. The defendant, having accepted the application and premium note, ratified the act of Crossman in taking the same. In that transaction he was the agent of the defendant, and bound it precisely to the same extent as though Hart, its regular agent, had prepared and forwarded the application.

It is argued that the company would not have been bound had Hart personally solicited the risk, since he was merely a soliciting agent without power to issue policies. There are decisions of other courts which fully sustain this contention, but, unfortunately for the defendant, this court has decided the point the other way. See *State Ins. Co. of Des Moines v. Jordan*, 29 Nebr., 514; *Dwelling-House Ins. Co. v. Weikel*, 33 Nebr., 668; *German-American Ins. Co. v. Hart*, 43 Nebr., 441; *German Ins. Co. v. Rounds*, 35 Nebr., 752; *Home Fire Ins. Co. v. Fallon*, 45 Nebr., 554.

The judgment included an allowance of $125 as fees for plaintiff's attorney. It is finally insisted that the provision of the statute allowing attorney's fees is unconstitutional and void. We are not advised of the section or provision of the fundamental law which it is claimed the statute infringes which authorizes the award of attorney's fees to the plaintiff against an insurance company; therefore, the question can not now be determined. See *Boyes v. Summers*, 46 Nebr., 308. The judgment is

AFFIRMED.

JOHN H. LONGFELLOW, RECEIVER OF THE STATE BANK OF WAHOO, APPELLEE, V. E. H. BARNARD, APPELLANT.

FILED DECEMBER 19, 1899. No. 8,902.

1. **Unincorporated Bank:** CORPORATION. An unincorporated bank, exclusively owned by one person, is not a corporation *de facto*, though the business was conducted by a president and cashier.

2. ———: DISPOSAL OF ASSETS. The assets of the bank may be lawfully disposed of by the owner to secure or pay the just claims of any of his creditors.

3. ———: ———: STARE DECISIS. *Longfellow v. Barnard*, 58 Nebr., 612, adhered to.

REHEARING of case reported in 58 Nebr., 612. *Former decision sustained. Judgment below reversed.*

W. J. Courtright, for appellant.

Good & Good, contra.

NORVAL, J.

This cause is on rehearing, the former opinion being reported in 58 Nebr., 612. After a careful consideration of the briefs and arguments of counsel for the respective parties, and an investigation of the questions anew, we have reached the same conclusion announced on the former submission. The only doubt we entertained was with respect to the soundness of the propositions embraced in the first two paragraphs of the syllabus to the prior opinion, and this doubt has been entirely removed by the further investigation and consideration which we have given the case. There is nothing in the prior decisions of this court to which our attention has been challenged which in the least militates against our former holding herein. The case most nearly in point is *State v. Commercial State Bank*, 28 Nebr., 677, but it is readily distinguishable from the one in hand. In that case the Commercial State Bank was an incorporated institution

—a distinct legal entity—while the State Bank of Wahoo was unincorporated, had no legal existence, and was owned by a single individual. In the case reported in 58 Nebr. it was ruled that the rights of the creditors of the bank to its property and assets, so far as essential to meet their demands against the bank, were superior to those of the stockholders or the assignee of an insolvent stockholder. But that case falls far short of being a precedent for holding that the assets of an unincorporated bank, owned by a single person, is a trust fund for the payment of the obligations against the bank to the exclusion of the other creditors of said owner, and that he may not apply such assets to pay or secure the claims of any of his creditors. The rule relative to the assets of an unincorporated bank owned by one person was correctly stated in the opinion of SULLIVAN, J., and will be adhered to. See *In re Vetterlein*, 44 Fed. Rep., 57; *In re Williams*, 3 Woods [U. S.], 493. The judgment of reversal will stand.

REVERSED.

BUILDING AND LOAN ASSOCIATION OF DAKOTA V. WILLIAM H. WALKER ET AL.

FILED DECEMBER 19, 1899. No. 9,059.

1. **Contracts:** CONSTRUCTION. It is not the province of courts to make contracts, but to construe and enforce those made by the parties.

2. **Usury:** PARTIES: MORTGAGES. The defense of usury is personal to the borrower and his sureties and privies, and is not available to a purchaser of the equity of redemption of the mortgaged premises.

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

William Leese and *Owsley Wilson*, for plaintiff in error.

A. R. Talbot, contra.

NORVAL, J.

This suit was instituted to foreclose a real estate mortgage given by one Parker F. Fugate to the plaintiff to secure his promissory note for the sum of $3,200 given December 2, 1889, due in three years thereafter and drawing interest at the rate of six per cent on $1,600. William H. Walker and Mary E. Walker purchased the mortgaged premises, and assumed and agreed to pay the indebtedness secured by the mortgage. Fugate was not made a party to the suit, but the Walkers were, who pleaded that the mortgage was given to secure a loan of $1,600, and no more, which it is alleged was the sole amount of money received from plaintiff by Fugate, and that the transaction was usurious. Certain payments were also pleaded. The court found that plaintiff, a Dakota corporation, was entitled to recover the actual amount of money loaned, $1,600, with interest thereon at ten per cent from the date of the mortgage, deducting the actual amounts paid plaintiff by way of principal, interest, premiums or otherwise, with interest thereon at the rate of ten per cent from the dates of such payment, and a decree was rendered in favor of plaintiff for the sum of $390.89. To reverse the same it has prosecuted this proceeding in error.

The amount of the face of the note and mortgage was $3,200, and the rate of interest which the note stipulated should be paid was six per cent, yet the court, by its decree, allowed plaintiff only $1,600, the sum borrowed, and ten per cent interest thereon, less payments made and interest on the same. The defense of usury was not sustained to its fullest extent, else the plaintiff would not have been awarded any interest or costs. The plaintiff was entitled to recover the face of its mortgage with the stipulated rate of interest after deducting payments, or the plea of usury should have been sustained in its entirety. It is not the province of the court to make new contracts for parties. This is elementary.

The defense of usury was not available to the defendants, since they were not parties to the loan, but merely purchased the mortgaged premises and assumed and agreed to pay the debt, which fact did not permit them to assail the contract on the ground that it was tainted with the vice of usury. See *Cheney v. Dunlap*, 27 Nebr., 401; *Morling v. Bronson*, 37 Nebr., 608; *McKnight v. Phelps*, 37 Nebr., 858. The decree is erroneous, and it is accordingly reversed, and the cause remanded, with leave to make the mortgagor a party defendant, and for further proceedings.

REVERSED.

BUILDING & LOAN ASSOCIATION OF DAKOTA V. LOUIS B. BILAN.

FILED DECEMBER 19, 1899. No. 9,058.

1. **Foreign Building and Loan Associations:** USURY. A foreign building and loan association is subject to the penalties of the statute against usury.
2. ———: CONTRACTS: LAW OF THE FORUM. *Held*, That the loans were Nebraska contracts, and their construction and validity to be governed by the laws of this state.
3. **Usury:** PARTIES: MORTGAGES. The defense of usury is of no avail to a purchaser of the equity of redemption, who has assumed and agreed to pay the mortgage debt.

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

William Leese and *Owsley Wilson*, for plaintiff in error.

I. H. Hatfield and *Mack & Angleton*, *contra.*

NORVAL, J.

In January, 1890, one Austin S. Gossett obtained from the Building & Loan Association of Dakota, a foreign corporation, two loans of $900 each, payable after three

years and within nine years, with interest at six per cent. The borrower gave two notes in the sum of $1,800 each, and secured their payment by two mortgages on real estate situate in Gibbon's Addition to the city of Lincoln. Afterward one Louis B. Bilan, through certain mesne conveyance, became the owner of the mortgaged premises. On October 15, 1895, Bilan instituted this suit in the court below against the Building & Loan Association of Dakota for the cancellation of record of said mortgages, alleging as ground therefor that they had been paid in full. The defendant filed an answer and cross-petition, denying the averments of the petition relative to payment, and praying the foreclosure of said mortgages for the sums remaining due thereon. From a decree canceling the mortgages and dismissing the cross-petition, the defendant has prosecuted error proceeding.

The record discloses, and the trial court so found the fact to be, that there had been paid on each of said loans the sum of $1,215.95; therefore, if the mortgages were tainted with the vices of usury, and such defense is available to Bilan, the mortgages have been paid, and there was no error in decreeing their cancellation. The defendant was incorporated under the laws of South Dakota, and had not complied with the laws of our state relative to building and loan associations; therefore, under the decisions, on its usurious Nebraska contracts it is subject to the penalties of the statute against usury. See *National Mutual Building & Loan Ass'n v. Keeney*, 57 Nebr., 94; *Interstate Savings & Loan Ass'n v. Strine*, 58 Nebr., 133, 80 N. W. Rep., 45.

It is argued that our statute relative to usury is not applicable in this case, because the notes and mortgages are Dakota contracts, and, being valid in that state, must be enforced here. The notes which the mortgages were given to secure contained the provisions that "this note is understood to be made with reference to and under the laws of the territory of Dakota, and all payments

hereon payable at the office of the association in Aberdeen, Dakota." Notwithstanding these stipulations, the trial court found that the contracts were made in, and governed by the laws of, Nebraska. This finding has in the record ample evidence to sustain it. The real estate incumbered by the mortgages is located in Lincoln, the loan was negotiated here through the lender's agent, the mortgages were executed and delivered, and the money was paid to Gossett, in Lincoln. It is plain the clauses to which reference has been made were inserted in the notes as a mere shift or device to escape the penalty of our usury laws, and that such clauses alone, in view of the other facts proven, did not have the effect to make the statutes of Dakota govern in the construction and validity of the contracts. There is no room to doubt that the loans were usurious. See *Lincoln Building & Savings Ass'n v. Graham*, 7 Nebr., 173; *National Mutual Building & Loan Ass'n v. Keeney*, 57 Nebr., 94. But the statute against usury can not be invoked by the defendant, since he was not a party to the usurious transaction, but purchased the mortgaged premises and assumed and agreed to pay the mortgage debts. See *Building & Loan Ass'n of Dakota v. Walker*, 59 Nebr., 456, and cases there cited. The decree is reversed, and the cause remanded, with leave to plaintiff to make the mortgagor party defendant.

REVERSED.

WILLIAM A. PAXTON ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 19, 1899. No. 10,977.

1. **Directing Verdict:** REVIEW. In reviewing a judgment rendered on a verdict, given in obedience to a peremptory instruction, it is the duty of the reviewing court to assume the existence of every material fact which the evidence for the complaining party establishes or tends to prove.

2. **Official Bond:** DELIVERY. An official bond is without validity until it has been delivered.

3. **State Officers:** OFFICIAL BONDS: ACCEPTANCE BY GOVERNOR. The governor has no authority, as an agent of the state, to accept the official bonds of state or district officers, and by such acceptance make them binding obligations.

4. ———: ———: APPROVAL BY GOVERNOR. The duty of the governor with respect to the official bonds of state and district officers is merely to approve them.

5. ———: ———: FILING. The official bonds of state and district officers, except that of secretary of state, do not become binding obligations until they have been filed in the office of the secretary of state.

6. ———: ———: ———. Section 15, chapter 10, Compiled Statutes, 1899, contemplates that an official bond, after its approval by the proper officer, shall be returned to the person presenting it, and be by him filed in the proper office for record.

7. **Delivery of Instruments.** An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled.

8. **Official Bond:** APPROVAL BY GOVERNOR. The approval of an official bond by the governor does not work its acceptance, nor make it a valid contract.

9. ———: DELIVERY BY PRINCIPAL: AGENCY. The principal in an official bond has an implied agency to deliver the bond as the contract of his sureties.

10. ———: POSSESSION BY PRINCIPAL: APPROVAL AND DELIVERY. Possession of an official bond by the principal on a day subsequent to that fixed by the statute for its delivery carries with it, *prima facie*, the right to have it approved and delivered.

11. ———: REVOCATION BY SURETIES: DELIVERY BY PRINCIPAL. Sureties on an official bond have the right, at any time before the obligation is delivered, to revoke their principal's authority to bind them; but, until such revocation, the right of the principal to deliver the instrument is presumed to continue.

12. ———: ———: ACCEPTANCE BY OBLIGEE. And, until the sureties have signified an intention to recede, the obligee may bind them by accepting their offer to answer for the official misconduct of their principal.

13. ———: DELIVERY: DELAY: KNOWLEDGE OF SURETIES: ADDITIONAL NAMES. Several days after the time fixed by statute for filing an official bond the sureties thereon signed an instrument reciting, "that any and all additional names that he [their principal] may procure on said bond shall in no manner affect our liability on said bond, and each of us are held liable the same as if said names had not been added." *Held*, That such instrument affords

the inference that, at the time it was signed, the sureties knew the bond had not become effective by having been approved and filed for record.

14. ——: ——: ——: DELIVERY BY PRINCIPAL. And *held*, also, that, when the principal presented the bond for approval, accompanied by such instrument, he had apparent authority from the sureties to have the obligation approved and delivered.

15. **Bond of State Treasurer:** APPROVAL: ADDITIONAL SURETIES. No officer of the state is authorized to demand additional sureties of the state treasurer after his official bond has been duly approved and filed for record.

16. **Official Bonds:** DELAY: VACANCY IN OFFICE. The failure of a state or district officer to have his official bond approved and filed for record in the proper office within the time fixed by statute creates a vacancy in the office to which he has been elected or appointed.

17. ——: ——: ——: OUSTER: WAIVER. In such case the state may waive its right to oust the incumbent, and elect to deal with him as the person entitled to the office.

18. **Officer:** WAIVER OF OUSTER: SURETIES ON BOND: ESTOPPEL. And if the state does waive its right, the sureties on the official bond of the officer are estopped from denying the validity of the bond because it was not approved and filed within the time fixed by law.

19. **Conversion:** JOINT TORT-FEASORS: SEPARATE ACTIONS. Where two or more persons have converted the property of another, the latter may sue them, either jointly or severally, as he may elect.

20. ——: ——: ——. And a court of equity will not require the injured party to pursue one of the wrong-doers rather than another who is equally culpable.

21. **Evidence:** STATEMENT BY ACCOUNTING OFFICER: SURETIES ON OFFICIAL BOND. A document prepared by an accounting officer during his term of office, showing the receipts and disbursements of, and the balance chargeable against, a financial officer, is competent evidence against the sureties on the official bond of the latter officer, if it was used by him in accounting to his successor and turning over the office, at the time and in the manner contemplated by the law and the contract of the sureties.

22. **Witnesses:** OFFICERS: BOOK ENTRIES. A person who has held an office for some considerable time is, presumably, competent to give an opinion as to the meaning of entries in the books of the office evidencing business transactions therein.

23. **State Treasurer:** ACCOUNTING: SECOND TERM: LIABILITY OF BONDSMEN. A state treasurer who, in accounting to himself, as his own

successor, turns over bank credits, which are afterwards entered as cash receipts on the books of his office, *prima facie*, relieves his first-term bondsmen from liability, and charges his sureties for the second term with the amount of such credits.

24. ———: OFFICIAL RECORDS: EVIDENCE. The official records kept by the state treasurer are competent evidence against his sureties, and, in the absence of countervailing proof, are conclusive.

25. **Certificate of Deposit:** RIGHTS OF TRANSFEREE. One to whom a certificate of deposit, or other evidence of money in the custody of a solvent bank, has been transferred is as effectually invested with control and dominion of such money as though there had been a manual delivery of it to him.

26. **Officers:** RECORDS: PRESUMPTIONS. The law presumes that a public officer faithfully performs official duty, and that the records of his office truly represent the business transactions entered therein.

27. **Action Against State Treasurer:** CONVERSION: EVIDENCE. In an action for a specific conversion of public money, brought by the state against an ex-treasurer and the sureties on his official bond, it is not error to exclude evidence tending to show that such officer paid his own funds into the public treasury, unless it appear that the alleged conversion occurred prior to such payment.

28. ———: ACCOUNTING: EVIDENCE. But, in an action for a general balance, such evidence would be admissible, even under a general denial, in support of a theory that an apparent shortage was the result of the treasurer having been charged on the books of his office with moneys which in fact belonged to himself.

29. **Evidence:** DECLARATIONS OF OFFICERS AND AGENTS. Public corporations act through their officers and agents, and the declarations of such officers and agents, made during, and in relation to, the transaction of official business, are, in a proper case, admissible in evidence as a part of the *res gestæ*.

30. ———: PLEADINGS. Pleadings may be received in evidence in suits, other than those in which they were filed, as admissions or declarations against interest.

31. ———: ———: ADMISSIONS. But such pleadings, when not signed or verified by the party himself, are received only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterwards sanctioned by him.

32. ———: ———: ———. The weight to be given a pleading in another action, as an admission of the facts stated therein, is for the jury.

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

The opinion contains a statement of the case.

John C. Cowin, Frank T. Ransom, Robert Ryan and *Frank Irvine,* for plaintiffs in error:

The court would have been justified in directing a verdict for the defendant sureties on the issue as to the delivery of the bond, and if not so, then certainly the issue should have been submitted to the jury. To render a bond effective as a binding obligation delivery is essential. See *Fay v. Richardson,* 7 Pick. [Mass.], 91; *Mills v. Gore,* 20 Pick. [Mass.], 28; *Powers v. Russell,* 13 Pick. [Mass.], 75; *Chadwick v. Webber,* 3 Greenl. [Me.], 141; *Porter v. Cole,* 4 Greenl. [Me.], 20; *Woodman v. Coolbroth,* 7 Greenl. [Me.], 181; *Simonton's Estate,* 4 Watts [Pa.], 180; *Allen v. Getz,* 2 P. & W. [Pa.], 310; *Whichard v. Jordan,* 6 Jones Law [N. Car.], 54; *Brown v. Westerfield,* 47 Nebr., 399; *Brittain v. Work,* 13 Nebr., 347; *McPherson v. Meek,* 30 Mo., 345; *Weed Sewing Machine Co. v. Jeudevine,* 39 Mich., 590; *Donnelly v. Rafferty,* 172 Pa. St., 587; *Overman v. Kerr,* 17 Ia., 485; *Parker v. Parker,* 1 Gray [Mass.], 409; *Steel v. Miller,* 40 Ia., 402; *Held v. Bagwell,* 58 Ia., 139; *United States Wind Engine & Pump Co. v. Drexel,* 53 Nebr., 771.

The office became *ipso facto* vacant upon failure of the treasurer to have his bond executed, approved and filed as provided by law. There was no waiver of the requirements of law as to time of tendering, approving and filing the bond. If there was any evidence tending to show such waiver, the issue was for the jury. See Compiled Statutes, ch. 10, secs. 5, 15; *State v. Lansing,* 46 Nebr., 514; *United States Wind Engine & Pump Co. v. Drexel,* 53 Nebr., 771; *Holt County v. Scott,* 53 Nebr., 176; *Livesey v. Omaha Hotel Co.,* 5 Nebr., 50; *Macfarland v. West Side Improvement Ass'n,* 53 Nebr., 417; *Boehme v. Omaha Hotel*

Co., 5 Nebr., 80; *Estabrook v. Omaha Hotel Co.*, 5 Nebr., 76; *Pence v. Langdon*, 99 U. S., 578.

Under the pleadings there is no estoppel as against the sureties. See *Apthorp v. North*, 14 Mass., 166; *State v. Fredericks*, 8 Ia., 553; *Marshal v. Hamilton*, 41 Miss., 229; *Lingonner v. Ambler*, 44 Nebr., 316; *Burke v. Utah Nat. Bank*, 47 Nebr., 247; *Parliman v. Young*, 2 Dak., 175.

Exhibit 23—a statement by the auditor purporting to show the balance of moneys and securities for which treasurer Bartley was accountable to his successor on January 7, 1897—was incompetent, and it was error to admit it as evidence against the sureties. See *Lee v. Brown*, 21 Kan., 458; *Stetson v. City Bank of New Orleans*, 2 O. St., 167; *County of Mahaska v. Ingalls*, 16 Ia., 81; *Lancashire Ins. Co. v. Callahan*, 71 N. W. Rep. [Minn.], 261.

In case of a conversion, the restoration of the money or property, while not a defense to the action, goes in mitigation of damages to the extent to which restoration is made. See *Squire v. Hollenbeck*, 9 Pick. [Mass.], 551; *Greenfield Bank v. Leavitt*, 17 Pick. [Mass.], 1; *Merrill v. How*, 24 Me., 126; *Bates v. Courtwright*, 36 Ill., 518; *Tripp v. Grouner*, 60 Ill., 474; *Nightingale v. Scannell*, 18 Cal., 315; *Watson v. Coburn*, 35 Nebr., 492; *Coburn v. Watson*, 48 Nebr., 257; *District Township of Viola v. Bickelhaupt*, 68 N. W. Rep. [Ia.], 914.

References as to effect on all parties of adding names of additional sureties without the knowledge or consent of those who originally signed: *Henry v. Coates*, 17 Ind., 161; *Houck v. Graham*, 106 Ind., 195; *Hall v. McHenry*, 19 Ia., 521; *Berryman v. Manker*, 56 Ia., 150; *Browning v. Gosnell*, 91 Ia., 448; *Wallace v. Jewell*, 21 O. St., 163; *Ford v. First Nat. Bank*, 34 S. W. Rep. [Tex.], 684; *Stoner v. Keith County*, 48 Nebr., 279; *Mersman v. Werges*, 112 U. S., 139; *Stone v. White*, 8 Gray [Mass.], 580; *Miller v. Finley*, 26 Mich., 249; *Barnes v. Van Keuren*, 31 Nebr., 165.

References as to question of shortage in Bartley's first

term: *Cedar County v. Jenal*, 14 Nebr., 254; *State v. Hill*, 47 Nebr., 456; *In re Treasurer's Settlement*, 51 Nebr., 116; *Bush v. Johnson County*, 48 Nebr., 1; *Whitney v. State*, 53 Nebr., 287.

The admission in evidence of Exhibit 26—the record of a suit in Lancaster county on the bond of Bartley for his first term of office—presented an issue for the jury as to whether or not there was a defalcation during his second term, and if so, the amount thereof, and it was prejudicial error to exclude from the jury the consideration of that issue. See *Snyder v. Chicago, S. F. & C. R. Co.*, 112 Mo., 527; *Ayres v. Hartford Fire Ins. Co.*, 17 Ia., 176; *Kamm v. Bank of California*, 74 Cal., 191; *Rich v. City of Minneapolis*, 40 Minn., 83; *Guy v. Manuel*, 89 N. Car., 83; *Blackmore v. Boardman*, 28 Mo., 420; *Burgess v. Inhabitants of Wareham*, 7 Gray [Mass.], 345; *Green v. North Buffalo Township*, 56 Pa. St., 110; *Harrington v. Inhabitants of Lincoln*, 4 Gray [Mass.], 563; *State v. Dennis*, 39 Kan., 515; *People v. Stephens*, 71 N. Y., 527; *State v. Ober*, 34 La. Ann., 361; *State v. Taylor*, 11 La. Ann., 430.

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

References as to question relating to delivery of bond: *Holt County v. Scott*, 53 Nebr., 191; *State v. Dunn*, 11 La. Ann., 550; *Pequawket Bridge v. Mathes*, 8 N. H., 139; *King County v. Ferry*, 19 L. R. A. [Wash.], 500; *Sampson v. Barnard*, 98 Mass., 359.

Bartley and his sureties are estopped from denying the validity of the bond, and from denying that he was *de jure* treasurer. See *State v. Rhoades*, 6 Nev., 352; *Blaco v. State*, 58 Nebr., 557.

Error can not be predicated upon the admission of improper evidence, when it is obvious that the unsuccessful party was not prejudiced. See *Terry v. Beatrice Starch Co.*, 43 Nebr., 866; *Farmers Loan & Trust Co. v. Memminger*, 48 Nebr., 17.

References as to evidence: *Shafer v. Whiting*, 55 Nebr., 756; *Davis v. Hilbourn*, 41 Nebr., 35; *Hiatt v. Brooks*, 17 Nebr., 33; *Knapp v. Jones*, 50 Nebr., 490; *Morgan v. Durfee*, 9 C. L. J. [Mo.], 12; *Dryden v. Britton*, 19 Wis., 31; *Godin v. Bank of Commonwealth*, 6 Duer [N. Y.], 76; *Stewart v. Simpson*, 1 Wend. [N. Y.], 376; *Connor v. Giles*, 76 Me., 132; *Combs v. Hodge*, 21 How. [U. S.], 397; *Delaware County v. Diebold Safe Co.*, 133 U. S., 473; *Vogel v. Osborne*, 32 Minn., 167; *Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis., 442; *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; *Wilkins v. Stidger*, 22 Cal., 232; *Dennie v. Williams*, 135 Mass., 28.

SULLIVAN, J.

At the general election in 1894 Joseph S. Bartley was elected to the office of state treasurer, as his own successor. On January 3, 1895, he took the oath required by law, and tendered his official bond to the governor for approval. The sureties whose names then appeared upon the obligation were: Nathan S. Harwood, F. M. Cook, A. B. Clark, John H. Ames, Charles A. Hanna, Mary Fitzgerald, C. C. McNish and E. E. Brown. The governor did not approve the bond on the day it was presented, but returned it to Bartley, who promised to strengthen it by procuring additional sureties. On January 9, 1895, the bond was again presented for approval with the names of Thomas Swobe, Cadet Taylor and W. A. Paxton added to the names of the original obligors. It was thereupon approved, and on the same day filed for record and recorded in the office of the secretary of state. Bartley, at the end of his second term, was found to be a defaulter, and this action was instituted in behalf of the state to recover of the defendants, as his sureties, the amount of the defalcation. The cause was tried to a jury in the district court of Douglas county, and resulted in a verdict and judgment against all the defendants except Mary Fitzgerald, who succeeded in establishing the defense of incapacity to contract at the time

her signature was obtained. The verdict against the sureties, who are here complaining, was rendered in obedience to a peremptory instruction from the trial court; and it becomes, therefore, our duty, in examining the questions presented for decision, to assume the existence of every material fact which the evidence for the defendants establishes or tends to prove.

The original sureties contend that they are not bound, because the bond was not accepted and approved on or before January 3, which was the first Thursday after the first Tuesday in that month. Brown further insists that the additional sureties signed without his consent, and that he thereby became released from his obligation. Paxton, Swobe and Taylor claim that the bond was already effective when their signatures were obtained, and that their undertaking is void for want of a consideration to support it. We will consider these defenses together. The petition alleges that the bond was delivered to the governor on January 3, and on that day filed for record in the office of the secretary of state. It is also alleged that the bond was afterwards returned to Bartley to obtain the signatures of additional sureties, and that on January 9 it was again handed to the governor, who then approved it and filed it with the secretary of state. These averments of the petition are traversed, and, after a careful examination of the record, we quite agree with the statements of counsel for the defendants, that the evidence conclusively shows that the bond was not filed in the office of the secretary of state until January 9. Prior to that date no contract relations existed between the state and any of the defendants herein growing out of the signing of the bond in suit. A bond, like a deed, is without validity until it has been delivered. Without delivery it is void. See *United States Wind Engine & Pump Co. v. Drexel*, 53 Nebr., 771; *Duer v. James*, 42 Md., 492; *Donnelly v. Rafferty*, 172 Pa. St., 587; *Fay v. Richardson*, 7 Pick. [Mass.], 91. As we understand the law, the governor was not the agent of the state to

accept the treasurer's bond. His duty was to approve it merely. He was not authorized to accept it on behalf of the state, and thereby give it vitality as a contract. By section 5 of chapter 10, Compiled Statutes, 1899, it is provided that all official bonds of officers chosen at a general election shall be filed in the proper office on or before the first Thursday after the first Tuesday in January next succeeding the election. Section 6 of the same act declares that the official bonds of all state and district officers, except the governor, shall be approved by the governor, and be filed and recorded in the office of the secretary of state. The governor's bond must be approved by the chief justice of the supreme court. Section 15 declares the consequence of a non-compliance with the requirements of the act. It is as follows: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." It seems entirely clear from the statutory provisions quoted and referred to that the official bond of the state treasurer does not become a binding obligation before it has been filed with the secretary of state. Section 15, in plain terms, declares that a public office shall become vacant if the person chosen to fill it neglects to have his official bond filed in the proper office within the proper time. This certainly implies that the bond shall be returned, after its approval, to the person presenting it, so that he may do the further act which is, under the law, indispensable to the completion of his title to the office. His right to the possession of the bond after its approval necessarily includes the right to file it or not, as he may think best, and precludes, of course, the idea of a prior delivery. An instrument is not delivered until it has passed beyond the dominion of the maker, and is

no longer capable of being recalled. If it be still under his control, and subject to his authority, it is not a binding contract. See *Duer v. James, supra; Fisher v. Hall,* 41 N. Y., 416; *Younge v. Guilbeau,* 3 Wall. [U. S.], 636. It was competent for the executive, under the provisions of chapter 10, *supra,* to approve the treasurer's bond, but it was not within his power to vitalize it by acceptance; that function belonged exclusively to the secretary of state. "The law," as was said in *Holt County v. Scott,* 53 Nebr., 176, "contemplates that the officer will have the bond approved, afterward filed and recorded. If he secured its approval, and did not file or deliver it, it would be no more binding because of the approval than it would without it. The approval does not work the acceptance of the bond."

Having reached the conclusion that Mr. Bartley's bond was still in his hands and subject to his control on January 9, we will inquire whether he had, on that day, authority to deal with it so as to make it a binding contract between the sureties and the state. It is, we believe, a doctrine of universal recognition that the principal in an official bond has an implied agency to deliver it as the contract of his sureties. They intrust it to him for that purpose. See *Pequawkett Bridge v. Mathes,* 8 N. H., 139; *Stephens v. Crawford,* 1 Ga., 574; *King County v. Ferry,* 19 L. R. A. [Wash.], 500. The obligation in suit was given by all the sureties to Bartley, to be by him presented for approval and filed in the office of the secretary of state. There is nothing in the record to indicate that any of the sureties signed conditionally, or that there was any actual limitation upon Bartley's implied authority to use the bond in furtherance of the purpose for which it was signed. Possession of the bond on January 9 carried with it, *prima facie,* the right to have it approved and delivered. See *Sampson v. Barnard,* 98 Mass., 359; *State v. Rhoades,* 6 Nev., 352. The sureties had the right to revoke their principal's authority at any time before the bond was delivered; but without such

revocation the right to deliver continued, and, as we have said, possession of the instrument was evidence of the right. Until the sureties were accepted, they were at liberty to recede; but until they signified an intention to recede, the state might bind them by accepting their offer to answer for the official misconduct of their principal. See *State v. Dunn*, 11 La. Ann., 550. There is in this record an entire absence of evidence from which it might be justly inferred that the delivery of the bond in its final form was in fact unauthorized. The only evidence bearing upon this point clearly indicates that the original sureties desired that the bond should be approved after January 3, strengthened by such additional sureties as Bartley might be able to procure. Between January 3 and the time when the bond was approved they signed a paper, referred to in the bill of exceptions as "Exhibit 2*e*," reciting that "each having signed the bond of Joseph S. Bartley, as state treasurer of the state of Nebraska, do hereby consent and agree that any and all additional names that he may procure on said bond shall in no manner affect our liability on said bond, and that each of us are held liable the same as if said names had not been added. Jan. —, 1895." This document affords, we think, but one rational inference, viz., that Bartley's bond had not been approved or filed within the time appointed by the statute. No officer of the state is authorized to demand additional sureties of the state treasurer after his official bond has been duly approved and filed for record. Sureties signing under such circumstances are not bound, there being no consideration for their promise. See *Stoner v. Keith County*, 48 Nebr., 279. This being so, the original sureties must have signed "Exhibit 2*e*" knowing, or at least believing, that their bond had not yet become effective. The sole motive for giving the bond was to establish Bartley in the office of treasurer; and, if that end had already been accomplished, the procurement of additional sureties would have been an idle ceremony—a vain and useless act.

When Bartley presented his bond, accompanied by "Exhibit 2*e*," on January 9, he was undoubtedly acting within the scope of an apparent authority from all his sureties to have the obligation approved and delivered; and we think the evidence conclusively shows that his apparent authority and his real authority were identical.

It is true that Bartley's right to act as treasurer became extinguished upon his failure to have his bond filed and approved on or before January 3. See Compiled Statutes, 1899, ch. 10, sec. 15; *State v. Lansing*, 46 Nebr., 514. The state might, on or after January 4, appoint another person to fill the office, but it was not bound to do so. It might waive its right to oust Bartley, and elect to deal with him in the character which he assumed. Section 15 of the law in relation to official bonds was enacted for the protection of the public, and not for the benefit of sureties; and they, consequently, can not be heard to object that approval and acceptance were not within the prescribed time. See *Holt County v. Scott, supra; Town of Ashkum v. Lake*, 12 Ill. App., 25; *Monteith v. Commonwealth*, 15 Gratt. [Va.], 172; *State v. Rhoades, supra.* The bond in suit was, with the implied and express authority of the sureties, approved and delivered after the forfeiture occurred. The state accepted it, relied on it, and was induced by it to waive its right to exclude Bartley from the office of treasurer. The right to the office was claimed by virtue of an election. The bond so states; and the bondsmen can not be permitted to escape liability by denying now the existence of a right which in behalf of their principal they successfully asserted on January 9, 1895. See *Holt County v. Scott, supra; Blaco v. State*, 58 Nebr., 557, 78 N. W. Rep., 1056; *State v. Rhoades, supra; Monteith v. Commonwealth, supra; 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.

Law, 73; *Ferguson v. Landram*, 5 Bush [Ky.], 237; *Mississippi County v. Jackson*, 51 Mo., 23; *Police Jury v. Brookshier*, 31 La. Ann., 736.

Having disposed of the main question, we will now turn our attention to some other assignments of error upon which a reversal of the judgment is claimed. The petition charges that on January 2, 1897, Bartley transferred to the Omaha National Bank, in payment of a void warrant held by it, $201,884.05 of the money of the state, and that such transfer amounted to a conversion. Some days before the trial the defendants asked leave to file an amended and supplemental answer, setting forth that the transferee of the fund and holder of the warrant was a state depository, and as such had in its custody, at the time of the transfer, the money alleged to have been converted. The court denied the application, and this ruling is assigned for error. The claim of the defendants is that the depository bank is primarily liable for the loss of the money paid upon the warrant; that it and its sureties should have been brought into court and charged with the amount of the unauthorized payment; and that Bartley's sureties should, as to this amount, have been entirely exonerated, or charged, at most, with a secondary liability. The legal effect of the transaction in question, according to the former decisions of this court, was to render both Bartley and the bank liable to the state as joint tort-feasors. See *Bartley v. State*, 53 Nebr., 310, s. c. on rehearing, 55 Nebr., 294; *State v. Bartley*, 56 Nebr., 810; *State v. Omaha Nat. Bank*, 59 Nebr., 483. The evidence in this case relating to that transaction is, in its essential features, the same as that given in the cases cited, and, therefore, according to a familiar doctrine of the law of torts, the state was at liberty to sue either or both or the joint wrong-doers. See *Kellow v. Central I. R. Co.*, 68 Ia., 470; *Johnson v. Chicago, M. & S. P. R. Co.*, 31 Minn., 57; *Pollett v. Long*, 56 N. Y., 200; *Stone v. Dickinson*, 5 Allen [Mass.], 29; *Boyd v. Insurance Patrol*, 113 Pa. St., 269. The cases cited in

support of the application to amend do not go to the extent of holding that equity will, under any circumstances, deprive a party of the right of election, and compel him to pursue one wrong-doer rather than another who is equally culpable. The state has in this case chosen to proceed against Bartley for a tortious act amounting to official misconduct; and it has a right to insist that his bondsmen shall perform their contract by making good the loss sustained by the public.

Error is assigned on the admission in evidence of "Exhibit 23" tendered by the state for the purpose of showing the balance with which Bartley was chargeable at the end of his second term. This exhibit is a statement prepared by the auditor of public acounts, and purports to show the moneys and securities for which Bartley, as treasurer, was accountable to his successor on January 7, 1897. It was produced by Bartley and handed to his successor, J. B. Meserve, in the office of the treasurer on the morning of January 8, at the time the office was being turned over, and in connection with the accounting which was then being made by the outgoing to the incoming treasurer. It was, in substance, a declaration by Bartley, while in the act of accounting, that the amounts mentioned in the document were the amounts for which he should account. It was the duty of Bartley to account to his successor, and to turn over all moneys and securities with which he was chargeable. The sureties contracted that this should be done. It was an official duty, the performance of which was necessary to their exoneration. The accounting was made at the very time the law required it to be made; and we, therefore, think that, although Bartley had ceased to be the *de jure* treasurer by reason of Meserve's having qualified, his declaration as to the amount of moneys and securities which he should turn over to his successor was admissible as evidence against the sureties. It was a declaration made during the transaction of business, for which they were liable and so became part of the *res gestæ*. See 1 Green-

leaf, Evidence [12th ed.], sec. 187; Brandt, Suretyship [1st ed.], sec. 518; *Lancashire Ins. Co. v. Callahan*, 68 Minn., 277; *Stetson v. City Bank of New Orleans*, 2 O. St., 167. But, if we are mistaken in our conclusion upon this point, the admission in evidence of "Exhibit 23" would not be reversible error, because the correctness of the balance shown by the paper is conclusively established by other competent proof. Mr. Meserve was called as a witness for the state, and permitted, over objection, to explain the meaning of certain entries in the books kept by Bartley as treasurer. The objection to the evidence is that the books speak for themselves, and that the witness was not shown to possess the qualifications of an expert. There was no error in the ruling. While it is true the books speak for themselves, their meaning is not apparent at once to the average juror. Mr. Meserve had, at the time of the trial, been state treasurer for more than two years, and was, therefore, presumably competent to give an opinion as to the meaning of entries evidencing business transactions in the treasurer's office.

A further contention of the defendants is that the court held them liable for a defalcation which occurred during Bartley's first term. This claim is based on the fact that Bartley, at the beginning of his second term, turned over to himself, as his own successor, a large amount of bank credits in lieu of actual cash. It is indisputably established that, in the accounting between the treasurer and the governor on January 8, 1895, Bartley produced what purported to be bank drafts, certificates of deposit, and other vouchers for money in bank, and that these credits were considered and accepted as the equivalents of money which they were supposed to represent. The attorney general insists that this transaction exonerated the first sureties and charged the second; and, we think, in view of the evidence, his position is tenable. The defendant sureties are, of course, liable only for moneys received by their principal during the second term; their contract does not bind them to answer for securities

which the treasurer was not authorized to accept in payment of obligations due to the state. But if the transfer of the bank credits in question was, in substance, a transfer of cash, the sureties are liable. The owner of a certificate of deposit, or other evidence of money in the custody of a solvent bank, is as effectually invested with control and dominion of such money as though there had been a manual delivery of it to him. Such is the doctrine of the later decisions of this court. See *State v. Hill*, 47 Nebr., 456; *Bush v. Johnson County*, 48 Nebr., 1. Whatever uncertainty there may be as to the position of the court upon other questions considered in the *Hill Case*, there is no doubt upon this point. Two of the judges and the three commissioners concurred in this statement of the law: "A state treasurer who, on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment, and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank." See *State v. Hill*, *supra*. In the *Bush Case* (*Bush v. Johnson County*, *supra*) the question was again presented, and the court, in an opinion by the chief justice, held that the transfer of a credit in a solvent bank is a transfer of money within the meaning of the law. That the bank credits transferred by Bartley to himself represented money in solvent banks is shown by the entries in the books of the treasurer's office. These records show that on January 31, 1895, Bartley had on hand, as cash, the money represented by the bank vouchers turned over on January 8. Other records subsequently made by Bartley as treasurer testify to the same fact. These records are competent evidence against the sureties; and, in the absence of countervailing proof, would be conclusive. See *Van Sickel v. Buffalo County*, 13 Nebr., 103; *Albertson v. State*,

9 Nebr., 429; *Ohio & M. R. Co. v. People*, 119 Ill., 207; *Pike v. People*, 84 Ill., 80; *Rizer v. Callen*, 27 Kan., 339; *Locke v. Bennett*, 7 Cush. [Mass.], 445; *Town of Union v. Bermes*, 15 Vroom [N. J. Law], 269. That Bartley had, during his first term, entered these same bank credits on his books as cash indicates nothing more, we think, than that they were considered and treated as money subject to his dominion and under his control. We can not presume that the records are false, but must, on the contrary, indulge the presumption that the treasurer performed, faithfully, the duties with which he was charged. See *Hastings School District v. Caldwell*, 16 Nebr., 68; *Taylor v. Wilson*, 17 Nebr., 88; *Green v. Barker*, 47 Nebr., 934; *Blaco v. State*, 58 Nebr., 557.

Another assignment of error relates to the rulings of the court excluding the proffered testimony of the witness Balch, and the books of the Omaha National Bank in connection therewith. By this witness, and the books of the bank of which he was assistant cashier, the defendants proposed to show that the warrant, for the payment of which Bartley, as treasurer, drew his check for $201,884.05 on January 2, 1897, had been previously sold by him and the proceeds of the sale turned over to the state, or paid out for its use and benefit. We are entirely satisfied that the rejection of this evidence was not error. The books of the treasurer's office are presumably a true record of the receipts and disbursements of the public revenues. It can not be assumed, without proof, that Bartley, in violation of his duty, charged himself with moneys which did not belong to the state. The rejected evidence does not go to the extent of showing that condition of affairs; and it had, therefore, no tendency to disprove the shortage disclosed by the state's evidence. There being, at the time it is claimed the proceeds of the warrant were paid to the state, no proof of any defalcation during the second term, it is clear the evidence in question was inadmissible, except on the theory that Bartley had been charged, as treasurer, with moneys

which in fact belonged to himself. Had the defendants offered to prove that he was so charged, and that the apparent shortage was the result of false entries in the treasurer's books, we think the evidence would have been admissible, even under a general denial, since the action is only in part for the conversion of a specific fund. But the defendants could not defeat a recovery, or break down the plaintiff's case, merely by showing that there had been, at different times, a wrongful commingling of Bartley's money with the money of the state. That fact would not answer the evidence of a defalcation furnished by the official records.

It is finally contended that the court erred in directing the jury to find in favor of the plaintiff for the full amount claimed in the petition. This contention must be sustained. There was conflicting evidence that should have been submitted to the jury. The action proceeded on the theory that Bartley had fully accounted for the treasury balance with which he was chargeable at the end of his first term. To prove that he had not so accounted, the defendants gave in evidence a transcript of a record of the district court of Lancaster county showing the institution and pendency of a suit brought, in behalf of the state, by the attorney general on his own motion, and, at the request of the governor, to recover of the first term bondsmen an alleged shortage of $335,000. The petition was verified by the attorney general on information and belief, but, according to his testimony, without any personal knowledge of the facts. The bringing of the action in Lancaster county was, in effect, a declaration by the state that Bartley had not accounted for the moneys received by him, as treasurer, during his first term. Public corporations are compelled to act through their officers and agents, and the declarations of such officers and agents, when made during the transaction of official business and in relation thereto, are admissible in evidence as part of the *res gestæ*. See *Gray v. Rollinsford*, 58 N. H., 253; *Chicago v. Greer*, 9 Wall. [U. S.],

726; *Town of Sharon v. Salisbury*, 29 Conn., 113; 1 Am. & Eng. Ency. Law [2d ed.], 691. The pleadings, under the reformed system of procedure, "are the written statements, by the parties, of the facts constituting their respective claims and defenses" (Code of Civil Procedure, sec. 89); they are not, as formerly, the mere flourishes of the draughtsman; and the practice, therefore, is to receive them in evidence in other suits when offered as admissions or declarations against interest. See *Bunz v. Cornelius*, 19 Nebr., 107; *Miller v. Nicodemus*, 58 Nebr., 352, 78 N. W. Rep., 618; *Ludwig v. Blaskshere*, 102 Ia., 366; *Feldman v. McGuire*, 55 Pac. Rep. [Ore.], 872. When not signed or verified by the party himself, they are received only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterwards sanctioned by him. See *Ayers v. Hartford Fire Ins. Co.*, 17 Ia., 176; *Vogel v. Osborne*, 32 Minn., 167. Being the admissions of the party against whom they are offered, or else the admissions of an agent having authority to make them, they possess evidential value; they afforded some probability of the existence of the facts admitted. In this case the question does not arise whether a particular admission in a pleading was made with the suitor's authority, or permitted to stand with his approval. The broad question is whether the institution of the suit in Lancaster county is evidence against the state that a right of action existed. We think it is. The attorney general had express statutory authority to sue the first term bondsmen, and the governor had like authority to direct such a suit to be brought. See Compiled Statutes, 1899, ch. 83, art. 5. Manifestly, then, the bringing of the action was a declaration by the state that a defalcation had occurred during Bartley's first term. It implied, logically, that either the attorney general or the governor, or both, had made an investigation into the treasurer's accounts, and had, as a result of such investigation, concluded that there was a shortage, for which the first term sureties are liable. And, when we

consider that the governor had in fact inquired into the condition of the treasury before requesting the institution of the suit, and that the Lancaster county action is still presumably pending, we can not doubt that there was sufficient evidence to take the case to the jury, and that it was error to direct a verdict in favor of the state for the full amount of its claim. In this connection it should be remembered that, while the attorney general testified that he had no personal knowledge of the facts alleged in the petition filed in Lancaster county, there is no proof in the record that the action was improvidently instituted, or that it has been yet abandoned. The state, it is true, offered to show that the Lancaster county case was commenced on the faith of a decision of this court which has been recently overruled; but the trial court refused the evidence, and left the matter unexplained. The proffered testimony should have been received. It is always competent for a party to weaken the force of an admission by showing the circumstances under which it was made. For the error committed by the district court in refusing to submit the case to the jury the judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J., dissenting.

I am unable to agree with my associates to the proposition that the turning over by Bartley to himself, at the commencement of his second official term, of bank drafts, certificates of deposit and other credits for and in lieu of money relieved the bondsmen of his first term and charged the sureties for the second term with the amounts of such drafts, certificates of deposit and other credits. It was held otherwise in an able opinion by LAKE, C. J., in *Cedar County v. Jenal*, 14 Nebr., 254, wherein it was stated: "Thus we see that, it being money that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over

to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county to pay money. The payment of money can be effectuated only by the delivery of that which by the law of the land is recognized as money. * * * In the collection, care and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. Criminal Code, sec. 124. It would indeed be a strange system of laws that would permit an act, denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice." It is true the decision in the case from which the foregoing excerpt was taken received a severe shock at the hands of the majority of the court in *State v. Hill*, 47 Nebr., 456, but the writer there assailed, in language as strong as he could command, the proposition that certificates of deposit were money, and that their acceptance from an outgoing officer as money released him and his sureties. I can not better express the views I now entertain upon the subject than to here reproduce what I said in the *Hill Case*. After quoting section 2, article 4, chapter 83, Compiled Statutes, this language follows: "The foregoing statute defining the duties of the state treasurer requires him to account for and pay over, on the expiration of his term, to his successor, all moneys received by him belonging to the state. This he can alone do by delivering the amount in actual cash. In no other way can he satisfy the conditions of his bond to

well and truly perform the duties of his office required by law. It is money that he is required to pay over. It is idle to say that a certificate of deposit is money. We know it is not. It is the mere promise of the person or bank issuing it to pay money either on demand or at a fixed time. It is absurd to say that a promise to pay money is money. No person is required to accept such paper in discharge of a debt, and yet it is insisted that the liability of an outgoing officer and his sureties is released by the delivery to and acceptance by his successor of certificates of deposit in settlement, and that the state, whether it will or not, is bound. To such doctrine I cannot yield assent." Of course, when certificates of deposit, bank drafts or other credits have been received in settlement from an outgoing officer for and in lieu of cash, and the money is thereafter realized thereon by the successor in office, to that extent the outgoing officer and his bondsmen are discharged from liability, for it is a payment in money when the cash is actually realized on the credits. The books in the state treasury left by Bartley, and the official statements made by him during his second term in charging himself with the specified amount of cash on hand, justifies the inference, in the absence of a showing to the contrary, that the money was obtained by Bartley on the credits which he turned over to himself, at the beginning of his second term as state treasurer.

As to the decision in *Bush v. Johnson County*, 48 Nebr., 1, all I care to say is that the writer took no part in that decision.

I prefer not to express myself on the questions discussed in the opinion of SULLIVAN, J., relative to the execution, approval and filing of the official bond of Bartley, but place my decision that the sureties are liable upon the proposition that, when this case was last before us, a judgment in their favor was reversed, and the cause remanded for a new trial. This was, in legal effect, an adjudication that the bond was a valid obligation, and became the law of the case, binding alike upon the parties and the courts.

STATE OF NEBRASKA V. OMAHA NATIONAL BANK ET AL.

FILED DECEMBER 19, 1899. No. 10,586.

1. **Appropriation Act:** SINKING FUND: DUTY OF TREASURER. An appropriation act which authorizes the state treasurer to reimburse the sinking fund from the general fund is, in effect, a command to such treasurer to make such entries in his books as will show a transfer of public moneys from one fund to another.

2. ———: ———: WARRANT TO TREASURER. Such act does not authorize the issuance of a warrant evidencing an indebtedness to the treasurer in his individual capacity.

3. ———: ———: ———: TRUST. Such a warrant is not a state obligation, and the person to whom it is payable, being a mere trustee, possesses no salable interest therein.

4. **Conversion:** DEFINITION. Every act of control or dominion over property without the owner's authority, and in disregard of his rights, is, in contemplation of law, a conversion. It is not the advantage accruing to the defendants from the act, nor the motives inducing it, but the substantial injury inflicted on the plaintiff which, ordinarily, constitutes the gravamen of the action.

5. **State Treasurer:** PURCHASER OF WARRANT: PAYMENT. The state treasurer is without authority to pay any part of the public money to one claiming to be the owner, by purchase of a warrant drawn on the general fund "to reimburse the sinking fund."

6. ———: ———: ———: CONVERSION. The payment by the state treasurer of public moneys to one claiming to be the owner, by purchase, of such a warrant, for the purpose of satisfying the same, is a conversion; and the receiving of such money by the person to whom it is paid is also a conversion.

7. **Trover:** PROPERTY. Trover may be maintained for every species of personal property which is the subject of private ownership, including money, bank bills, notes and bonds.

8. ———: MONEY: BILLS: LIABILITY OF PURCHASER. Trover does not lie to recover money or negotiable instruments in the hands of a *bona fide* holder; but one is not an innocent holder when he knew to whom the money or mercantile paper belonged at the time he received it.

9. ———: STATE WARRANTS: RECITALS: NOTICE. Whether or not certain recitals appearing upon the face of a state warrant impute notice to parties handling or dealing with it, are proper to be submitted to the jury.

10. **Review:** BRIEFS. A party can not, by filing a brief after the submission of the cause, bring to the notice of the court points not suggested either in the original briefs or on the oral argument.

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

The facts are stated in the opinion.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General,* for the state:

Before final submission plaintiff moved to dismiss the case without prejudice, and its motion should have been sustained. See Code of Civil Procedure, sec. 430; *Zittle v. Schlesinger,* 46 Nebr., 844; *Lawrence v. Schreve,* 26 Mo., 492; *Wood v. Nortman,* 85 Mo., 298; *Harris v. Beam,* 46 Ia., 118; *Mullen v. Peck,* 57 Ia., 430; *Morrisey v. Chicago & N. W. R. Co.,* 80 Ia., 314; *Vertrees v. Newport News Co.,* 95 Ky., 314.

The peremptory instruction to the jury to return a verdict for defendants was erroneous. Under the facts pleaded and proved, Bartley was guilty of a conversion of the money paid on the check, and Millard and the bank were participants in every act constituting the conversion. See *Bartley v. State,* 53 Nebr., 310; *Sharp v. Parks,* 48 Ill., 511; *Hoffman v. Carow,* 20 Wend. [N. Y.], 21; *Cerkel v. Waterman,* 63 Cal., 34; *Swim v. Wilson,* 90 Cal., 126; *Robinson v. Skipworth,* 23 Ind., 311; *Kearney v. Clutton,* 59 N. W. Rep. [Mich.], 419; *Hill v. Campbell Commission Co.,* 54 Nebr., 59; *Cook v. Monroe,* 45 Nebr., 349; *Perkins v. Smith,* 1 Wilson [Eng.], 328; *Stephens v. Elwall,* 4 M. & S. [Eng.], 259; *Tugman v. Hopkins,* 4 M. & G. [Eng.], 389; *Everett v. Coffin,* 6 Wend. [N. Y.], 603; *Mead v. Jack,* 12 Daly [N. Y.], 65; *McPartland v. Read,* 11 Allen [Mass.], 231; *McCombie v. Davies,* 6 East T. R. [Eng.], 538; *Edgerly v. Whalan,* 106 Mass., 307; *Spraights v. Hawley,* 39 N. Y., 441; *Alexander v. Swackhamer,* 105 Ind., 81.

Defendants had constructive knowledge of Bartley's lack of authority, and are chargeable the same as if they had actual knowledge. One who is bound to inquire is charged with the knowledge which he would have acquired had he made inquiry. See *Knapp v. Bailey*, 79 Me., 195; *Beard v. Milmine*, 88 Fed. Rep., 868; *Bartley v. State*, 53 Nebr., 310.

John L. Webster, contra:

The transaction does not involve the elements of conversion. See *Stough v. Stefani*, 19 Nebr., 468; *Nichols v. Newsom*, 2 Murphy [N. Car.], 303; *Badger v. Hatch*, 71 Me., 565; *Spencer v. Blackman*, 9 Wend. [N. Y.], 168; *Ferguson v. Clifford*, 37 N. H., 101; *Laverty v. Snethen*, 68 N. Y., 524; *Bristol v. Burt*, 7 Johns. [N. Y.], 258; *Spooner v. Holmes*, 102 Mass., 506.

The rule in larceny cases does not apply to money and negotiable paper. See *Spooner v. Holmes*, 102 Mass., 503; *Goodman v. Simonds*, 20 How. [U. S.], 343; *Evertson v. National Bank*, 66 N. Y., 14; *Jones v. Nellis*, 41 Ill., 482; *Shipley v. Carroll*, 45 Ill., 285; *Burson v. Huntington*, 21 Mich., 415; *Olmstead v. Winsted Bank*, 32 Conn., 278; *King v. Doane*, 139 U. S., 166; *Swift v. Smith*, 102 U. S., 442; *Hotchkiss v. National Banks*, 21 Wall. [U. S.], 354; *Hopkins v. Withrow*, 42 Ill. App., 584; *Wilson v. Denton*, 82 Tex., 531; *First Nat. Bank of Cameron v. Stanley*, 46 Mo. App., 440; *Richards v. Monroe*, 85 Ia., 359; *Indiana & I. C. R. Co. v. Sprague*, 103 U. S., 756.

The contention of the attorney general, that the Omaha National Bank had constructive notice of Bartley's want of authority to pay the warrant, and that such notice is equivalent to actual knowledge, is unsound. See *Speer v. Board of County Commissioners*, 88 Fed. Rep., 749; *Wall v. County of Monroe*, 103 U. S., 74; *Thompson v. Searcy County*, 12 U. S. App., 627; *Board of County Commissioners v. Sherwood*, 27 U. S. App., 458.

The bank is not liable for the misapplication of the state funds by the treasurer, as there is no proof that

the bank was in fact aware that the payment of the warrant was unlawful, and was not a participant in the transaction knowing it to be unlawful. See *Fifth Nat. Bank v. Village of Hyde Park*, 101 Ill., 595; *Duckett v. National Mechanics Bank*, 86 Md., 400; *Munnerlyn v. Augusta Savings Bank*, 88 Ga., 333; *State Nat. Bank v. Reilly*, 124 Ill., 464; *Freeholders v. Newark Nat. Bank*, 48 N. J. Eq., 51; *Goodwin v. American Nat. Bank*, 48 Conn., 550; *Howard v. Deposit Bank of Owensboro*, 80 Ky., 496; *Walker v. Manhattan Bank*, 25 Fed. Rep., 247; *State Nat. Bank v. Dodge*, 124 U. S., 333; *United States v. American Exchange Nat. Bank*, 70 Fed. Rep., 232; *Wells, Fargo & Co. v. United States*, 45 Fed. Rep., 337; *National City Bank v. Westcott*, 118 N. Y., 468; *National Park Bank v. Seaboard Bank*, 114 N. Y., 28; *Herrick v. Gallagher*, 60 Barb. [N. Y.], 566; *Buller v. Harrison*, 2 Cowper [Eng.], 568; *Mowatt v. McClelan*, 1 Wend. [N. Y.], 173; *State v. Flint & P. M. R. Co.*, 89 Mich., 481; *United States v. Dalles Military Road Co.*, 41 Fed. Rep., 493; *United States v. McLaughlin*, 30 Fed. Rep., 147; *Commonwealth v. Heirs of Andre*, 3 Pick. [Mass.], 224; *Attorney General v. Ruggles*, 59 Mich., 124.

The court did not commit error in overruling the plaintiff's motion to dismiss without prejudice, under the facts in this case. See *Aultman v. Reams*, 9 Nebr., 487; *Omaha & R. V. R. Co. v. Hall*, 33 Nebr., 229; *Standiford v. Green*, 54 Nebr., 10; *State v. Scott*, 22 Nebr., 628; *Beaumont v. Herrick*, 24 O. St., 446; *Sheedy v. McMurtry*, 44 Nebr., 499; *Huntington v. Forkson*, 7 Hill [N. Y.], 195; *Glass Co. v. Taylor*, 99 Ky., 24; *Beals v. Western Union Telegraph Co.*, 53 Nebr., 601; *Dunn v. Wolf*, 81 Ia., 688; *Toof v. Foley*, 87 Ia., 8; *Ætna Life Ins. Co. v. Board of County Commissioners*, 49 U. S. App., 122; *McArthur v. Schultz*, 78 Ia., 364.

R. S. Hall and *Connell & Ives*, also for defendants in error.

SULLIVAN, J.

The state of Nebraska brought this action in the district court of Douglas county to recover from the Omaha

National Bank and J. H. Millard, its president, the sum of $201,884.05. The basis of the claim was an alleged conversion by the defendants of certain money belonging to the plaintiff. A jury, impaneled to try the issues, found, in obedience to a peremptory direction from the court, that the state had no cause of action. A motion for a new trial was denied, and, judgment having been rendered on the verdict, the attorney general, by this proceeding in error, has brought the record here for review.

The controversy arises out of the following facts: The defendant bank was a state depository, and as such had in its custody on January 2, 1897, state funds amounting to more than $200,000. The legislature of 1895 passed an appropriation bill, entitled "An act making appropriation for current expenses of the state government for the years ending March 31, 1896, and March 31, 1897, and to pay the miscellaneous items of indebtedness owing by the state of Nebraska." See Session Laws, 1895, p. 386, ch. 88. Among the items of appropriation contained in the first section of the act is the following: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one-hundredths ($180,101.75) dollars, to reimburse said fund for same amount tied up in Capital National Bank." The bill was approved by the governor April 10, 1895, and the same day J. S. Bartley, the state treasurer, filed with the auditor of public accounts a claim for the entire sum appropriated to reimburse the sinking fund. This account having been examined and adjusted by the auditor and approved by the secretary of state, a warrant in the following form was made out and delivered to the claimant:

"$180,101.75. STATE OF NEBRASKA. No. 95241.

"OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,

"LINCOLN, NEB., Apr. 10, 1895.

"Treasurer of Nebraska,

"Pay to J. S. Bartley or order one hundred eighty thousand one hundred one and 75-100 dollars, for to reim-

burse state sinking fund, in accordance with legislative appropriation approved Apr. 10, 1895, and charge general fund.

"Countersigned: EUGENE MOORE,
"J. S. BARTLEY, *Auditor of Public Accounts.*
"*State Treasurer.* P. O. HEDLUND, *Deputy.*
"———, *Deputy.*"

On left hand margin: "Treasury Warrant."

Upon the back of this warrant appears the following indorsements: "Presented and not paid for want of funds, and registered for payment Apr. 10, 1895. Number 27932. J. S. Bartley, State Treasurer, Lincoln, Nebraska." This further indorsement appears: "J. S. Bartley. J. H. Millard, Pt."

This warrant, it is asserted by the defendants, was sold by Bartley to the Chemical National Bank of New York. The state does not deny the assertion, but, on the contrary, by implication, concedes its truth. At any rate, it is certain that the New York bank, claiming to be the owner of the instrument, forwarded it for collection to the defendant bank in October or November, 1896. On January 2, 1897, Bartley called at the Omaha National Bank, and, for the purpose of paying the warrant, drew his check, as treasurer, upon the funds of the state on deposit in said bank. The amount of the check was $201,884.05; it was made payable "to the order of J. H. Millard, Pt.," and was delivered to the payee, who thereupon surrendered the warrant to Bartley, and caused the state's money, to the amount of the check, to be turned over to the Chemical National Bank of New York and the Exchange Bank of Atkinson. These are the salient facts, and we proceed now to inquire whether they show a right of recovery in the state. Whether the appropriation to reimburse the sinking fund was legislation fairly embraced within the title of the act may well be doubted; but we pass that question by, as its determination is not necessary to a decision of the case. The warrant under consideration was issued to reimburse the sinking fund

— to transfer the state's money from one fund to another. It was a direction to Bartley to take money out of the general fund and put into the sinking fund. It declared on its face, in unequivocal terms, the purpose of its existence. No one could possibly be deceived by it. It would not suggest to an intending purchaser, however slow of apprehension he might be, the thought that the state was indebted to Bartley, and that the money directed to be paid was for his individual use. If the warrant was of any validity at all, it was, in substance, a command by the state to its treasurer to make certain entries in the books of his office. The warrant was neither actually nor apparently a state obligation. Bartley never had a salable interest in it, or the semblance of such an interest; and in the hands of the Chemical National Bank and in the hands of the Omaha National Bank it was absolutely null and void. Discussing this same question NORVAL, J., in *Bartley v. State*, 53 Nebr., 310, said: "The warrant did not belong to him [Bartley], notwithstanding it was drawn payable to himself in his individual capacity, but he received it officially in trust for the state, for and on behalf of the state sinking fund, as he well knew. The title to the warrant never vested in him, and he could not transfer to another by indorsement that which he never possessed. He could not divest the title of the state in the warrant by the sale thereof to the Chemical National Bank, since he possessed no power to sell or negotiate the instrument. Nor was the bank 'an innocent purchaser' within the meaning of that term as applied to commercial paper, inasmuch as the warrant disclosed on its face the purpose and object for which it was drawn, and the bank was bound to know at its peril that the defendant had no title to the instrument."

We come now to the question of conversion. The substance of the transaction between the defendants and Bartley at the Omaha National Bank of January 2, 1897, was, according to the doctrine of the last mentioned case,

the taking by the defendants of the state's money from the hands of Bartley and delivering it to the New York and Atkinson banks. As the state was not indebted to either of these banks, and as the treasurer had no authority to turn over to them any part of the public funds, the payment and receipt of the money on account of the sinking fund warrant were illegal acts, the performance of which resulted in a loss to the state of over $200,000. That the transaction amounted to a technical conversion and rendered the New York and Atkinson banks liable to the state for the money received by them, does not seem to be seriously disputed; but the contention of the defendants is that they acted in the matter as innocent agents; that they committed no conscious wrong, and that, therefore, the law, in its charity, acquits them of blame. The effect to be given to the intention of the defendant in determining whether he has been guilty of a conversion, is a point upon which the authorities appear to be in irreconcilable conflict. Some cases assert, without qualification or limitation, that the intent of the wrong-doer is altogether immaterial, while others declare in general terms that innocence of intent relieves him from responsibility for what would, under other circumstances, be an actionable wrong. The generally accepted doctrine, however, is that every act of control or dominion over property without the owner's authority, and in disregard and violation of his rights, is, in contemplation of law, a conversion. It is not the advantage accruing to the defendant from the act, nor the motives inducing it, but the substantial injury inflicted on the plaintiff which, ordinarily, constitutes the gravamen of the action. An early expression of this view is found in a suit for conversion brought against a clerk who had received goods from his master's agent and had sent them abroad to his master, in ignorance of the fact that they were the plaintiff's property. Lord Ellenborough, delivering judgment in favor of the owner of the goods, said: "The only question is whether this is a conversion

in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his act may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another—who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage." See *Stephens v. Elwall*, 4 Maule & S. [Eng.], 259. That the doctrine thus declared is the law of this state is settled by *Hill v. Campbell Commission Co.*, 54 Nebr., 59, and *Cook v. Monroe*, 45 Nebr., 349.

But it is said by counsel for defendants that the Omaha National Bank was a state depository, and that there can be no liability, because it was the duty of the bank to pay out the state's money on checks signed by Bartley in his official character. This is true. It is conceded that the custodian of a trust fund is not liable for the loss of money disbursed by him in good faith on the trustee's order; but what relevancy has that proposition to the case before us? It is not sought here to charge the defendant bank with any wrongful conduct in connection with its office of custodian of public moneys. No violation of duty in that respect is alleged against it. The unlawful act upon which this suit is grounded is not the payment of the money on Bartley's check, but the receiving of it by the defendants for the use and benefit of the Chemical National Bank. When the Omaha bank, acting as a collecting agent, received the state's money and turned it over to its principal, it did an act which, according to the overwhelming weight of authority, amounted to a conversion.

It is, nevertheless, in the brief of counsel for defendants, earnestly insisted that there can be no recovery in this case, because the rule in regard to the conversion of chattels is not applicable to money and negotiable obligations. That trover may be maintained for every species of property which is the subject of private ownership, including money, bank bills, notes and bonds, is a proposition that has been established by numerous adjudications. See *Moody v. Keener*, 7 Port. [Ala.], 218; *Davis v. Funk*, 39 Pa. St., 243; *Stone v. Clough*, 41 N. H., 290; *Otisfield v. Mayberry*, 63 Mo., 197. The law, however, seems to be that neither money nor mercantile instruments in the hands of innocent holders are subject to the rules governing other kinds of property. They do not stand on the same footing as chattels. Possession as to them is assurance of title and right of disposition. They are intended to pass quickly from hand to hand, and the policy of the law is to faciliate their circulation by dispensing with all inquiry as to whether the putative owner is in fact possessed of the title. But the distinction between money and other forms of property is not material in this case. The money in question was earmarked. It was known to be the state's money when the defendants received it. They knew it was the state's money when they turned it over to the Chemical National Bank, and there is, therefore, no reason why they should not be held to the same measure of liability as though they had handled chattels belonging to the state. In the case of *Cook v. Monroe, supra*, a recovery was permitted, although the defendant was ignorant of the fact that he was dealing with money of the plaintiff. *A fortiori*, should there be a recovery under circumstances of this case, for defendants not only knew that they were dealing with the state's money, but they were also, in all probability, aware that the sinking fund warrant did not belong to the Chemical National Bank, and was incapable of being held in private ownership. The most casual inspection of the warrant would reveal its char-

acter. That the jury would be justified in finding from the evidence that the defendants closely examined it, computed interest on it, and in so doing discovered that it was issued to reimburse the sinking fund, hardly admits of doubt. William Wallace, cashier of the defendant bank, testified that the warrant was received for collection in October or November, 1896; that the letter in which it was received directed the collection of "one hundred and eighty thousand and odd dollars, * * * and interest"; that the New York bank asked only the face of the warrant, with six per cent from April 10, 1895. It further appears that Bartley's check covered interest on the warrant at the rate of seven per cent up to January 2, 1897, and that the defendants turned over to the Atkinson bank something over $3,000, being interest at the rate of one per cent on the warrant during the time it was outstanding. It also appears that at some time, for some purpose not disclosed by the record, the defendant Millard had possession of the warrant, and, in his official capacity, indorsed it. The conclusion is, we think, irresistible that the Omaha bank had actual knowledge of what was written upon the face of the warrant. At any rate, it is clear that a jury might with propriety find that such was the fact. The trial court, therefore, erred in directing a verdict in favor of the defendants.

Since the foregoing opinion was prepared there has been presented to us an additional brief on behalf of defendants challenging the sufficiency of the petition in error. Without any intimation that counsel had other arrows in his quiver, he was given leave to file a supplemental brief, after the cause was submitted, but was informed at the time that the court would not feel bound to consider it. Neither in the original brief nor in the elaborate oral argument was there any allusion to an alleged defect in the petition in error. And yet, if it be true that the pleading is so lacking in essential averments as to preclude an adjudication on the merits, the

matter should, in all fairness, have been called to our attention at the earliest moment. Counsel have no right to impose upon us the labor of investigating questions which they believe are not properly before us for decision. Besides, the practice of raising new points when the case is in the hands of the court is not fair to the adverse party. It has the appearance of being strategic. It is subject to the suspicion that it may be an adroit maneuver to gain an advantage. We do not purpose either to encourage or countenance it, and, therefore, decline to consider the belated brief.

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

REVERSED AND REMANDED.

HARRISON, C. J.

Prior to the submission of this cause to the trial jury the court denied a motion of the plaintiff to dismiss its action, without prejudice. This refusal was assigned as error. I think the point well taken, and for this reason join in the judgment of reversal. I do not concur in the reasons for reversal stated in the opinion.

NORVAL, J., took no part.

JACOB WEIS V. MILTON J. ASHLEY.

FILED DECEMBER 19, 1899. No. 9,072.

1. **Statutes:** ENACTMENT: GOVERNOR. The governor is a part of the lawmaking power, and, in acting on bills presented to him for his approval or rejection, he is engaged in the performance of a legislative duty enjoined upon him by the constitution.

2. ———: CHANGE IN TITLE OF BILL: CONSTITUTIONAL LAW. A material change in the title of a bill after it has passed both houses of the legislature, and before its presentation to the governor for his approval or rejection, renders the act unconstitutional and void.

3. ———: ———: ———: ANIMALS: LIEN FOR GET. Chapter 3, Session

Laws of 1887, passed both houses of the legislature as an act amendatory of section 40, article 1, chapter 4, Compiled Statutes, 1885, but was enrolled and presented to the governor as amendatory of section 48 of said chapter 4. *Held*, That such change in the title was material, and that the amendatory act is unconstitutional and void.

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

John D. Carson, for plaintiff in error.

References: *Ives v. Norris*, 13 Nebr., 253; *White v. City of Lincoln*, 5 Nebr., 516; *Marvin v. Weider*, 31 Nebr., 775.

William M. Clark, contra.

References: *Poffinbarger v. Smith*, 27 Nebr., 788; *State v. Bush*, 25 Pac. Rep. [Kan.], 614; *People v. Nelson*, 27 N. E. Rep. [Ill.], 217; *In re Pinkney*, 27 Pac. Rep. [Kan.], 179; *Easton & A. R. Co. v. Central R. Co.*, 52 N. J. Law, 267; *Tice v. Bay City*, 78 Mich., 209; *County Commissioners v. Hellen*, 72 Md., 603; *Perry v. Gross*, 25 Nebr., 826; *Fenton v. Yule*, 27 Nebr., 758.

SULLIVAN, J.

This suit was instituted by Milton J. Ashley against Jacob Weis to recover the possession of a bay colt eight months old. The officer charged with the execution of the order of delivery being unable to find the animal, the action proceeded as one for damages, and resulted in a verdict and judgment in favor of the plaintiff for $5.40. The defendant, by this proceeding in error, raises an important question of constitutional law, the decision of which disposes of the case, and renders unnecessary an examination of other points relied on for a reversal of the judgment.

The plaintiff's claim to the possession of the colt in controversy is asserted under the provisions of section 40, article 1, chapter 4, Compiled Statutes, 1899, which is as follows:

"Sec. 40. That owners of stallions, jacks, and bulls in

the state of Nebraska have a lien upon the get of such stallion, jack, or bull for the period of nine months after the birth of same for the payment of the services of said stallion, jack, or bull; *Provided*, That the owner of the stallion, jack, or bull shall have filed in the office of the clerk of the county in which such get is owned, a description of the same with date of birth within one hundred and twenty days after the birth thereof. Said lien may be at any time after the filing of said description foreclosed in manner and form as provided by law for foreclosing of chattel mortgages."

The original legislation upon this subject was enacted in 1883. The proviso was added by way of amendment in 1887. The contention of the defendant is that the amendatory act was not constitutionally adopted, and is, therefore, void. From the legislative journals it appears clearly that the title of the act of 1887, as it passed both branches of the legislature, was "An act to amend section 40 of article 1 of chapter 4 of the Compiled Statutes of 1885, entitled 'Animals,' and to repeal the said section so amended." The enrolled bill, which was sent to and which received the approval and signature of the governor, was entitled "An act to amend section 48 of article 1 of chapter 4 of the Compiled Statutes of 1885, entitled 'Animals,' and to repeal the said section so amended." See Session Laws, 1887, p. 70, ch. 3. Section 48 of chapter 4 relates to the inspection of sheep, and is entirely unrelated to the subject embraced in the section sought to be amended. The question for decision is, whether the change in the title of the act after it had passed both branches of the legislature, and before its approval by the governor, was a violation of 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." That section 40 could not be amended by an act professing in its title to amend section 48 is a proposition about which there can be no difference of opinion. See *State v. Tibbets*, 52 Nebr., 228.

But the position for which the plaintiff contends is that the constitutional inhibition has no application to bills after they have passed the legislature. We think it has. We think the scope and purpose of the provision should not be so limited by construction as to permit a measure of legislation to slough its title altogether, or assume a deceptive one, after having passed the legislature and before being presented to the executive for approval. The governor is a part of the lawmaking power, and, in acting on bills presented to him for approval or rejection, he is engaged in the performance of a legislative duty enjoined upon him by the constitution. "To him as well as to the legislature is confided the business of making laws." See *State v. Crounse*, 36 Nebr., 835; *People v. Supervisor*, 16 Mich., 254; *State v. Deal*, 24 Fla., 293; *In re Executive Communication*, 23 Fla., 298; Cooley, Constitutional Limitations [6th ed.], 184. Constitutional provisions similar to the one above quoted have been adopted in many states. The reasons for their adoption are thus stated by Judge Cooley in his work on Constitutional Limitations: "First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire." See Cooley, Constitutional Limitations [6th ed.], p. 172. The people have the right to petition the governor on the subject of proposed legislation (Constitution, art. 1, sec. 19); and, to give practical effect to this right, it would seem to be almost necessary to preserve the titles by which bills have become generally known. A protest against the approval of a bill amending section 40 aforesaid would hardly be con-

sidered by the governor when acting on a measure which, according to its title, proposed to amend section 48. We think it would violate the letter and spirit of the constitutional safeguard against stealthy legislation to hold that the subject of a bill must be clearly expressed in its title during the progress of the measure through the legislature, but that any misleading or delusive title may be attached to it when it is presented to the governor for approval. The precise point here considered was before the supreme court of Florida in the case of *State v. Green*, 36 Fla., 154, 18 So. Rep., 334. In the course of the opinion Mabry, C. J., said: "The office of the title of an act under constitutions like ours, it is evident, is to control the subject of an act of legislation, and to restrict its provisions to matter properly connected therewith. It may be that the necessity and reasons for the requirement that the subject of an act shall be restricted to the subject expressed in the title as it passes the legislative bodies do not exist with the same urgency as applied to the approval of the law by the governor; but still it is essential that an act have a title which will have a controlling effect over the subject-matter of the act, and if the difference between the title of an act, as it passed the legislative bodies and when approved by the governor, is so essential as to affect the entire act, it can not be said that the same act received the sanction of the entire legislative department of the state." This view of the matter seems to be countenanced, though not expressly decided, in *Stow v. Common Council*, 79 Mich., 595. In *People v. Supervisor, supra*, Cooley, J., said: "I am not prepared to say that an act of the legislature can be valid which, as engrossed for the signature of the governor, would be void if passed by the legislature in that form. A law must have the concurrence of the three branches of the legislative department; and if it differs in an essential particular, when presented to the governor for his signature, from the bill passed by the two houses, there is difficulty in saying that it has been concurred in

by all. See *Prescott v. Trustees Illinois & Michigan Canal*, 19 Ill., 324. And under our constitution the title is not only important, but it is absolutely made to control; so that I do not see how any important change in the title can be said to be immaterial."

Our conclusion is that the act of 1887 (Session Laws, p. 70, ch. 3), amending the prior act "for the protection of owners of stallions, jacks and bulls" (Session Laws, 1883, p. 58, ch. 2), was not adopted in accordance with the requirements of the constitution, and is, therefore, null. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. BANKERS RESERVE LIFE ASSOCIATION, RELATOR, V. CUNNINGHAM R. SCOTT, RESPONDENT.

FILED DECEMBER 19, 1899. No. 11,054.

1. **Bill of Exceptions:** RULES OF TRIAL COURT. The rules of practice of the district court may be incorporated into the bill of exceptions without being formally introduced in evidence.

2. **Evidence:** JUDICIAL NOTICE. Facts of which the court will take judicial notice need not be given in evidence.

3. **Bill of Exceptions:** RECORD OF EVENTS. A bill of exceptions may properly include a record of events transpiring in the presence of the court, but not formally introduced in evidence.

4. ———: OBJECTIONS TO RULINGS NOT IN RECORD. Grounds of objection to a ruling, order or judgment which do not appear in the record may be brought into the bill of exception by the party complaining, by reducing such grounds of objection to writing and asking to have them incorporated into such bill of exceptions.

ORIGINAL application for mandamus to require respondent to allow and sign a bill of exceptions. *Writ allowed.*

T. J. Mahoney, for relator.

Weaver & Giller, contra.

SULLIVAN, J.

The question raised by this record is not a very perplexing one. The action is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus commanding Hon. Cunningham R. Scott, one of the judges of the district court for the fourth judicial district, to allow and sign a bill of exceptions. The respondent, in his return to the alternative writ, sets out at length the proceedings had before him in the case of Finn against Bankers Reserve Life Association, and, in justification of his refusal to sign the bill of exceptions presented to him for allowance in that case, states: "I further certify that all the evidence and every part thereof that was introduced before me at the time of the hearing of the motion to set aside said judgment is already incorporated in the bill of exceptions which I signed; and to incorporate into said bill of exceptions the matters sought to be incorporated therein by these proceedings would be incorporating therein extrinsic matter not introduced in evidence and would therefore be a violation of the well settled practice of this state by the adjudications of this court that no matter shall go into the bill of exceptions as evidence unless it had been formally introduced at the time of the hearing." The matters which it is now sought to have incorporated into the bill of exceptions are the rules of practice of the district court and a recital of events which transpired in the presence of the court, and which, it is claimed, have a material bearing on the rulings of which the relator complains. The contention of the respondent, that the bill of exceptions should contain only evidence formally introduced at the trial, or on the hearing of a motion, can not be sustained. To intelligently review an order or

judgment of the district court it is necessary that this court should be put in possession of all the facts and circumstances known to the district court, and which it is claimed did influence, or should have influenced, its decision. What transpires in the presence of the court, and what is judicially known to the court, need not be formally given in evidence. See 1 Jones, Evidence, sec. 134; *Secrist v. Petty*, 109 Ill., 188; 12 Ency. Pl. & Pr., 1. And yet upon these things often rest rulings, orders and judgments called in question by appellate proceedings. Section 311 of the Code of Civil Procedure provides: "When the decision is not entered on the record or the grounds of the objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing," and present them to the presiding judge for allowance. In this case the relator asserts that the rulings, of which it complains, were made in violation of the rules of practice of the district court, and that, in view of certain events transpiring in the presence of the court, and of which it had knowledge, the rulings were erroneous. In this situation of affairs it is very clear that the grounds of the relator's objections do not appear in the record, and that it is, therefore, entitled to have them brought into the bill of exceptions. See *People v. Gibbons*, 54 Ill. App., 617; *Chapman v. State*, 39 S. W. Rep. [Tex.], 113; *Hamilton v. Moore*, 4 W. & S. [Pa.], 570; *Muirhead v. Muirhead*, 16 Miss., 211; *Wallace v. Boston*, 10 Mo., 660. Whatever the district court may properly take into account in making a decision should, if practicable, be presented to this court when the record is brought up for review, so that the decision may be judged in the light of the circumstances under which it was made.

We make no inquiry at this time touching the correctness of the respondent's rulings. Whether they are right or wrong, the relator is entitled to have them reviewed in a direct proceeding. The peremptory writ is allowed.

WRIT ALLOWED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1900.

PRESENT:

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

STATE OF NEBRASKA, EX REL. CHARLES L. BUGBEE, V. EDWARD P. HOLMES.

FILED JANUARY 3, 1900. No. 11,016.

1. **Intervention**: TIME TO RULE ON APPLICATION. Where a petition to intervene is filed without notice, or application for leave to file, or permission granted, it is proper practice for the court to pass upon the right or propriety of the intervention immediately prior to, or at the time, a decision or judgment upon an issue in the cause.

2. ———: APPEAL: SUPERSEDEAS. If such action is taken, it may bar the applicant to intervene of the supersedeas of the main order or judgment in an attempted or prospective appeal by him therefrom.

3. ———: RECEIVER'S SALE: OBJECTIONS. A petition of intervention, the avowed purpose of which was to object to the sale under order of the court by a receiver of an insolvent bank of some assets remaining after former sales, examined, and *held* not sufficient, under the circumstances and conditions as to the time made, etc., to affect an intervention.

ORIGINAL application for mandamus to require respondent, as judge of the district court, to fix the amount of a bond to supersede an order confirming a sale of realty. *Writ denied.*

Frank Irvine, for relator:

So far as the right to a supersedeas is concerned, there is no distinction between an order directing the sale of real estate, and an order confirming such sale. See *Kountze v. Erck*, 45 Nebr., 288; *State v. Fawcett*, 58 Nebr., 371.

The facts and pleadings establish relator's right to intervene. See *Wilcox v. Bickel*, 11 Nebr., 154; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Nebr., 374; *Bronson v. La Crosse M. R. Co.*, 2 Wall. [U. S.], 283; *Morrill v. Little Falls Mfg. Co.*, 48 N. W. Rep. [Minn.], 1124; *Waymire v. San Francisco & S. M. R. Co.*, 44 Pac. Rep. [Cal.], 1086; *Park v. Petroleum Co.*, 25 W. Va., 108.

No prior leave of court is essential to the right of intervention. The statute gives the absolute right. The merits of the intervention are to be determined later. See Code, secs. 46, 47, 50*a*, 50*b*, 50*c*; *McConniff v. Van Dusen*, 57 Nebr., 49; *Clark v. Way*, 52 Nebr., 204; *Cobbey v. Dorland*, 50 Nebr., 373; *Moline v. Hamilton*, 56 Nebr., 132; *Deere v. Eagle Mfg. Co.*, 49 Nebr., 385; *Welborn v. Eskey*, 25 Nebr., 195.

Tibbets Bros., Morey & Anderson, contra.

References: *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Nebr., 137; *Harrison v. King*, 9 O. St., 388; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. R. Co.*, 53 Fed. Rep., 186.

HARRISON, C. J.

The object of this action is to procure the issuance from this court of a writ of mandamus by which one of

the judges of the district court of Lancaster county will be directed to fix the amount of a bond to supersede an order made by him by which there was confirmed the sale of some real estate. It appears that the Lincoln Savings Bank & Safe Deposit Company was a corporation of this state, and engaged in the banking business; that in January, 1896, in a suit by one who claimed to be its creditor, pursuant to the relief sought, a receiver was appointed to wind up the affairs of the bank, and the receiver appointed entered upon the duties, and has since been performing them; that on July 17, 1899, an order was made that the receiver sell such assets of the bank as then remained in his hands for disposition, and pursuant to which, during the month of September, 1899, the receiver made a sale of some of the said assets, inclusive of real estate, and reported his doings at such sale to the court. That the relator herein filed on September 19, 1899, a petition of intervention in the original action in which the receiver was appointed; also, objections to the confirmation of said sale; that from an order of confirmation the relator sought to perfect an appeal, and asked that the trial court fix the amount of a supersedeas bond, which request was refused. It was stated in the petition of intervention:

"Now comes Charles L. Bugbee and shows to the court that this is an action wherein it is sought to wind up the affairs of the defendant Lincoln Savings Bank & Safe Deposit Company, a corporation organized under the laws of the state of Nebraska; that John E. Hill has been appointed receiver in said action and is now and for a long time past has been acting as such.

"Your petitioner further says that he is the holder of ten shares of stock in said Lincoln Savings Bank & Safe Deposit Company and was such holder at the time of the commencement of this suit. That said receiver has been proceeding from time to time to sell and dispose of the assets of said corporation generally at private sale and always without notice to said corporation and with-

out any adequate advertisement of said sales, and that by virtue of said actions a large proportion of said corporate assets has been sold, and disposed of at much less than the real value of such assets and that the interests of said corporation its creditors and stockholders have been very greatly injured and impaired by such irregular and unlawful sales. That there still remains in the possession of and under the control of said receiver the remainder of said assets consisting of real estate situated in the counties of Lancaster, Greeley, Scott's Bluff, Gage and Thayer in Nebraska, and in the county of Laramie, Wyoming, and also certain personal property consisting of notes, warrants and judgments, a more detailed description of said assets is hereto attached and marked Exhibit 'A.' There may be and probably are in the hands of the receiver other assets but your petitioner has no means of informing himself thereof and cannot definitely allege that there are other assets or describe the same. Your petitioner further avers that said receiver proposes this day to sell at his office in the city of Lincoln said assets described in Exhibit 'A'; that he proposes to do so under a pretended order purporting to be made by the Honorable Edward P. Holmes, judge of this court, July 17, 1899, and on this behalf your petitioner avers that said pretended order is wholly void, as he is prepared to show if permitted so to do; and that said receiver has proceeded, is proceeding and intends to proceed in disregard of the terms of said order and that the result of said proceeding if confirmed by this court will be to sacrifice the remaining assets of said corporation by disposing thereof at much less than their real value and at much less than he would receive from a fair and legal sale thereof and that if said pending and proposed action be confirmed the rights and interests of said corporation its stockholders and creditors will be further and irremediably impaired.

"And further your petitioner avers that at the time of the commencement of this suit and for a long time prior

thereto one R. D. Miller was president of said corporation and of its board of directors; that soon after the commencement of this suit said Miller removed from this state and has ever since been and still is absent therefrom and his whereabouts is unknown. That since the year 1895 there has been no election of a board of directors of said corporation and that the term of office of each director then elected long ago expired. That when this suit begun said directors abdicated their functions and they have never since met or acted in any way as a board of directors; that said board of directors has never appeared to defend this action nor has said board of directors nor any one having any authority to act as directors appeared in defense thereof; and that there are now no officers to whom appeal can effectually be made to defend this suit on behalf of said corporation or to resist said pending and threatened unlawful proceedings of said receiver. Nevertheless your petitioner has caused demand to be made upon said former directors to meet and take steps on behalf of said corporation and resist said pending and threatened proceedings but said former directors have refused to comply with said demand."

It is pleaded in the present application for a writ of mandamus that on a hearing of a motion filed by relator to set aside the sale it was "held and announced" that he was entitled to intervene, and to resist the confirmation of the sale; also, that the sale was regular, and would be confirmed, but that afterward the judge before whom the matters were heard, signed and caused to be made of record an order in which the holding in regard to the relator's intervention was to the contrary of what had been announced. The order of record recites that a hearing was had, and it was determined that the relator had no standing in court to be heard, had not intervened or been allowed to, could not object to the proceedings or "obtain any rights or benefits," and, as we have before stated, the sale was confirmed, and there was a re-

fusal of the relator's demand to fix the amount of a supersedeas. The provisions of law under which the relator claims the right of intervention existed are sections 50*a*, 50*b* and 50*c* of the Code of Civil Procedure:

"Sec. 50*a*. Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant either before or after issue has joined in the action, and before the trial commences.

"Sec. 50*b*. The court shall determine upon the intervention at the same time that the action is decided, and if the claim of the intervenor is not sustained he shall pay all costs of the intervention.

"Sec. 50*c*. The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as obtain in regard to other pleadings provided for by the Code. But if such petition is filed during term the court shall direct the time in which answers thereto shall be filed."

The portion of the Code under which the direct right to a supersedeas was and is claimed is the third subdivision of section 677.

There is little or no contention in arguments on the point made for the relator that the right to a supersedeas exists in appeals from orders of confirmation of sales, and we pass it without further notice. It is urged for the relator that the right to intervene is absolute, and if a petition of intervention discloses a right in the intervener when it has been filed, he is in court and the right must be adjudicated; that no leave to intervene or order allowing the intervention is necessary.

The position of respondent is stated in a brief as follows:

"1st. If relator was never a party to the action, then he had no right to supersede the order of the court.

"2d. The relator could become a party to the action only (*a*) by order of the court in the exercise of its discretion; (*b*) by allegations of interest in the subject of the action in accordance with the statutes governing interventions.

"3d. If he comes in by right and not by consent or order of the court, he must allege specific facts, which, if sustained, will make his intervention effective."

One of the main contested points is relative to the sufficiency of the petition of intervention. The petition of intervention, as will no doubt have been noticed, purported to be for the immediate petitioner and other stockholders. It was filed without leave or notice, and no order allowing intervention was ever asked or granted. The order in the case in which intervention was sought decided that it had not been effectuated. We are satisfied that, when a petition is filed by a party who thereby seeks to intervene, as there was in the matter involved in this application, and no allowance of the intervention is asked or granted, it is proper practice for the court in which the action is pending to decide the question of intervention at the time of its decision of the main issue then in litigation, and, if decided adversely to the petitioner, and as was the adjudication here in question, that he had no standing or was not in court, he can have no appeal from the decision on the merits. The question then is, did the petition here disclose interest or rights in the applicant which were being invaded or infringed? The application was not presented, as shown by the petition, until many sales had been made, nor until the sale of what was the remainder, or the last of the assets, had been ordered and about to occur. The sale was, as were all of them, under the direct order and supervision of the court, or made by the court through its receiver, and the

party who sought to intervene in his petition did not plead any matters of fraud, nor that there was to be or had been other than intelligent and honest actions in regard to sales. The statements were mere attacks upon what may be termed alleged irregularities, also as to things as to which the petitioner differed in opinion with the court and its receiver in the manner of or the proper disposition to be made of the assets. In regard to the prices which had been realized or would be, the allegations were but general, nothing specific or of facts from which, at least, inferences of fraud might be drawn; in short, the allegations of the petition for intervention, under all the circumstances and conditions of the time when made, were, as determined by the trial judge, insufficient to give the applicant a standing in the court and case. This being true, he was not entitled to supersede the order of confirmation. The main reason on which our decision rests was probably not clearly expressed in the journal entry made in the lower court; but it was nevertheless included. It follows that the writ must be denied.

WRIT DENIED.

NEBRASKA TELEPHONE COMPANY V. JOHN JONES.

FILED JANUARY 3, 1900. No. 9,031.

Personal Injury: CONTRIBUTORY NEGLIGENCE: DIRECTING VERDICT. Where the evidence of plaintiff in suit for damages for personal injury alleged to have been the result of negligence of defendant conclusively established contributory negligence of plaintiff, which was the immediate cause of the injuries, there can be no recovery, and it is error to refuse a request to charge the jury to return a verdict for the defendant.

ERROR from the district court of Sarpy county. Tried below before SLABAUGH, J. *Reversed.*

W. W. Morsman, for plaintiff in error.

John P. Breen, contra.

HARRISON, C. J.

In this, an action commenced in the district court of Sarpy county, the defendant in error sought, and recovered, a judgment for damages against the plaintiff in error, hereinafter designated as the company, the ground of the suit being the alleged negligence of the company, by reason of which the defendant in error suffered personal injuries. The petition was in part as follows:

"That some time before the accident hereinafter detailed occurred the said company constructed a telephone line along and upon the public highway through said Sarpy county commonly known as the 'Bellevue Road'—a regularly laid out and duly-dedicated public highway of said county, and one of the chief public thoroughfares of that county, running north and south across the county, and passing through the little town of Bellevue in said county; that in constructing said line said company in the usual manner placed large telephone poles in said public highway at short distances apart in said road, and strung upon said poles its lines of telephone wires, but that said company never had permission, license or right of way granted from said county or its duly authorized agents to construct said telephone line along said public highway and that in erecting said poles and wire upon and along said public highway it was from the beginning a trespasser thereon; that some time before the accident hereinafter detailed occurred the said company, desiring to remove or relocate its said line, cut down a number of said telephone poles at a point on said public highway near where the same approaches and passes the said town of Bellevue; but plaintiff alleges that in the work of cutting down and removing said poles at this point the company carelessly and negligently, and with utter disregard for the safety of public travel along said road, cut said poles off so as to leave a stump or portion of said poles extending above

the surface of the ground to the height of one foot or eighteen inches, and carelessly and negligently permitted and still permit a number of these stumps to remain in said public highway at and near said point which range in height one foot to eighteen inches; that upon the 2d day of June, 1896, plaintiff, an aged man, was driving along said public highway at the point above indicated with a wagon and team when, without fault or negligence on his part, his wagon struck one of these telephone pole stumps or projections with considerable force and the shock and tilting of the wagon occasioned thereby threw the plaintiff violently from the wagon to the ground, breaking and dislocating his arm and otherwise severely injuring him internally and causing him to suffer great pain."

The answer was, in fact, as to the portion of the petition we have quoted, a general denial. During the trial, at the close of the evidence in chief for the defendant in error, it was moved that the jury be directed to return a verdict in favor of the company, on the ground that it was affirmatively disclosed by the evidence for defendant in error that the injuries of which he complained resulted from his own negligence, or rather that there had been contributory negligence on his part. This was overruled.

At the close of the evidence the court was requested to instruct the jury that, upon the whole of the evidence, the defendant in error was not entitled to a recovery, and the verdict must be for the company. This was also refused.

Of the errors assigned for the company are these refusals to direct a verdict in its favor, the argument being that there appeared such contributory negligence by the defendant in error as precluded a recovery. The evidence disclosed that on the day the defendant in error was injured he was employed by one William Hoogeboom, and, with a team and wagon which belonged to his employer, the wagon loaded with oats, from a place

about ten miles distant therefrom, drove to South Omaha, where the oats were disposed of and the wagon loaded with baled hay. The sideboards were on the bed of the wagon, or it had on what is commonly known as the "double box," which was more than filled with the baled hay, or the top of the load was above the wagon box—so much so that the spring seat did not rest, as usually, on the sides of the wagon bed, but upon the hay. A part of the highway upon which the defendant in error traveled in going to and from South Omaha at the time in question was quite a hill—some "three hundred yards from the top to the bottom." The road in the center and to one side of the hill was rough and often wet or muddy, and the track mainly traveled was upon the other side of the highway. About halfway down the hill stood the "stump," referred to in the petition, and it was while driving down the hill on the return trip that the defendant in error was injured. He stated that he was sitting "in the spring seat on the right-hand side as I was going south." We will now quote at some length from his testimony:

"I was going south. I could not reach the brake, going down hill, and I pulled the horses out a little, and this was hard to hold. I was bracing and pulling the bit, and on the lines. I could not reach the brake. I did not see the stump. It was just about twelve inches high. Then the wheel on this side of the road, it cut down and made it lower; and it pitched me out on my head and shoulders, quicker than that [snapping his fingers]. I went on the west side of the wagon.

* * * * * * *

"Q. I think you have answered, let me inquire again though, that you did not see this stump at the time that you ran on to it?

"A. No I did not see it at the time.

"Q. How often had you been on this Bellevue road prior to this accident?

"A. Several times.

"Q. State to the jury whether or not before this accident occurred you had discovered on that part of the road there a line of stumps.

"A. Yes, I knew the stumps were there. I saw them different times, especially when I went up with the buggy a time or two. This one I run over, it just missed the axletree of the buggy; and I spoke about them. At the time of coming down I did not think of the stump. I was watching the team, although I knew that they were there.

"Q. Where did the line of stumps commence that you had discovered?

"A. Right on top of the hill, and run south down. I counted five that stuck up out of the ground.

"Q. Right in the road?

"A. Right in the road, on the main wagon track. Straddled right over them.

"Q. On which side of the line is this row of stumps?

"A. On the east side of the road.

"Q. About how far should you locate them from the fence or east side of the road?

"A. These were about seven or eight feet from the fence in the road as near as I could judge.

"Q. Where did you say the main track of the road was —that is, the traveled part of the road at that time?

"A. It run right over these stumps. The other side was rough. It had been raining. This was the main traveled track—the smooth track; and I pulled out to get out in a rough track, to hold it off from the horses. They were hard to hold any way."

A portion of the cross-examination was as follows:

"Q. Then you got to this place where the injury occurred about five o'clock?

"A. About five o'clock I suppose; between four and five.

"Q. It was on the second day of June?

"A. Yes, sir.

"Q. It was broad daylight?

"A. Yes, sir.

"Q. You knew of the existence of these stumps?

"A. Yes, sir.

"Q. You had seen them frequently?

"A. Yes, sir.

"Q. And drove over them frequently; and this particular one just missed the axletree of your buggy?

"A. Yes, sir.

"Q. You spoke about it frequently?

"A. Yes; I did.

"Q. And you say that the main track of the highway—that is the traveled track, made by the travel in the highway—was over these stumps? Straddled right over them was the stumps, midway between the tracks of the wheels?

"A. Yes, sir.

"Q. And on the inside of the east line of the highway, how close to the east line of the highway was the row of stumps?

"A. I suppose six or seven feet from the fence on the inside of the road."

The defendant in error was recalled and we quote from the record:

"Q. I think in your testimony on yesterday you spoke of having noticed this line of stumps there, upon one of which you ran and was hurt, before this occasion when you ran on to it. How many of the stumps are down in the beaten wagon track that you noticed?

"A. I noticed four, I think, along there in a row. The fourth was the highest of all.

"Q. That was the one the farthest to the south?

"A. Yes, the farthest to the south.

"Q. Had you noticed the four at any time previous to the time that you were hurt or have you since discovered that there were four?

"A. Before I got hurt?

"Q. Yes.

"A. I noticed them before and spoke about them. I said, 'Somebody will get hurt on them yet.' I spoke about them before, and knew they were there.

"Q. Where does the top of the hill commence, with reference to this stump where you were hurt—how far away?

"A. From the top of the hill?

"Q. Yes, sir.

"A. It must be three or four hundred feet; may be more. I could not say.

"Q. Which wagon wheel was it that struck this stump?

"A. It was the left forewheel as I went south.

"Q. Upon which side of the wagon were you sitting?

"A. On the right hand side.

"Q. On this occasion when you were coming down the hill there did you notice this stump?

"A. I did not.

"Q. What was it that particularly attracted your attention?

"A. The team was high-strung, and I was trying to hold them; and I could not get hold of the brake and it drew my attention off the stump.

"Q. Were you trying to get hold of the brake?

"A. I looked for it, and I suppose I drew the team to one side.

"Q. Were you trying to reach the brake?

"A. I do not recollect.

"Q. How far down was the brake from the seat where you were sitting.

"A. I had to bend way down. I was too high to reach it good."

A part of the cross-examination upon recall was as follows:

"Q. Of course you did not see the stump at all?

"A. No, I did not see it at the time.

"Q. And was not looking for it?

"A. No, I had no time to look for it. If I had, I would not have hit it.

"Q. You were not thinking about it.

"A. No; I was not thinking about the stump.

"Q. And did not make any effort to discover it?

"A. No, sir.

"Q. And what was the thickness of the stump?

"A. Well, it was six or seven inches through, I suppose by the looks of it."

Redirect:

"Q. State whether or not you had driven on that track over those stumps before.

"A. Yes, several times, and noticed them particularly.

"Q. I mean straddled the stumps?

"A. Yes, it was the main traveled road at that time."

The defendant in error was the only witness in regard to the happenings at the time of his injuries; and the question presented is, did he disclose affirmatively such contributory negligence as to defeat a recovery of damages? We will say here that the evidence on the issue of whether the company left the stump in the road or not was conflicting, and in this connection, it was shown for the company that when it removed the poles of its old line, it had them either broken or chopped off flush with the ground, the only evidence to the contrary being the condition of the stumps at the time, some years afterward, of the injuries to defendant in error; but these matters were determined against the company by the jury, and there was probably sufficient evidence to sustain the findings. The undisputed fact that defendant in error had knowledge of the condition of the highway and the existence of the obstruction to safe travel—the stump—is not, in and of itself, conclusive against him on the issue of contributory negligence; neither is the further fact that, being possessed of such knowledge, he was, at the time he was injured, so inattentive as to not then have it in mind conclusively; nor are the two combined. A prudent man is warranted in taking some risks. But defendant in error states that the team was a spirited one. He was perched on top the hay, at a disadvantage in driving; could not readily reach the brake; was going down a steep hill, on which in the road or track there

were known obstructions which he himself had concluded, as he stated, were dangerous to travelers by vehicle, and he drove to one side of the regular track, placing his wagon in such a position that it was almost certain, as the subsequent event proved, that the wheel would strike the stump. In combination these facts conclusively establish a lack of such care, under all the circumstances and conditions as would be expected of or exercised by a prudent person. It is further true that this lack of care was of the immediate cause of the injuries, and without which they would not have been suffered; and these things being true, he was not, under the evidence, entitled to the verdict rendered, and the jury should have been so instructed.

The further assignments of errors relate to matters of which we do not deem a discussion or decision necessary at this time; hence they will not be further noticed. The judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. HARVEY R. WALDRON, V. BASIL S. RAMSEY.

FILED JANUARY 3, 1900. No. 10,947.

Bill of Exceptions: CORRECTIONS: MANDAMUS. In an action of mandamus it was complained that a trial judge had allowed a bill of exceptions, and wrongfully included matters of amendments and excluded other things. The bill, as allowed, had been filed in an appeal to this court, and had become of its records. *Held*, That the bill should have been tendered, before filed in this court, to the trial judge for correction and resettlement, or, after filing, it should, on leave obtained, have been withdrawn from the files and presented to the trial judge for the desired action, and without this, suit must fail.

ORIGINAL application for mandamus to require respondent, as judge of the district court of Cass county, to correct a bill of exceptions. *Writ denied.*

Samuel M. Chapman and *Allen Beeson*, for relator.

C. S. Polk and *Roscoe Pound, contra.*

HARRISON, C. J.

In an action in the district court of Cass county, of foreclosure of real estate mortgages, and in which the relators herein were defendants, and the First National Bank of Greenwood was plaintiff, after trial of the issues joined, there was a decree in favor of the bank of date February 25, 1899, and on the 27th of the same month the court adjourned without day. On March 9 following the defendants filed a supersedeas bond, and other steps were taken to perfect an appeal of the cause to this court. The regular March, 1899, term of the district court of Cass county convened on March 6, and during the session there was filed and presented a motion, on the part of the Bank of Greenwood, to vacate the submission of the cause and allow the plaintiff to make additional proof on the point of whether any action at law had been instituted to recover the indebtedness upon which the foreclosure suit was predicated. On hearing, this motion was sustained, and, over objections of the defendants, further evidence was received, and on May 16, 1899, another decree was entered. On May 16, 1899, the appellants delivered to counsel for the bank a bill of exceptions for examination, which on the 23d of the same month was returned with proposed amendments, which consisted of a record of the March term proceedings in the cause. To the allowance of these amendments the appellants filed written objections, and in support of the objections filed certain affidavits, and on June 5, 1899, the matter was heard, and the trial judge allowed the amendments, and with them included, signed and settled, the bill of exceptions, and the document, thus settled and allowed, was, on August 15, 1899, filed in an appeal of the action to this court. In this, an application for a writ of man-

damus, the relators complain of the allowance of the amendments to the bill; also allege that the trial judge wrongfully excluded from the bill of exceptions the objections to its amendments, and the affidavits which accompanied the objections. The prayer of the petition in this case is as follows: "Relators therefore pray this honorable court that said respondent be forthwith compelled to certify to these relators a true bill of exceptions in said cause, to exclude therefrom the illegal, unlawful and improper action of said court had at the March, A. D. 1899, term thereof, and to return with said bill of exceptions a true record showing the exceptions, objections and written evidence presented to said respondent by the counsel for these relators upon their application for an allowance of said bill of exceptions, and for costs of this proceeding."

The relators should have, prior to the filing of the bill as settled by the judge, if they desired it corrected by omission of the amendments, or in any other particular, or wished a resettlement of it, tendered it to the trial judge, and demanded the relief, and, if refused, an application for the writ now asked for would have been proper. This was not done. The bill was filed in this court, and is of its records. The bill having been filed in this court, the relators should have asked leave to withdraw it for presentation to the trial judge for correction or resettlement (*Hoagland v. Van Etten*, 27 Nebr., 705), and, if such leave were given, should have tendered the bill to the trial judge and demanded the desired action, and, in the event of a refusal, might have secured a determination of their rights in a suit like the present one. These things were not done, and it results therefrom that the relators are not in position to demand the writ, and it must be denied.

WRIT DENIED.

STATE OF NEBRASKA V. CHARLES M. MURDOCK.

FILED JANUARY 3, 1900. No. 9,078.

Recognizance: TERMS: FORFEITURE. A recognizance in a bastardy proceeding, conditioned that accused "shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court," is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a non-appearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance.

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

E. O. Kretsinger, for plaintiff in error.

Bush & Bush and *A. D. McCandless, contra.*

HARRISON, C. J.

In the petition in this action, in the district court of Gage county, it was in substance alleged that one George F. L. Walker was arrested and brought before a justice of the peace of said county to answer to a charge of bastardy; that he was the father of a bastard child, of which Elizabeth Walker, an unmarried woman, then and now a resident of Gage county, had then been delivered. It was further pleaded that on hearing before the justice the defendant was ordered to enter a recognizance in the sum of $1,000, conditioned that he be and appear at the next term of the district court in and for Gage county to answer the accusation against him, and abide the order of the court; that the defendant Walker did appear at the next term of the district court of Gage county, and from term to term until the February term, 1895, during which, and on March 16, 1895, the said court being then in session, it was ordered that the defendant Walker

enter into a recognizance in the sum of $1,000, conditioned for his appearance at the next term of the court, and that he and the defendant, Charles M. Murdock, as C. M. Murdock, entered into a recognizance in the following words: "Now on this 16th day of March, 1895, it being the thirty-fifth day of the term, this cause coming on further to be heard, now comes the defendant as principal with C. M. Murdock as surety and acknowledge themselves to owe and to be indebted to the state of Nebraska in the penal sum of $1,000.00 to be levied of their goods and chattels lands and tenements, to be void however in case the said defendant shall be and appear before the district court on the first day of the next term thereof and appear thereat from day to day to abide the order of the court, otherwise to be and remain in full force and effect." The petition continues: "Plaintiff further states that the said defendant Walker did not appear at the next term of said court (being the May term, 1895) in person but did appear by his attorneys of record, and by mutual agreement between the attorneys of the said Walker and the attorney of Elizabeth Walker, the prosecutrix, and the defendant, Charles M. Murdock, said cause was continued from the May term of court, 1895, until the next term of court being the September term of court, 1895. 6. Plaintiff further states that the said defendant Walker did not appear at the said September term of court, 1895, in his own person, but at said term the attorneys of record of the said Walker and the attorney for Elizabeth Walker, the prosecutrix, and the defendant Charles M. Murdock, mutually agreed in open court that said cause against the said George F. L. Walker should be continued until the next term of court, or until the February term, 1896." That Walker appeared before the court at its February, 1896, term, and on the 19th of said month a trial was had, and he was by a jury determined guilty of the charge against him; that he did not await or abide the order or judgment of the court, but fled or left the state, and has not further

appeared; that the court fixed a day of said term of court for the announcement of its judgment in said cause, and ordered that the accused then appear; that the case came on to be further heard, and Walker not appearing, the recognizance was duly forfeited. The demand was for a judgment for the amount of the recognizance. To the petition there was a general demurrer for the defendant, Charles M. Murdock, which, on hearing, was sustained, and the plaintiff electing to plead no further and to stand on its petition, the action was dismissed.

There are several questions argued, but we deem it necessary to consider but one, the decision of which will fully dispose of the case. The point to which we refer is the main one argued, and is whether the recognizance given for the appearance of the accused person at a designated term of court, or on the first day of the next term after the giving of the recognizance, and to appear thereat from day to day, to abide the order of the court, remained of effect during the several continuances of the cause, and was of binding force at the second term after that at which it, in terms, provided the appearance should be. This, we think, must be answered in the negative. The condition was for an appearance at the next term, and to answer the charge during such term from day to day thereof, not at another and subsequent term to which a continuance might be made. The condition to abide the order of the court was of some order effective during the term, not of an order of continuance. The recognizance ended with the term at which it required appearance, and, in the event of a continuance and to a subsequent term, a further recognizance should have been exacted, and upon a non-compliance the accused committed to jail. See *Swank v. State*, 3 O. St., 429; *Gebhart v. Drake*, 24 O. St., 177; *Grieve v. Freytag*, 31 O. St., 147; *Gray v. Fulsome*, 7 Vt., 450; *Burr v. Wilson*, 50 Ind., 587; *Lane v. State*, 50 Pac. Rep. [Kan.], 905; *State v. Roop*, 41 Atl. Rep. [Del.], 196; *Kiser v. State*, 13 Ind., 80; *State v. Mackey*, 55 Mo., 51; *Keefhaver v. Com-*

monwealth, 2 P. & W. [Pa.], 240; *State v. Becker*, 80 Wis., 313. The counsel for the state has directed our attention to a number of decisions of courts of last resort in which a contrary doctrine is announced, but we deem the rule we have herein stated the sounder and supported by better reasons.

The continuance of a recognizance in a case such as the one at bar is, under certain existent conditions, provided for in our statutory law, but it must be by order of the court (Compiled Statutes, ch. 37, sec. 4); but it is not claimed this has any effect in the present case. The judgment of the district court must be

AFFIRMED.

STATE OF NEBRASKA V. HOME INSURANCE COMPANY.

FILED JANUARY 3, 1900. No. 10,929.

1. **Fees of State Officers:** STATE TREASURER. It was provided in the constitution of 1875 (art. 5, sec. 24) that "all fees that may be hereafter 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."

2. ———: ———: AUDITOR: INSURANCE COMPANIES. This so modified section 32, chapter 43, Compiled Statutes (General Statutes, 1873, ch. 33, sec. 32), in relation to fees to be paid by insurance companies to the state auditor for services to be performed by him for them, as to, in effect, prohibit the payment of the fees to him or their reception by him. See *Moore v. State*, 53 Nebr., 831; *State v. Moore*, 56 Nebr., 82.

3. **Auditor of Public Accounts:** INSURANCE COMPANIES: FEES. The insurance company applied to the then state auditor to perform for it certain services in the issuance of certificates of authority to transact business in the state, and some other matters of the requirements of the laws in regard to such companies, and paid the fees to the auditor, and did not pay them, and has not paid them, into the state treasury. The payment to the auditor was wholly unauthorized, and did not bind the state, nor did the money thus paid into the auditor's hands belong to the state.

4. ———: ———: SUIT BY STATE FOR FEES. The services having been obtained, and the fees not paid, the company became liable to the state therefor, and such liability can be enforced by suit.

5. ———: ———: ———: ESTOPPEL. A company which has obtained the performance of the services by the auditor in the issuance of certificates of authority to do business in the state, and also his attention to other things for which they must apply to or call upon him, and has used and enjoyed the results and benefits of said matters, will not be heard to urge, against the recovery by the state of the fees for such services which have not been paid into the state treasury, that the certificates and documents issued to it by the auditor were void for the reason that the fees had not been paid in advance, and where required by the constitution.

6. ———: ———: ———. The fees were paid to Eugene Moore, then state auditor. He could not, and did not, act as agent for state in the reception of the fees. It was an act which was discountenanced or forbidden by the constitution.

7. ———: ACTION TO RECOVER FEES PAID BY INSURANCE COMPANIES. In a suit against the auditor and the sureties on his official bond the state recovered a judgment for a sum which was inclusive of the fees, the subject of the present litigation. In an error proceeding to this court on behalf of the sureties the judgment was reversed, and it was decided that they were not liable; that the reception of the fees by Moore was not an official act, and, if it be conceded (it is not decided) he became a bailee or trustee of the money for the company, the suit by the state against him can not be treated as an election to consider him as the debtor and to seek a recovery against him to the exclusion of any remedy against the company, the one primarily liable.

8. **State and State Officers.** A state can only act through its officers, and they only in matters assigned to them by law, or in and about which they are authorized and empowered by law to perform duties.

9. **Auditor of Public Accounts:** FEES PAID BY INSURANCE COMPANIES: RATIFICATION. No officer possessed power or authority to so act as to ratify for the state the receiving of the fees by the auditor. No one had power to effect a ratification of an act which was, impliedly at least, prohibited by the constitution.

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

C. J. Smyth, Attorney General, and *George F. Corcoran, Assistant Attorney General,* for the state:

The auditor of public accounts had no authority to receive from insurance companies fees for services performed for them. See *Moore v. State,* 53 Nebr., 831.

The state can not be estopped by unauthorized acts of officers or agents. See *Brewer v. State*, 83 Ala., 113; *Floyd Acceptances*, 7 Wall. [U. S.], 676; *Woodward v. Campbell*, 39 Ark., 580; *Pulaski County v. State*, 42 Ark., 118; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 735; *Day Land Co. v. State*, 68 Tex., 526.

An unconstitutional statute neither confers authority to act nor protects one who has acted under it. See *Sumner v. Beeler*, 50 Ind., 341; *Strong v. Daniel*, 5 Ind., 348; *Barling v. West*, 29 Wis., 307; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S., 465.

Defendant is estopped from denying the validity of the certificates issued by the auditor. See *Marsh v. Harris Mfg. Co.*, 63 Wis., 277; *Noton v. Brooks*, 7 H. & N. [Eng.], 499; *Jones v. Burnham*, 67 Me., 98; *Kinsman v. Parkhurst*, 59 U. S., 289; *Marston v. Sweet*, 82 N. Y., 534; *Lamb v. Clark*, 22 Mass., 193; *Oregonian R. Co. v. Oregon R. & N. Co.*, 10 Sawy. [U. S. C. C.], 464.

Greene & Breckenridge, contra:

Under the constitution, the auditor had no right to perform services for defendant unless the fees therefor were "paid in advance into the state treasury." Certificates issued in violation of this provision were void, and the state can not recover therefor. See Constitution, art. 5, sec. 24; *Willis v. Board of Commissioners*, 86 Fed. Rep., 872.

The state is estopped to claim from defendant services of the auditor which he could not legally perform unless the fees therefor were "paid in advance into the state treasury." See *Chope v. Detroit & H. P. Road Co.*, 37 Mich., 195; *Verdier v. Port Royal R. Co.*, 15 S. Car., 477; *St. Paul S. & T. F. R. Co. v. First Division*, 26 Minn., 31; *City of Chicago v. Sexton*, 115 Ill., 230; *City of Cincinnati v. Cameron*, 33 O. St., 336; *Worden v. New Bedford*, 131 Mass., 23.

Moore did not receive payment of the fees as auditor, but as agent of the state. That agency is established through the election of the state to claim from him the

money thus received by him as the money of the state, whereby his assumption of agency was ratified by the state. See *Moore v. State*, 53 Nebr., 831; *State v. Leidtke*, 12 Nebr., 171; *County of San Luis Obispo v. Farnum*, 108 Cal., 562; *Mills v. Gleason*, 11 Wis., *470; *Sentell v. Kennedy*, 29 La. Ann., 679; *New Orleans v. Southern Bank*, 31 La. Ann., 560.

HARRISON, C. J.

This action was commenced for the state in the district court of Lancaster county, and it was alleged in the petition that the defendant company filed with the state auditor during the month of January, 1896, a statement, such as the law required, of "foreign insurance companies" transacting business in the state, and received of the auditor a certificate of its compliance with the law, also one hundred and twenty-five certificates of authority to its agents throughout the state to transact its business; that the aggregate of the fees to be paid the state for the services so rendered was $272, which sum the defendant had not paid, and for which judgment was prayed. The defendant, in answer filed, admitted that the services pleaded had been performed for it, and that the amount of fees was correctly stated, but denied its failure to pay. It was alleged in the answer that the defendant had been conducting its business in this state for more than twenty-five years, and had at all times endeavored to comply, and had in fact complied, with the requirements of the laws of the state with respect to insurance companies; that since the year 1873 the defendant had paid to the auditor the fees exacted by law from insurance companies for the services performed by the auditor in accordance with the terms of section 32, chapter 33, General Statutes (section 32, chapter 43, Compiled Statutes, 1897); that from the year 1873, inclusive of the years 1895 and 1896, it was customary and usual for the defendant and all other insurance companies transacting business in the state to pay the fees required of them by

law for services of the auditor to him, and from 1873 up to and inclusive of the year 1896 the auditor accepted said fees, and, until about January 1, 1896, the auditor paid all such fees to the state; that the state, by its executive and legislative officers, had knowledge of the aforesaid custom and usage, and made no objection thereto and took no action with respect to the same. It was averred that Eugene Moore was the auditor of public accounts in this state during the year 1896, and, relying upon the custom and usage which had prevailed in regard to the payment of such fees during "nearly" twenty-five years, the defendant company paid the fees, the subject of this litigation, to him as the agent of the state, and the said Eugene Moore failed to account for or turn over to the state said fees; that said Eugene Moore, as auditor of public accounts, collected during the year 1895 fees from this and other insurance companies, in the aggregate the sum of $16,738, and during the year 1896 the sum of $15,378.70, which fees were paid to him as agent for the state and for and on account of fees required by law to be paid; that on January 3, 1896, Eugene Moore paid to the state treasurer $5,000, on February 9, 1897, paid to the state treasurer $1,500, and on February 17, 1897, the sum of $2,500, all of said sums being of the fees he had collected of defendant and other insurance companies, and said amounts were received by the state by its treasurer and credited upon the books of the state among miscellaneous receipts and passed into the general fund moneys of the state; that included in the total amount due from Eugene Moore to the state upon which the aforesaid payments were made was the sum for the recovery of which this suit was instituted. It was further answered that in an action in the same court in which this suit was in progress, in a petition filed on March 2, 1898, the plaintiff, the state, prayed a recovery of the said Eugene Moore and the sureties on his bond as state auditor the balance of the amount of money he had collected as fees as aforesaid, and stated in such petition that "be-

tween the 3d day of January, 1895, and the 7th day of January, 1897, the said Eugene Moore, as auditor of public accounts of the state of Nebraska, received into his possession and control as such auditor the sum of $27,208.05, the property of the state of Nebraska, which sum came into his hands as auditor of public accounts in payment for services performed by him or performed under his direction as such auditor, which sum was received by him by virtue of his office as such auditor and which sum it was his duty as such auditor to pay the treasurer of said state of Nebraska or turn over on the 7th day of January, 1897, to his successor, but the said defendant has at all times failed and refused to pay the same to the treasurer of the state of Nebraska, or to his successors in office, except the sum of $4,000 paid by the defendant Eugene Moore to the treasurer of the state of Nebraska on or about the 15th day of February, 1897." Also pleaded in said petition that the money sought to be recovered from Eugene Moore and his sureties on his official bond was paid to him by the insurance companies then doing business in this state for services performed by him as auditor of the state. It was of the further allegations of the answer in this cause that in the case against Moore and his bondsmen there was on March 25, 1898, judgment for the state against him for the sum of $25,184.50, principal and interest, which judgment was inclusive of the sum upon which the present suit is predicated. To this answer there was filed for the state a general demurrer, which on hearing was overruled. The state then filed a reply, which was as follows:

"Now comes the plaintiff in the above entitled action, and for its reply to the second amended answer of the defendant states: It denies that the defendant company has complied with all the laws of the state of Nebraska in this, that it has not paid to the state of Nebraska the money due to the state from it for the services rendered to the defendant company by the state as more particularly described in the petition in this action.

"2. Plaintiff denies that Eugene Moore was the agent of the plaintiff at any of the times named in the petition or second amended answer for the purpose of receiving from the defendant company or any other insurance company fees for services rendered by the said Moore as auditor of public accounts of the state of Nebraska and denies that the said Moore was at any time authorized by the plaintiff to receive for plaintiff's use and benefit or on its account or for any purpose whatever any moneys of any kind whatever due and payable to the state as fees for services rendered by the said Eugene Moore as auditor of public accounts.

"3. Plaintiff denies that the legislature of the state of Nebraska at any time authorized or had the power to authorize Eugene Moore as auditor of public accounts to receive for the state the money sued for in this action or any moneys due and payable to the state of Nebraska and denies that the state of Nebraska through its legislature or otherwise ratified or approved or consented to the action of said Eugene Moore, while auditor of public accounts in receiving from said defendant company the fees sued for in this case and which were due and payable to the state of Nebraska and alleges that whatever the said Moore did in connection with the receipt of the said fees was done by him as the agent of the defendant company and not as the agent of the state of Nebraska.

"4. Plaintiff admits that the attorney general acting in the name of the state of Nebraska brought suit in the district court of Lancaster county against Eugene Moore and his sureties on the official bond of the said Moore to recover the moneys sued for in this action and that in the petition in said action there occurred a paragraph in words and figures identical with that set forth in said amended answer.

"5. Plaintiff further admits each and every allegation in said amended answer not denied herein."

The cause was submitted on the pleadings, and judgment rendered for the defendant. The state presents the case to this court by petition in error.

By section 32 of chapter 43 of the statutory law of the state, and which became of effect in 1873, each insurance company in business or which desired to transact business in the state was required to pay to the state auditor certain stated fees for services to be performed by him in and about the procuration of the necessary certificate or license to transact business in the state, issuance of certificates of authority to agents, filing and recording of required statements, etc. In the year 1875 the present constitution became of force, and a portion of section 24, article 5, is as follows: "All fees that may be hereafter 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," which, it has been decided, so modified the said section 32 as to require the designated fees to be paid in advance of the services and to the state treasurer, and, in effect, to prohibit the collection or reception of any of said fees by the state auditor. See *Moore v. State*, 53 Nebr., 831; *State v. Moore*, 56 Nebr., 82. The first case cited was one in which Eugene Moore had been prosecuted for and convicted in the trial court of the embezzlement of the aggregate of fees in which the amount involved in the present suit was included, and which was reversed in this court, and the second was the suit against Moore and his bondsmen to recover the amount of the fees, and the case to which reference is made in the pleadings in the present action. These decisions settled that Moore did not, as state auditor, for the state, receive the fees, inclusive of the sums which defendant pleads it paid him. It is true, as contended for defendant in error, that the constitution required the payment of the fees in question herein to the state treasurer in advance of any action by the auditor. It is also just as true that this was known by the company and Moore at the time he performed the services for it, and it and he were charged, or chargeable, with such knowledge; and that they ignored it, and that the fees were for any reason paid to Moore or any other unauthor-

ized person, or not paid, can make no difference. So long as the services were performed, and received; and the results and benefits used and enjoyed by the company, an indebtedness arose to the state which it could and can enforce. It surely can not be that because the money was required to be paid in advance of the services, and it was not done, but the services were obtained, that no indebtedness arises and payment can not be enforced. The law contemplates the payment of the fees for the services, and if the latter are demanded and performed, the state may collect for them, notwithstanding the company may have intentionally, or the reverse, as was no doubt true of the matters herein involved, or in any manner or for any reason evaded the requirement of an advance satisfaction. The payment of the amount of the fees to Moore, which the state now seeks to exact from the company, was no doubt made under a mistaken idea of to whom and when it should be paid; but this clearly furnishes no matter of defense. It is urged for the company that, by the constitution, it having been declared that the fees shall be paid in advance to the state treasurer, no other payment would or will suffice, and the payment of the fees in the matter herein in controversy not having been made, the certificate and evidence of authority to transact business in the state which were by the auditor issued and delivered to the company were void and of no effect. The company in fact received nothing, and is not liable for any fees; also, that the state, by asserting, as it is urged it has in substance by bringing this action, the validity of said documents so issued, has estopped itself to further say that the payment of the fees was not made in accordance with the legal requirements. In support of a portion of this contention our attention is directed to an opinion in the case of *Hartford Fire Ins. Co. v. State*, 9 Kan., 211, wherein it appears that the company had obtained a certificate of authority to do business in the state of Kansas, which by law it must have prior to any transactions of its business within the state. The law

in force at the time in that state in regard to payment of fees was as follows: "Before the auditor shall issue any certificate of authority under this article, or any renewal of the same there shall be paid into the state treasury by the corporation or its agent, for the support of the common schools, the sum of fifty dollars." There was a provision in an act passed by the legislature to the effect that there might be recovered in a suit against any insurance company, such as the one a party to the action, a penalty of not less than one hundred dollars nor more than five hundred dollars for transacting business in the state without first procuring the certificate of authority therefor. The amount required to pay for the issuance of the certificate had been paid to the auditor, and by him, subsequent to the issuance of the certificate, paid into the state treasury. The action was against the company for engaging in the insurance business within the state of Kansas without first procuring the certificate of authorization so to do, and it was decided that the exaction that the fees be paid before the certificate should be issued was jurisdictional, and that it was not done, rendered the certificate which was obtained a nullity; also, that the auditor had no authority to and could not receive the fee for the state, and while it was in his hands the state had no interest in it or control over it. A recovery of the penalty was allowed. We do not consider the rule announced in the decision to which we have just referred, to the extent it established that the payment of the fee before the issuance of the certificate was jurisdictional and in the absence of it the certificate void, in point in the matter at bar. The defendant in error obtained the certificates which were issued to it of the proper officer, and they were issued at its request, the company used and enjoyed them, and it can not now defeat the recovery by the state of the fees, for the payment of which it became bound, by a plea that the certificates were void because of its own act or failure to properly act—*i. e.*, pay the fees in advance into the

state treasury. We do not mean to be understood as saying or countenancing that the state, or any of its officers, may do any of its business on credit, allow any time for the payment of the fees—the constitution states to the contrary, but where a party has obtained the services and enjoyed the results, and has failed to pay the fees, the state may collect them.

For the state there was instituted an action against the auditor and the sureties upon his official bond to recover the aggregate sum of these fees, inclusive of the amount claimed in the present suit, and judgment was obtained for the plaintiff, which in an error proceeding to this court on behalf of the sureties was as to them reversed, and it was decided that they were not and could not be liable. It is asserted that that suit was, in effect, a ratification of the collection of the fees by the auditor for the state—an election to treat him as a trustee or bailee of the money either for the company or the state—and there can not be successfully prosecuted this action against the company for the recovery of the fees. The company was and is primarily liable for the payment of the fees, and that the state may have, mistakenly or otherwise, prosecuted to judgment a suit for the funds against a bailee or trustee would not destroy the liability of the company. There might be the two judgments, although there could be but one satisfaction. The constitution, impliedly at least, forbids the reception of the money by any other than one officer, and no person could receive it as agent for the state. The state acts only through its officers, and they can perform only such duties as are assigned by law, and none possessed any power or authority to ratify an act which the constitution discountenanced.

It follows from the conclusions reached that the judgment of the district court is erroneous, it must be reversed, and the cause remanded.

REVERSED AND REMANDED.

NEBRASKA SAVINGS & EXCHANGE BANK ET AL. V. SARDIUS C. BREWSTER, EXECUTOR.

FILED JANUARY 3, 1900. No. 10,829.

1. **Law of the Case:** FORMER APPEAL. The points of law decided on a former appeal ordinarily can not be reviewed on a subsequent appeal.
2. **Sufficiency of Evidence.** The finding of a jury on a question of fact will not be disturbed on review, when sustained by sufficient evidence.
3. **Instructions:** ISSUES. It is not reversible error to refuse an instruction upon a point not involved in a case, or, if in issue, it has been fully and fairly covered by the instructions given.
4. **Misconduct of Counsel:** REVIEW. Argument of counsel based on matters not in evidence will not be reviewed if made in reply to similar argument of adverse counsel.

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

Silas Cobb and *E. M. Bartlett*, for plaintiffs in error.

James H. McIntosh, contra.

NORVAL, J.

This cause was before us at a former term. See *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Nebr., 104. The action was instituted by Mary W. Gaylord to recover the value of a certain promissory note alleged to have been converted by the bank. For a full statement of the facts reference is made to the former opinion filed herein. The last trial in the district court resulted in a verdict and judgment against the defendant. Subsequently the plaintiff died, and the cause has been revived in the name of her executor.

The note in question was payable to Mary W. Gaylord, and when received by the bank bore this indorsement: "Pay to the order of Mary W. Gaylord." On the former hearing it was determined that this did not constitute

a general indorsement of the paper, nor such an indorsement as would transfer the legal title by a mere delivery of the note. This doctrine is criticised in the brief of counsel for the bank. This point not only received careful consideration by this court prior to the announcement of its former opinion, but was investigated anew, and adhered to, on petition for rehearing, and must now be regarded as the settled law of the case.

It is insisted by the same counsel that the plaintiff is estopped from asserting any rights to the note against the bank by reason of the indorsement of the paper and sending it to her son. There is more than one ready answer to this contention. The issue of estoppel, and the evidence adduced bearing thereon were submitted to the jury under instructions as favorable as the bank had the right to demand, and the jury, upon ample evidence, found that issue in favor of plaintiff, which finding is conclusive on reveiw.

The note and the assignment of the mortgage given to secure the same disclosed that the note and mortgage belonged to Mrs. Gaylord. The officers of the bank, as shown by their own testimony, were aware when they made the loan to Mrs. Gaylord that the assignment contained the name of no person as assignee; hence they were bound to know that she had not parted with her title to the note and mortgage. We passed upon a similar question in *Folsom v. McCague*, 29 Nebr., 124. There certain land contracts were signed by the owner in blank, the name of the assignee being omitted, and sent to a party in Omaha to be exchanged for city property, who pledged them as collateral security; and it was urged therein that the owner was estopped from asserting title to the contracts. In the opinion in that case it was said: "The principle of estoppel is often applied in cases where the owner of property clothes another with the apparent right of ownership or absolute disposition, and such person sells or pledges the property to an innocent third person. We do not see how this principle can be in-

voked in the case at bar. Had Crew's name been inserted in the assignments as assignee then the doctrine contended for would apply. These assignments in blank did not hold out Crew as the apparent owner. They in no manner indicated any ownership in him. To make a valid assignment of these contracts, it was as necessary to have an assignee as it was to have the signature of the assignor. Until some one's name was filled in these blanks as assignee the appellees appeared to be and were the real owners. It is not claimed that any name had ever been inserted therein as assignee. Had Crew inserted in the blanks his own name as assignee before presenting them to the bank, then there might be some ground for urging an estoppel against plaintiffs." Paraphrasing the above, until the name of an assignee was inserted in the indorsement on the note or the assignment of the mortgage, Mrs. Gaylord appeared to be the real owner of the papers. Had the firm name of Muir & Gaylord been inserted as assignee in the assignment or indorsement there would be some ground on which to base an estoppel. Neither the indorsement of the note nor the blank assignment of the mortgage indicated that Mrs. Gaylord had parted with the title, and the bank, at its peril, made the loan to Muir & Gaylord, accepting the note and mortgages as collateral security. There was not anything done or omitted by Mrs. Gaylord, after she ascertained that the note and mortgage had been pledged as security, which induced the bank to change or alter its previous condition so as to entitle it to invoke an estoppel against her. The law relative to estoppel, as applicable to the case, was clearly and accurately stated in the charge of the court to the jury; and the instructions tendered on behalf of the bank were properly refused, because, in so far as they contained correct statements of the law, they had been covered by instructions given.

Paragraphs 4, 5, 6, 7 and 8 of the charge of the court are assailed. These instructions followed the former opinion in this case, which is conceded by counsel for

bank; therefore the assignments of error predicated on said instructions will be overruled without further comment.

The court refused to give certain instructions tendered by the bank relative to a special agency. No such question was in the case. The bank did not receive the note from the firm of Muir & Gaylord, as agent of Mrs. Gaylord, but as absolute owner of the paper.

It is finally argued that there was misconduct on the part of the attorney for plaintiff while making his closing argument to the jury. The alleged misconduct consisted in his commenting on matters not embraced in the record. The bill of exceptions reveals the fact that counsel for the bank was the first offender in that respect, and that the remarks of plaintiff's attorney, of which complaint is made, were in reply thereto; and hence defendant can not be heard to complain. See *Stratton v. Dole*, 45 Nebr., 473. The judgment is

AFFIRMED.

AMMI B. TODD ET AL. V. A. L. HOUGHTON & COMPANY.

FILED JANUARY 3, 1900. No. 10,903.

Law of the Case: FORMER APPEAL. This court ordinarily will not re-examine questions of law presented and determined on a prior appeal of the same cause.

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

Byron Clark and *C. A. Rawls*, for plaintiffs in error.

John S. Bishop, contra.

NORVAL, J.

This cause was before us at a former term. See *Houghton v. Todd*, 58 Nebr., 360. After the judgment of

reversal was entered the cause was again tried in the district court, upon the evidence adduced upon the first trial, and from the judgment recovered by plaintiff a petition in error has been prosecuted by defendants. Every legal question involved herein was decided in the former opinion. It was determined that the knowledge of an agent engaged in an independent fraudulent scheme without the scope of his agency is not knowledge of his principal; and that the contract between the plaintiffs and defendants was not a suretyship, but one of sale. This adjudication became the law of the case, and the soundness of the decision will not now be inquired into. See *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330. The verdict on the first trial in the district court was rendered for defendants in obedience to a peremptory instruction of the court, which was determined by this court to have been prejudicial error, since the evidence presented a question for the determination of the jury as to the implied or apparent authority of Dundas. This was, in effect, an adjudication that the evidence was sufficient to justify a finding and judgment in favor of plaintiffs. Upon the evidence before us on the former hearing the trial court has found the issues against the defendants. No other questions are presented by this record, and the judgment must accordingly be

AFFIRMED.

ALVIN M. MILLER ET AL. V. NEELY & WESTOVER.

FILED JANUARY 3, 1900. NO. 9,087.

1. **Mechanics' Liens:** FORECLOSURE: EVIDENCE. Evidence *held* sufficient to sustain a decree foreclosing a mechanic's lien.

2. **Review:** NEW TRIAL: QUESTIONS NOT RAISED BELOW. In an error proceeding to review a decree sustaining a mechanic's lien this court will not examine the record to ascertain whether the amount of recovery was excessive, where the point was not raised in the trial court in the motion for a new trial.

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

Smith P. Tuttle, for plaintiffs in error.

W. M. Iodence, contra.

NORVAL, J.

This suit was instituted in the district court by the Des Moines Manufacturing & Supply Company to foreclose a mechanic's lien for labor and material furnished in the construction of a flouring mill. Neely & Westover and others were made defendants, and Alvin M. Miller, Edward S. Wildy and N. J. T. Orr were permitted to intervene in the cause. Neely & Westover filed an answer and cross-petition, claiming a mechanic's lien on the same premises for labor performed in the construction of the mill. Miller and Wildy claimed to have purchased the interest of Henry J. Schluntz, one of the original owners of the property, and which interest they set up by appropriate pleading. N. J. T. Orr pleaded that he had acquired the interest of Josiah Thomas, the other original owner of the premises. A decree of foreclosure was entered sustaining the liens of plaintiff and Neely & Westover, and Miller and Wildy have brought the record here for review by error proceeding.

The decree, to the extent that it awarded Neeley & Westover a mechanic's lien, is assailed as not being supported by the evidence. The written contract between the lienors and the original owners of the premises was sufficient on which to predicate a lien, although such contract was not personally signed by Henry J. Schluntz, one of the joint owners of the premises. It was executed for him by the other owner, Joseph Thomas, and the mill was erected by Neely & Westover in pursuance of the contract, with the knowledge and consent of Schluntz. It is true that Neely & Westover, by the terms of the

contract, were to receive as part compensation for their labor in erecting the mill promissory notes against them to the amount of $735, but this fact would not defeat a mechanic's lien, inasmuch as part of the consideration was to be paid in money. As to that amount, at least, the contract was sufficient to support a lien, and there is no assignment in the motion for a new trial or petition in error that the amount of the lienors' recovery was excessive.

It also insisted that the claim of Neely & Westover for a lien was not filed in time. The evidence adduced upon the trial was ample to sustain a finding that the last labor performed by them in the erection of the building under the contract was within four months prior to the filing of the lien statement. This was sufficient. There is no error in the record, and the decree is

AFFIRMED.

HERMAN SCHLAGECK V. JOSEPH WIDHALM.

FILED JANUARY 3, 1900. No. 9,083.

1. **Review:** ASSIGNMENTS OF ERROR. Rulings of the trial court will not be reviewed which are not assigned as error in the petition in error.

2. **Special Findings:** VERDICT: JUDGMENT. A judgment will not be entered on special findings of fact in opposition to a general verdict, unless such special findings are inconsistent with the general findings.

3. **Alteration of Instruments.** A material alteration of a bond, after its approval, by a stranger to the instrument, without the consent of the obligee or obligor, will not release the latter.

4. ——: APPEAL BOND. Where an appeal undertaking is changed before its approval by increasing the amount of the penalty therein, without the knowledge or consent of the surety thereon, he is released from liability, if the approving officer had notice of such alteration before the approval.

5. **Pleading:** AMENDMENT: REVIEW. It is not reversible error to refuse a plaintiff to amend his petition to conform to the proofs, where, had such amendment been made; the undisputed evidence would not have justified a verdict in his favor.

ERROR from the district court of Platte county. Tried below before SULLIVAN, J. *Affirmed.*

R. P. Drake and *C. J. Garlow*, for plaintiff in error.

F. M. Cookingham and *Reeder & Albert, contra.*

NORVAL, J.

This was an action by Herman Schlageck against August Roemhild and Joseph Widhalm, as sureties on an appeal undertaking, which it is alleged they signed for one Bernard Schroeder. Roemhild made no appearance in the cause, nor does the record disclose that he was served with process. Widhalm interposed as a defense that the undertaking, after it was signed by him, was materially altered without his knowledge or consent, whereby it is claimed that he was released from all liability. There was a trial to a jury, who returned a general verdict for the defendant, and also made special findings. Plaintiff moved for judgment on the special verdict, which request was denied by the court, and judgment was rendered for the defendant on the general verdict.

The special findings were returned as follows:

"1. Was the bond in suit, which has been given in evidence as Exhibit No. 1, executed by the defendant and accepted by the justice of the peace, William Berg, as an appeal bond, in the case of Herman Schlageck v. Bernard Schroeder, tried before said justice?

"Answer. Yes.

"2. Was the penalty of the bond changed at any time from $306 to $328.80?

"Answer. Yes.

"3. Was said penalty so changed before or after it was signed by the defendant, Widhalm?

"Answer. After.

"4. If you say that the penalty of said bond was

changed, from $306.00 to $328.80, after it was signed by the defendant, Widhalm, you will state whether such change was made with the knowledge, authority or consent of the defendant, Widhalm?

"Answer. No.

"5. If said bond was so changed after defendant, Widhalm, signed it, by whom was such change made?

"Answer. We don't know.

"6. If you find that the bond was altered so as to make the penalty $328.80, instead of $306.00, state whether such change was made by the plaintiff, or with his consent, or by his authority, or to his knowledge?

"Answer. We find that the change was made without the plaintiff's consent or knowledge.

"7. What is the amount now due the plaintiff on the judgment rendered in his favor in the case in which said appeal bond was given?

"Answer. $233.40.

"8. What is your finding on the other disputed facts in the case?

"Answer. We find all other disputed facts in the case in favor of the plaintiff."

The eighth or last interrogatory and answer were, on motion of defendant, stricken out, on the ground that they had been inserted by the trial court. Complaint of this ruling is made in the brief filed, but we are precluded from considering the point, for the reason that the decision of the trial court in that regard is not assigned for error in the petition in error.

It is contended by counsel for the unsuccessful party that judgment should have been entered in favor of plaintiff on the special findings, notwithstanding the general verdict. If the eighth interrogatory and answer had not been stricken out, then the special verdict or findings would have justified the entry of a judgment thereon in favor of the plaintiff. But with the eighth finding eliminated, the remaining special findings were insufficient, alone, to warrant a judgment opposed to the general ver-

dict, because it was pleaded and proven that the undertaking had been materially altered by changing the amount of the penalty thereof, after the defendant had signed and before the undertaking had been approved by the justice. The special findings did not respond to this issue, while the general verdict in favor of the defendant embraced that point. If the alteration occurred after the approval, without the obligee's knowledge or consent, it would not have released the defendant from liability. See *Bingham v. Shadle*, 45 Nebr., 82. But the rule is different where the alteration occurred before the bond was approved, with notice thereof to the approving officers, since in such a case the instrument accepted and approved not being the one signed, the minds of the parties never met, and no binding obligation was created. See *Smith v. United States*, 2 Wall. [U. S.], 219.

Plaintiff declared on the undertaking or bond in its altered form, and after verdict he asked to amend his petition to conform to the proofs, by pleading the bond in its original condition. Had the amendment been made, plaintiff would not have been entitled to recover, since, under the undisputed evidence, the alteration of the instrument was made prior to the approval of the undertaking, with notice thereof to the justice. The judgment is

AFFIRMED.

SULLIVAN, J., not sitting.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. JOHN V. FARWELL, JR.

FILED JANUARY 3, 1900. No. 10,962.

Evidence: CONDEMNATION PROCEEDINGS: VIEW OF PREMISES. The view of the *locus in quo* by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court.

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

W. F. Evans and *Billingsley & Greene,* for plaintiff in error:

The jury's view of the premises is evidence in the case, and an instruction stating a different rule is error. See *Omaha & R. V. R. Co. v. Walker,* 17 Nebr., 435; *Carroll v. State,* 5 Nebr., 35; *Washburn v. Milwaukee & L. W. R. Co.,* 59 Wis., 364; *Neilson v. Chicago, M. & N. R. Co.,* 58 Wis., 517; *Remy v. Municipality,* 12 La. Ann., 500; *Parks v. City of Boston,* 15 Pick. [Mass.], 198; *Toledo R. Co. v. Dunlap,* 47 Mich., 456; *Springfield v. Dalby,* 139 Ill., 34; *Michigan Air Line R. Co. v. Barnes,* 44 Mich., 222; *Harper v. Lexington & O. R. Co.,* 2 Dana [Ky.], 227; *Benton v. State,* 30 Ark., 328; *People v. Bush,* 10 Pac. Rep. [Cal.], 169.

Tibbets Bros., Morey & Anderson, contra:

A view by the jury is not evidence; but it is permitted to enable the jury to understand the evidence. See *Wright v. Carpenter,* 49 Cal., 607; *Close v. Samm,* 27 Ia., 503; *Thompson v. Keokuk,* 61 Ia., 189; *Harrison v. Iowa M. R. Co.,* 36 Ia., 324; *Morrison v. Burlington, C. R. & N. R. Co.,* 84 Ia., 663; *Wright v. Carpenter,* 49 Cal., 609; *Jeffersonville, M. & I. R. Co. v. Bowen,* 40 Ind., 545; *Gagg v. Vetter,* 41 Ind., 228; *Heady v. Vevay Turnpike Co.,* 52 Ind., 117; *City of Indianapolis v. Scott,* 72 Ind., 196; *Chute v. State,* 19 Minn., 281; *Seefield v. Chicago, M. & S. P. R. Co.,* 29 N. W. Rep. [Wis.], 904; *Washburn v. Milwaukee & L. W. R. Co.,* 59 Wis., 364; *Munkwitz v. Chicago, M. & S. P. R. Co.,* 64 Wis., 403; *Sasse v. State,* 68 Wis., 530; *Groundwater v. Washington,* 65 N. W. Rep. [Wis.], 871; *City of Columbus v. Bidlingmeier,* 7 O. C. C. Rep., 136; *People v. Thorn,* 156 N. Y., 286; *State v. Moran,* 15 Ore., 262; *State v. Lee Doon,* 7 Wash., 308; *State v. Reed,* 35 Pac. Rep. [Idaho], 706; *Bigelow v. Draper,* 69 N. W. Rep. [N. Dak.], 570; *Machader v. Williams,* 43 N. E. Rep. [O.], 324; *Neal v. State,* 32 Nebr., 120.

NORVAL, J.

The Chicago, Rock Island & Pacific Railway Company instituted condemnation proceedings in the county court to acquire right of way over and across certain real estate belonging to J. V. Farwell, Jr. Commissioners were duly appointed by the county court to assess the damages, who awarded the landowner the sum of $2,200. The railway company prosecuted an appeal to the district court, where the cause was tried to a jury, who returned a verdict in favor of Farwell in a like sum. From the judgment subsequently entered thereon he prosecuted a petition in error to this court, which was sustained, and the judgment was accordingly reversed. See *Farwell v. Chicago, R. I. & P. R. Co.*, 52 Nebr., 614, 53 Nebr., 706. A second trial in the district court terminated in a verdict and judgment for the landowner for the sum of $4,692.90, and the cause is now before us at the instance of the railway company.

During the second or last trial of this cause in the court below the jury were permitted, and directed, by the court to view the premises in controversy, and they were instructed as follows:

"9. You were sent to view the lots in question, not for the purpose of furnishing any evidence to you of their value, or that you might in any manner be made witnesses concerning such value, but for the sole purpose that you might thereby be placed in a better position to understand the testimony theretofore received. The purpose of said view is by the law thus limited, and you must consider it in no other light or for any other purpose."

An exception was taken by the railway company to this paragraph of the charge of the court, and its giving is assigned for error in this court. The instruction was faulty. The view of the premises was evidence, and it was prejudicial error to otherwise instruct the jury. As well say that the plans, photographs and diagrams of a

building which have been introduced and allowed to go before the jury are not evidence, as to hold that a view of the same building by the jurors permitted by the court is not evidence. The view of the *locus in quo* is not allowed merely to enable the jury better to understand and apply the evidence, although many courts have so decided. There is a sharp conflict in the authorities on the subject, but the sounder doctrine is contained in the following language of Thompson on Trials, sec. 893: "There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case. The conception that what a body of jurors see themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject-matter by witnesses is evidence in merely a secondary sense. An objective lesson always impresses itself more vividly upon the mind than an oral lesson. Such a conclusion is tantamount to saying that they are to take the trouble of going in a body to inspect land, or other material object, out of court, and that when they come to make up their verdict they must resolutely forget the impressions acquired from such inspection. The conception that a body of freeholders, residing in the vicinity, shall view the land in controversy, in a proceeding to expropriate it for public use, and then shall put out of sight, in making their estimate of damages, their own knowledge of the value of land in that vicinity, applied to the character of the particular land as they have observed it, is also nonsense. Impressed with this view, the supreme court of Wisconsin, speaking through Lyon, J., has said: 'We understand that the object of a view is to acquaint the jury with the physical situation, condition and surroundings of the thing viewed. What they see they know absolutely. If a witness testified to anything which they know by the evidence of their senses on the view is false, they are not

bound to believe, indeed cannot believe, the witness—and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testified that a certain farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned—no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court.' That court accordingly has held that the knowledge which the jurors acquire in making the view is evidence to be considered by them in assessing damages in a proceeding for the condemnation of land for public use upon which they may act to the exclusion of contradictory evidence; and similar views prevail in other jurisdictions." In *Carroll v. State*, 5 Nebr., 31, what the jury saw in viewing the scene of a crime was considered as evidence. *Omaha & R. V. R. Co. v. Walker*, 17 Nebr., 432, was a proceeding to assess damages to property appropriated by the railroad company for its right of way. One of the grounds relied upon for a reversal was that the damages were excessive. Upon this branch of the case the court said: "At the request of the plaintiff in error the jury were permitted under proper restrictions to view the right of way across the lands of the several defendants, and in what way they were damaged by the location of the road. Where this is permitted it is difficult to review the judgment as being against the weight of evidence, because all the evidence before the jury—the view of the premises—cannot from the nature of the case be incorporated in the record, and in these cases there is no such discrepancy between the evidence in the record and the verdict as to justify the court in setting them aside, which the court would not do unless it was clear that the jury had erred." The principle that a view of the premises

by a jury is evidence has been recognized and applied by this court in other cases which we will not take the time to cite. But it is argued that *Neal v. State*, 32 Nebr., 120, sustains the instruction of which complaint is made in the case at bar. This contention is not well founded. The question herein involved was not passed upon in the case to which reference has just been made, but rather that a defendant in a criminal case could waive the right to be present while the jury are viewing the place where the homicide occurred. We are fully convinced that the instruction quoted above was erroneous, and should not have been given. For this reason the judgment must be

REVERSED.

CITY OF KEARNEY V. GEORGE H. DOWNING.

FILED JANUARY 3, 1900. No. 9,069.

Municipal Corporations: EXPENSES: APPROPRIATIONS. The council of a city of the second class, having over 5,000 inhabitants, can not lawfully incur expense, or enter into contract therefor, unless money has been previously appropriated for that purpose, or the expenditure has been previously sanctioned by a majority of the electors of the city.

ERROR from the district court of Buffalo county. Tried below before GREENE, J. *Reversed.*

William Gaslin and *N. P. McDonald*, for plaintiff in error.

Fred A. Nye and *E. Frank Brown, contra.*

NORVAL, J.

George H. Downing sued the city of Kearney to recover for a quantity of coal alleged to have been furnished by him to the temporary poor in said city. A general demurrer to the petition was interposed by the defendant, which was overruled by the court below, and

the plaintiff obtained judgment, to reverse which is the purpose of this proceeding.

The main proposition argued in the briefs, whether the city of Kearney is liable for the relief furnished the temporary poor within the city, we are unwilling at this time to consider or decide, since the question is not presented by the record.

By section 39, chapter 14, article 2, Compiled Statutes, it is provided that "the city council shall, within the last quarter of each fiscal year, pass an ordinance, to be termed the 'annual appropriation bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during the then ensuing year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor; and all appropriations shall end with the fiscal year for which they were made; *Provided*, That the fund arising from 'road taxes,' as in this chapter provided, shall be deemed specially appropriated, and shall not be included in the annual appropriation ordinance; *And provided further*, That no warrant shall be drawn, account allowed, or debt contracted with reference to such fund unless there shall be money in the treasury for the payment thereof; *And provided further*, That nothing herein shall be construed to prohibit the council from appropriating other money in the annual appropriation bill for the use of streets, grades, and bridges." Section 40 of the same article and chapter declares: "Before such annual appropriation bill shall be passed, the council shall prepare

an estimate of the probable amount of money necessary for all purposes to be raised in said city during the fiscal year for which the appropriation is to be made, including interest and principal due on the bonded debt and sinking fund, itemizing and classifying the different objects and branches of expenditures, as nearly as may be, with the statement of the entire revenue of the city for the previous fiscal year, and shall enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city." Section 41 reads: "The mayor and council shall have no power to appropriate, issue, or draw any order or warrant on the treasurer for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which such order or warrant is issued has been allowed, according to the provisions of this chapter, and appropriations for the class or object out of which such claim is payable has been made as provided in section 41 (39). Neither the city council, nor any department, or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill for that year, except as herein otherwise specially provided; and no expenditure for any improvement, to be paid for out of the general fund of the corporation, shall exceed in any one year the amount provided for such an improvement in the annual appropriation bill; *Provided, however*, That nothing herein contained shall prevent the city council from ordering, by a two-thirds vote, the repair or restoration of any improvement, the necessity of which is caused by any casualty or accident happening after such annual appropriation is made, or, by a like vote, from making necessary appropriations for quarantine or hospital purposes in case of the outbreak of virulent epidemic or contagious disease. The city council may, by a like vote, order the mayor to borrow a sufficient sum to provide for the expense necessary to be incurred in making any

repairs or restoration of improvements, the necessity of which has arisen, as is last above mentioned, for a space of time not exceeding the close of the next fiscal year, which sum and interest shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein. Should any judgment be obtained against the corporation, the mayor, under the sanction of council, may borrow a sufficient amount to pay the same, for a space of time not exceeding the close of the next fiscal year, which sum and interest shall, in like manner, be added to the amount authorized to be raised in the general tax levy of the next year, and embraced therein." Section 42 follows: "Sec. 42. No contract shall be hereafter made by the city council or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

There is no averment in the petition to the effect that the city of Kearney, by ordinance or otherwise, had made an appropriation of any sum of money to be devoted to the relief of the temporary poor within the city, or for any other purpose. Therefore, under the provisions of the statute quoted, the city of Kearney could not lawfully incur an indebtedness for relief furnished its temporary poor. See *City of Blair v. Lantry*, 21 Nebr., 247; *McElhinney v. City of Superior*, 32 Nebr., 744. It is strenuously insisted that this question was not presented to the trial court, and for that reason is not available here. The point was sufficiently raised by the general demurrer to the petition. For the reason stated, the judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

CHARLES C. PARMELE ET AL., APPELLEES, V. EMMA C. M. SCHROEDER ET AL., APPELLEES, AND JOHN LINDER ET AL., APPELLANTS.

ANNA M. DEWEY, APPELLEE, V. EMMA C. M. SCHROEDER ET AL., APPELLEES, AND JOHN LINDER ET AL., APPELLANTS.

FILED JANUARY 3, 1900. No. 9,084.

1. **Mortgage Foreclosure:** DECREE: DEFICIENCY. In an action of foreclosure the decree *in personam* does not become final until after the sale of the property and entry of judgment for the deficiency.

2. ——: ——: ——: EXCEPTIONS TO APPRAISEMENT: APPEAL. In a foreclosure suit, a defendant who is adjudged liable for any deficiency remaining after a sale of the property may file exceptions to the appraisement without forfeiting his right to appeal from the final judgment in the case.

3. **Final Order.** A decree is not final, if anything remains to be done by the court before it can be executed.

4. **Decree of Foreclosure:** DEFICIENCY: APPEAL: DISMISSAL. An appeal from a decree of foreclosure by a defendant who objects only to the entry of a deficiency judgment against him is premature, if taken before the rendition of such judgment.

APPEAL from the district court of Cass county. Heard below before RAMSEY, J. *Appeal dismissed.*

Morris & Marple, E. E. Aylesworth, Duffie, Gaines & Kelby, Duffie & Van Dusen and *A. N. Sullivan,* for appellants.

Jesse L. Root, Byron Clark, C. A. Rawls, Allen Beeson and *R. B. Windham, contra.*

SULLIVAN, J.

These actions, which have been consolidated and are submitted together, were instituted in the district court of Cass county to foreclose real estate mortgages executed by Fred and Emma Schroeder. Renneau, Linder and Hahn were made defendants, on the theory that they had purchased the mortgaged premises of the Schroeders,

and had, as a part of the transaction, assumed and agreed to pay the several items of indebtedness secured by the mortgages. The trial court rendered a decree of foreclosure in the usual form, and at the same time fixed and established the liability of appellants for any deficiency remaining after the sale of the property and the due application of the proceeds. The appellants contend that they never accepted a deed from the Schroeders for the property covered by the mortgages in suit, and that they have, therefore, no interest in such property. They find no fault with the decree of foreclosure, and only ask for a reversal of the judgment so far as it makes a possible deficiency a personal charge against them.

The first question for decision is whether the appellants have, by their conduct, forfeited their right to prosecute an appeal in this case. We think they have not. It is true that they, or at least one of them, filed exceptions to the appraisement of the property, which was made for the purpose of a sale under the decree of foreclosure. These exceptions were called to the attention of the court by counsel for appellees, at whose instance the appraisement was set aside as being too low. It is now contended that the filing of the exceptions to the appraisement was an assertion of ownership of the property, which precludes an appeal grounded on a disclaimer of such ownership. We are not able to perceive why appellants might not, with propriety, suggest to the court that the property about to be sold under the decree of foreclosure had not been fairly appraised; and we do not see any good reason for holding that such suggestion should be regarded as a conclusive admission of ownership. See *Tama County v. Melendy*, 55 Ia., 395; *Barker v. White*, 58 N. Y., 204.

The next question to be decided is whether the judgment appealed from is final. We think it is not. We think the appeal is premature, and that it must be dismissed. In *Dainese v. Kendall*, 119 U. S., 53, Chief Justice Waite observed: "The authorities are uniform to the

effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that, if there be an affirmance here, the court below will have nothing to do but execute the decree it has already entered." If there be a deficiency in this case, the judgment already rendered against the appellants can not be enforced by execution, or otherwise, without a further judicial order. The court will be obliged to ascertain the amount of the deficiency, and render a judgment therefor after the execution of the decree of foreclosure. The point has been already definitely settled by this court in *Millard v. Parsell*, 57 Nebr., 178. We are inclined to think, after examining the record, that the judgment against appellants is not supported by sufficient evidence; but we can not, at this time, dispose of the case on the merits. The appeal is

DISMISSED.

CHARLES L. GYGER V. CHARLES R. COURTNEY.

FILED JANUARY 3, 1900. No. 9,066.

1. **Trusts:** INJUNCTION: ACTION ON BOND. A trustee of an express trust, who was restrained with respect to matters concerning the trust estate, may maintain an action on the bond given in the injunction suit in which he is named as the obligee.

2. **Parties to Actions:** DEFENDANTS: JOINT DEBTORS. In an action against joint debtors the plaintiff, unless the court otherwise direct, may proceed against such of the defendants as have been served with process.

3. **Injunction:** DISSOLUTION: DAMAGES: ATTORNEYS' FEES. Where the hearing of an application for a temporary injunction has been unreasonably postponed, attorneys' fees necessarily incurred in effecting a dissolution of a restraining order are a proper element of damage in case it is determined that the restraining order should not have been allowed.

4. **Bonds:** EXECUTION: SURETIES. A bond, voluntarily given, is not rendered void because of the fact that it was signed by one surety when the order was that it be executed by "sureties."

5. **Injunction:** DISMISSAL: SUIT ON BOND. The voluntary dismissal of

an injunction suit by the plaintiff gives the defendant the right to maintain an action on the injunction bond.

6. **Bonds:** DELIVERY. In the absence of evidence to the contrary, it will be presumed that the delivery of a bond was unconditional.

7. ——: ——. In the absence of proof that a bond was delivered in violation of an express or implied condition, the bond is effective for the purpose for which it was delivered.

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

Montgomery & Hall, for plaintiff in error.

Howard B. Smith, contra.

SULLIVAN, J.

Samuel A. Lewis and Helen A. Lewis brought suit in the district court of Douglas county to enjoin Charles L. Gyger from prosecuting against them an action for the unlawful detention of real property. A restraining order was allowed on condition that the Lewises should give a bond in the sum of $250, with sureties to be approved by the clerk of the court. In compliance with this order, and on the day it was made, a bond, of which the following is a copy, was executed, approved and filed with the papers in the case:

"Whereas, Samuel A. Lewis, Helen A. Lewis, has obtained an order of injunction against Charles L. Gyger in an action pending in the district court for the county of Douglas wherein the said Samuel A. Lewis, Helen A. Lewis is plaintiff, and the said Charles L. Gyger, et al., are defendants, on his giving an undertaking to the said defendant in the sum of $250.00:

"Now, therefore, we, Samuel A. Lewis, Helen A. Lewis, principals, and Charles R. Courtney, surety, hereby undertake that the said Samuel A. Lewis, Helen A. Lewis, plaintiff, will pay to the said Charles L. Gyger, defendant, all damages which the said defendant may sustain by reason of the issuing of said injunction not exceeding

$250,00, if it shall be finally decided that the said injunction ought not to have been granted.

"SAMUEL A. LEWIS,
"HELEN A. LEWIS,
"By F. A. BROGAN, *Attorney.*
"CHARLES R. COURTNEY."

The hearing of the application for a temporary injunction was fixed for December 23, 1893. On December 7, Gyger filed a motion to dissolve the restraining order. This motion was heard on December 22 and 23; but there was, so far as the record shows, no final disposition of it. It appears, however, that on the day last mentioned a temporary injunction was allowed on condition that the Lewises should give a bond forthwith in the sum of $2,000. This order was in effect, and was doubtless intended to be, a denial of the application to vacate the restraining order. No bond having been given as required by the order of December 23, there was entered, on December 27, an order dissolving the restraining order; and afterwards, on May 6, 1894, the action was dismissed on the motion of the Lewises. The present action, which is grounded on the bond above set out, was instituted by Gyger against Samuel A. Lewis, Helen A. Lewis and Charles R. Courtney, to recover damages alleged to have been sustained by reason of the wrongful issuance of the restraining order. The summons issued for the Lewises not having been served, the action proceeded against Courtney alone. The trial court found the issues in favor of the defendant, and rendered judgment accordingly. The plaintiff brings the record here for review.

One contention of the defendant is, that the plaintiff can not recover, because he is not the real party in interest. According to the evidence, he holds the legal title to the property involved in the action in which the bond in suit was given. He is also the obligee named in the bond, and is, therefore, under the plain terms of section 32 of the Code of Civil Procedure, entitled to maintain an action upon it in his own name. Courtney's undertaking

will be satisfied, when he shall have paid Gyger the damages resulting from the wrongful issuance of the restraining order.

Another contention of the defendant is that the judgment is right and should be affirmed, because there is no several liability on the bond. The action was, in form, against the principals and the surety. Process issued for all the defendants, but was not served on the Lewises because, according to the return of the officer, they could not be found in Douglas county. Under these circumstances, it was entirely proper to proceed against Courtney alone. See Code of Civil Procedure, sec. 84; *Fox v. Abbott*, 12 Nebr., 328.

A further argument of the defendant in support of the judgment in his favor is that there is no proof of any damage sustained by the plaintiff. This contention is grounded chiefly on the decision in *Carnes v. Heimrod*, 45 Nebr., 364. In the first point of the syllabus of that case it is said: "Attorney's fees, ordinarily, are not recoverable in this state for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction." The office of a restraining order is to prevent action on the part of the defendant until both parties can be heard on the application for a temporary injunction. The practice being to hear such applications at the earliest practicable moment, there will, ordinarily, be no occasion for a motion to dissolve the restraining order. But, if the hearing of the application for a temporary injunction be unreasonably postponed, as it was in this case, we think the party on whom the restraint has been imposed is justified in moving to dissolve the order; and that all reasonable expense incurred in the matter, including attorney's fees, may be recovered in an action on the bond. But, aside from the evidence in regard to the attorney's fees, there was proof of other damages exceeding the penalty of the bond. The restraining order prevented Gyger, for nearly three weeks, from obtaining possession

of property having an estimated rental value of $500 per month. As no effective temporary injunction was ever granted, and as the action was eventually abandoned and dismissed, it is plain, both on principle and authority, that the restraining order was wrongfully allowed. In other words, it has been conclusively settled—it has been, in the language of the bond, "finally decided"—in the injunction case, that the order preventing Gyger from proceeding with the action to obtain possession of his property was granted in violation of his rights. See *Gibson v. Reed*, 54 Nebr., 309; *Smith v. Gregg*, 9 Nebr., 212; *Omaha Lithographing Co. v. Simpson*, 29 Nebr., 96; *Mitchell v. Sullivan*, 30 Kan., 231; *Swan v. Timmons*, 81 Ind., 243; *Richardson v. Allen*, 74 Ga., 719; *Asevado v. Orr*, 100 Cal., 293; *Apollinaris Co. v. Venable*, 136 N. Y., 46. In 10 Ency. Pl. & Pr., 1124, the rule upon this subject is thus stated: "The voluntary dismissal of the action by the plaintiff has the same effect, as regards the defendant's right to enforce the bond, as a decision of the court that the plaintiff was not entitled to the injunction."

It is finally contended by the defendant that the bond in suit is void, because it does not meet the requirements of the order of the court. The order in question directed that an undertaking be given with "sureties," and it is quite possible that Gyger, for whose benefit the order was made, might have insisted on a strict compliance with its terms. But, if the obligation was voluntarily delivered, and was accepted by the clerk of the district court, it became a binding contract, which the obligee is entitled to enforce. See *Cutler v. Roberts*, 7 Nebr., 4. Although possibly defective, the instrument was not void; and, if objection had been made to it on the ground that it had been executed by only one surety, the court might have permitted the defect to be cured by amendment. See *State v. Russell*, 17 Nebr., 201.

It is said that the bond was handed by Courtney to Mr. Brogan, attorney for the Lewises, to be delivered only on condition that it should be first signed by an-

other surety. In the absence of evidence, the presumption is that the delivery was unconditional; and it is for the defendant to plead and prove the contrary. See *Hart v. Mead Inv. Co.*, 53 Nebr., 153; *Owen v. Udall*, 39 Nebr., 14; *Mullen v. Morris*, 43 Nebr., 596; *Brumback v. German Nat. Bank*, 46 Nebr., 540. There was in this case neither averment nor proof that the bond was delivered to the clerk of the district court in violation of any express or implied condition. The instrument was signed to enable the Lewises to obtain the restraining order; and it was handed to their attorney without any limitation upon his authority to use it for that purpose. Courtney did not know that the order required two sureties, and he received no assurance that another surety would sign it with him. He might have had some vague expectation that another person would share the risk which he assumed; but that fact was unimportant. It did not make the delivery to Mr. Brogan a conditional one. The result of the adjudged cases on the subject of the delivery of bonds by sureties to their principals is thus stated in the note to *Guild v. Thomas*, 25 Am. Rep. [Ala.], 703: "The mere faith on the part of the obligor signing the bond, and the assurance to him by others, that other persons named, or not named, in the bond are also to execute it, is not enough to release him in case this assurance is not fulfilled; there must at least be a delivery by him upon the express condition that the others shall also execute it." The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

KARL LEY V. ADAM PILGER ET AL.

FILED JANUARY 3, 1900. No. 9,065.

1. **Summons:** RETURN DAY. A summons in which an erroneous return day is inserted is irregular, but not void.
2. ———: ———: MOTION TO QUASH. In such case a defendant, on whom such erroneous summons has been served, should, if he desire to take advantage of the defect, move to quash the writ.
3. ———: JURISDICTION: JUDGMENT. Where a court obtains jurisdiction of a party by the service of a defective summons, the judgment rendered is not void.
4. ———: JUDGMENT: CORRECTION. The right to correct an erroneous judgment, arising from the service of defective process, rests, in the first instance, with the court out of which the process issued.

ERROR from the district court of Stanton county. Tried below before EVANS, J. *Affirmed.*

Brome & Burnett, for plaintiff in error.

John A. Ehrhardt, contra.

SULLIVAN, J.

Adam Pilger and Fred Feyerherm sued Karl Ley in the county court of Stanton county to recover $280, claimed to be due upon a note and account. The summons was issued and served on April 21, and was made returnable on the first day of the following month, which was the first day of the May term. The defendant made no appearance in the action, and on May 2 judgment was rendered against him by default. He afterwards prosecuted error to the district court, where the judgment of the county court was affirmed. We are of opinion that the judgment of affirmance is right, and that there is no error in the record brought here for review. The case being within the enlarged jurisdiction of the county court, the issuance, service and return of the summons was regulated by section 8, chapter 20, Compiled Statutes, 1899, which is as follows: "In all cases commenced

in said courts wherein the sum exceeds the jurisdiction of a justice of the peace, it shall be the duty of the county judge to issue a summons, returnable on the first day of the next term of said court, if there be ten days intervening between the issuance of the summons and the first day of the term, and if not, then to be made returnable on the first day of the next term thereafter, which summons shall be directed and delivered to the sheriff or any constable of said county, and the sheriff or constable shall serve the same upon the defendant as in other civil cases, at least ten days before the return day thereof. When the summons has not been served ten days before the first day of the term, the cause shall stand continued until the next regular term of said court, and shall then stand for trial, without further notice to the defendant." Only nine days intervened between the 21st day of April and the first day of the May term, and, therefore, under the provisions of the section quoted, the summons should have been made returnable on the first Monday in June.

It is contended by counsel for Ley that the process issued by the county judge was unauthorized and void; that the county court did not acquire jurisdiction of the person of the defendant, and that the judgment pronounced is a nullity. The opinion in *Crowell v. Galloway*, 3 Nebr., 215, contains some expressions which seem to countenance the claim that the commission of an error in fixing the answer day or the return day of a summons, would make the writ void; but no such question was decided in that case. In *Clough v. McDonald*, 18 Kan., 114, and in *Swerdsfeger v. State*, 21 Kan., 475, it was held that the insertion of an erroneous return day in a summons renders the process irregular, but not void. This we think the correct doctrine. The same conclusion was reached in *Granger v. Judge*, 44 Mich., 384; *Gribbon v. Freel*, 93 N. Y., 93; *Stilwell v. Swarthout*, 81 N. Y., 109, and *Ziegenhager v. Doe*, 1 Ind., 296. There are cases holding that such process is void, and not merely irregular; but the reasoning upon which they rest is not at all con-

vincing, and we must decline to follow them. If a party has been served with summons, he should not be permitted to disregard it altogether because the answer day named is either too near or too remote, or because the officer is given less time to make the service than the law allows. If the writ is not in strict conformity with the statute, the right of the defendant is to appear specially, and move to quash it. See *Roggencamp v. Moore*, 9 Nebr., 105. Since there was, in this case, no ruling on a motion to quash the summons, the defendant's only ground of complaint is that the judgment against him was prematurely rendered. The right to correct this error belonged, in the first instance, to the county court, and could not be raised, primarily, in the district court. The matter is governed by sections 597 and 598 of the Code of Civil Procedure, which are as follows:

"Sec. 597. A mistake, neglect, or omission of the clerk shall not be a ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect, or omission occurred.

"Sec. 598. Rendering judgment before the action stood for trial according to the provisions of this code, shall be deemed a clerical error."

The attention of the county court not having been called to the error committed by it in rendering judgment against the defendant at the May term, its action in the premises can not be reviewed. The judgment is

AFFIRMED.

JOSEPH R. WEBSTER, ADMINISTRATOR, V. CITY OF HASTINGS.

FILED JANUARY 3, 1900. No. 10,935.

1. **Statutes:** AUTHENTICATION: EVIDENCE. The due authentication and enrollment of a statute affords only *prima facie* evidence of its passage.

2. ———: EVIDENCE OF ENACTMENT: JOURNALS. The legislative jour-

nals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution.

3. ———: ———: ———. If the entries found in the legislative journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail.

4. ———: ———: ———. The legislative journals, kept in obedience to the command of the constitution, are the best evidence of what affirmatively appears in them regarding the enactment of a law.

5. ———: SUBJECTS AND TITLES OF BILLS. The provision of section 11, article 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," is intended to prevent surreptitious legislation, and forbids amendatory legislation foreign to the subject of the original act, and which would not be embraced in the title thereof.

6. ———: AMENDMENT OF CITY CHARTER. Chapter 14, Session Laws of 1885, is void as amendatory legislation not covered by the title of the original act.

7. **Action for Personal Injuries**: ABATEMENT. A pending action for personal injuries does not abate by the death of the plaintiff.

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

Joseph R. Webster and *Halleck F. Rose*, for plaintiff in error:

The legislature has no power to change the scope or effect of prior legislation by amending the title of an act passed by a former legislative assembly. See *People v. McCallum*, 1 Nebr., 182; *State v. Stewart*, 52 Nebr., 243; *Ballou v. Black*, 17 Nebr., 391.

No act with the title "An act to amend the title and sections one (1), two (2), three (3), and four (4) [of chapter sixteen (16)] of an act entitled 'An act to provide for organization, government, and powers of cities of the second class having over ten [or two] thousand inhabitants,' approved March 1st, 1883," ever passed either house of the legislature, and therefore there is no such a law. See *State v. McLelland*, 18 Nebr., 236; *State v. Robinson*, 20 Nebr., 96; *State v. Liedtke*, 9 Nebr., 462; *In re Groff*, 21 Nebr., 647.

The purpose of the act of 1885 was to provide for organization of cities of population between 5,000 and 10,000—a subject not expressed by the title. The act is, therefore, void. See *Sheasley v. Keens*, 48 Nebr., 64; *State v. Board of County Commissioners*, 47 Nebr., 428; *Weigel v. City of Hastings*, 29 Nebr., 384; *Touzalin v. City of Omaha*, 25 Nebr., 817; *State v. Tibbets*, 52 Nebr., 228; *Douglas County v. Hayes*, 52 Nebr., 191.

The new matter introduced by amendment is not germane to the act amended, and is inconsistent with the title of the act. See *State v. Lancaster County*, 6 Nebr., 484; *Burlington & M. R. R. Co. v. Saunders County*, 9 Nebr., 511; *Ex parte Thomason*, 16 Nebr., 238; *Holmburg v. Hauck*, 16 Nebr., 340; *State v. Pierce County*, 10 Nebr., 477; *Miller v. Hurford*, 11 Nebr., 381.

The amending act of March 5, 1885, under which defendant claims its corporate powers, is not complete in itself, and is in conflict with the act of March 1, 1879, which is not amended or repealed. It is, therefore, unconstitutional. See *State v. Board of Commissioners*, 47 Nebr., 438; *State v. Cobb*, 44 Nebr., 438; *In re House Roll 284*, 31 Nebr., 509; *State v. Corner*, 22 Nebr., 272; *Smails v. White*, 4 Nebr., 357; *Sovereign v. State*, 7 Nebr., 413.

L. J. Capps and *John C. Stevens, contra:*

In arguing that the act is constitutional, reference was made to the following cases: *Miller v. Hurford*, 13 Nebr., 14; *State v. Ream*, 16 Nebr., 681; *State v. Abbott*, 80 N. W. Rep., 499; *Lane v. Harris*, 16 Ga., 217; *Leland v. Wilkinson*, 6 Pet. [U. S.], 317; *Albrittin v. Huntsville*, 60 Ala., 486; *Payne v. Treadwell*, 16 Cal., 221; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala., 611; *Montgomery v. Hughes*, 65 Ala., 201; *State v. Murfreesborough*, 11 Humph. [Tenn.], 217; *Beasley v. Beckley*, 28 W. Va., 81; *Sipe v. Holliday*, 62 Ind., 4; *Town of Albion v. Hetrick*, 90 Ind., 545; *Bellmont v. Morrill*, 69 Me., 314; *People v. Mahaney*, 13 Mich., 481; *Board of Commissioners v. Heenan*, 2 Minn., 336; *State v. Clare*, 5 Ia., 509; *Dawdee v. State*, 58 Ind., 333; *Girard v. Philadelphia*, 7 Wall. [U. S.], 1.

Foxworthy's death abated the action. See *Burlington & M. R. R. Co. v. Crockett*, 17 Nebr., 570; *Mobile Life Ins. Co. v. Brame*, 95 U. S., 759; *Lawrence v. Martin*, 22 Cal., 173; *Comegys v. Vasse*, 1 Pet. [U. S.], 193; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind., 143; *McCurley v. McCurley*, 60 Md.. 185; *Russell v. Sunbury*, 37 O. St., 372.

SULLIVAN, J.

This case, after having experienced more than the ordinary vicissitudes of litigation, has now practically reached the end of its changeful career. At the last trial in the district court the jury found that Foxworthy had been injured through the culpable omission of the city of Hastings to keep its streets free from obstructions and fit for use. There was a general verdict fixing the amount of plaintiff's recovery at the sum of $4,734.16, and a special finding to the effect that there was no legal excuse for Foxworthy's failure to file his claim for damages with the city clerk within six months from the date of the accident. The court denied plaintiff's motion for judgment on the verdict, and, on the assumption that the special finding was inconsistent with the general verdict, gave judgment for the defendant. It is alleged in the petition in error, and argued by counsel for plaintiff, that there was no law requiring Foxworthy to file his claim for damages with the city clerk, and that the special finding of the jury is, therefore, without controlling force and altogether immaterial. The question thus raised is the constitutionality of chapter 14 of the Session Laws of 1885. The legislature, in 1883, passed an act entitled "An act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants." The first section of the act declared (Session Laws. 1883, ch. 16): "That all cities in this state having more than ten thousand, and less than twenty-five thousand, inhabitants shall be governed by the provisions of this act." Section 34 of the act of 1883, as amended by chapter 15 of the Session Laws of 1885, re-

quired notice of claims for damages, resulting from personal injuries, to be filed with the city clerk within six months from the time such injuries were sustained. Chapter 14 of the Session Laws of 1885, as enrolled and signed by the governor, was entitled "An act to amend the title and sections 1, 2, 3, and 4 of an act entitled: 'An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants,' approved March 1st, 1883." The first section assumes to amend the title of the original act so as to read: "An act to provide for the organization, government, and powers of cities of the second class having more than five thousand inhabitants." The second section purports to amend section 1 of the original act so as to read: "That all cities of the second class having more than five (5,000) thousand inhabitants and less than twenty-five (25,000) thousand inhabitants shall be governed by the provisions of this act." Foxworthy was injured in 1886, so that, if the amendatory act last mentioned is valid, he can not recover; but if the act is void, there was no law requiring notice, and the finding of the jury upon that subject presents no legal obstacle to a judgment on the verdict.

One of the contentions of counsel for the plaintiff is that the act in question is void, because its present title is substantially different from the title under which it passed the legislature. Without giving in detail the history of the measure as disclosed by the legislative journals, and taking no account of an obvious, clerical mistake, it may be said that the bill, during its entire progress through the house and senate, and up to the time of its enrollment, was invariably designated and referred to as "A bill for an act to amend sections one (1), two (2), three (3), and four (4) of chapter sixteen (16) of 'an act entitled an act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants,' approved March 1, 1883." The present title of the act, namely, "An act to amend

the title and sections one (1), two (2), three (3), and four (4) of an act entitled 'an act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants, approved March 1, 1883,' " is first mentioned in the report of the house committee on engrossed and enrolled bills announcing the enrollment of the measure. That the title was changed by inserting therein the words "the title and" after the bill had passed the legislature, and while it was being prepared for the signature of the executive, is a conclusion that can not be avoided without disregarding entirely the evidence of the legislative journals. This, under what is now the settled doctrine of this court, we can not do. The rule established by our former decisions is that the due authentication and enrollment of a statute affords only *prima facie* evidence of its passage; and that the legislative journals may be examined for the purpose of ascertaining whether the measure was enacted in the mode prescribed by the constitution. If the entries found in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. The journals, being the records of legislative proceedings kept in obedience to the command of the constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws. See *State v. McLelland*, 18 Nebr., 236; *In re Granger*, 56 Nebr., 260; *State v. Francis*, 26 Kan., 724; *Illinois C. R. Co. v. People*, 143 Ill., 434; *Meracle v. Down*, 64 Wis., 323; *State v. Platt*, 2 S. Car., 150; *Osburn v. Staley*, 5 W. Va., 85; *People v. Mahaney*, 13 Mich., 481; *Spangler v. Jacoby*, 14 Ill., 297; *People v. Starne*, 35 Ill., 121.

As the original and only legitimate title of chapter 14 of the Session Laws of 1885 was clearly not broad enough to cover legislation amending the title to chapter 16 of the Session Laws of 1883, we shall, in the further consideration of this case, deal with the former act under its proper title—the title by which it became known

during its passage through both branches of the legislature. Leaving out of view, then, the spurious portion of the title, and the first section of the act, the question for determination is this, was it competent for the legislature to make the provisions of an act entitled "An act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants," applicable to cities having less than ten thousand inhabitants by an enactment, the object of which, as expressed in the title, was to amend the first four sections of the original law? To prevent surreptitious legislation the constitution declares: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." See Constitution, art. 3, sec. 11. This provision of the supreme law forbids amendatory legislation which is foreign to the subject of the original act, and which would not be embraced within the title thereof. If the amendatory law might have been made a part of the original act at the time it was passed, it is valid; otherwise, it is not. "Whatever might have been enacted under the title of the former statute, and nothing more beyond it," says LAKE, J., in *Burlington & M. R. R. Co. v. Saunders County*, 9 Nebr., 507, "could rightly be included in the amendatory act." A like expression is found in *State v. Pierce County*, 10 Nebr., 476. And to the same effect are *People v. Gadway*, 61 Mich., 285, and *Roby v. Sheppard*, 42 W. Va., 286. It would hardly be contended, in view of the decisions here and elsewhere, that an original act which, according to its title, related exclusively to cities having more than ten thousand inhabitants, might embrace legislation affecting cities having less than ten thousand inhabitants. See *Sheasley v. Keens*, 48 Nebr., 57; *State v. Board of County Commissioners*, 47 Nebr., 428; *Weigel v. Hastings*, 29 Nebr., 379; *Touzalin v. Omaha*, 25 Nebr., 817; *State v. Tibbets*, 52 Nebr., 228; *Adams v. San Angelo W. W. Co.*, 86 Tex., 485; *State v. Trenton*, 53 N. J. Law, 566; *Shelton v. State*, 96 Tenn., 521. The restrictive title would, in such case, clearly ex-

clude from the operation of the law all cities having a population of less than ten thousand. And it is equally clear that an act purporting merely to amend such a law would furnish no indication that the amendatory legislation was dealing with a different class of cities. For these reasons we conclude that the act of 1883 was not applicable to the city of Hastings, and that Foxworthy was, therefore, under no legal obligation to file notice with the city clerk of his claim for damages.

Another question discussed at some length and with much ingenuity, in the brief of counsel for the defendant, relates to the power of the court to revive the action in the name of Webster, as administrator of Foxworthy's estate. Without stopping to inquire whether that point is properly presented by the record before us, we will say that, in our opinion, section 455 of the Code of Civil Procedure leaves no room to doubt the right of the plaintiff, in his representative capacity, to prosecute the action to judgment. The section referred to is as follows: "Sec. 455. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant." Foxworthy had a right of action against the defendant for a personal injury occasioned by the city's negligent omission of duty. He had, at the time of his death, a suit pending for the enforcement of that right. The section quoted declares, in plain terms, that suits instituted to redress a particular class of wrongs, among them being certain injuries to the person and reputation, shall abate by the death of the defendant; but that no other pending action shall abate for any cause. The language employed by the legislature is so clear that it requires no construction. The meaning of the law, as applied to this case, would not be more evident had it said in so many words that an action for a personal injury caused by the negligence of the

defendant shall not abate by the death of the plaintiff. To sustain the contention of counsel for the city, that the death of a party abates all pending actions except those brought for the vindication of some right covered by the provisions of section 454 of the Code, would be to annul completely the provisions of section 455.

As a result of the conclusions reached upon the questions considered, the judgment in favor of the city is reversed, and the cause remanded, with direction to the district court to render judgment on the general verdict in favor of the plaintiff for $4,734.16, and costs.

REVERSED AND REMANDED.

GEORGE W. SCOTT, APPELLANT, V. SOCIETY OF RUSSIAN ISRAELITES ET AL., APPELLEES.

FILED JANUARY 24, 1900. No. 9,113.

1. **Religious Societies:** PROPERTY: TAXATION. Property used directly, immediately and exclusively for religious purposes is exempt from taxation, without regard to the question of absolute ownership.

2. **Bill of Exceptions:** OMISSIONS: REVIEW. Where, upon an inspection of a bill of exceptions, palpable omissions appear, as that certain exhibits introduced are not incorporated therein, the reviewing court will not pass upon the sufficiency of the evidence to sustain the finding below.

3. **Landlord and Tenant:** PAYMENT OF VOID TAXES. A tenant, by assuming in a lease the payment of taxes which shall be subsequently levied upon the demised premises, does not thereby obligate himself to pay any taxes which may be illegal and void.

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

W. A. Saunders, for appellant.

Will H. Thompson and *D. W. Merrow*, *contra.*

NORVAL, C. J.

This suit was instituted in the court below by George W. Scott to foreclose a tax certificate upon the west half lot 7, block 73, in the city of Omaha, for the taxes of 1889, and for state, county and city taxes subsequently paid by the tax purchaser. At the time the 1889 taxes were levied, as well as when the tax sale occurred, the premises were owned by one David H. Bowman, who, on February 20, 1889, executed a lease therefor to the defendant, the Society of Russian Israelites, for the term of ten years, the lessee agreeing to pay, in addition to the monthly rental agreed upon, all taxes and assessments imposed against the property during the lease. The defendant obtained the lease for the purpose of erecting on the lot a house for worship, and in March, 1889, the society commenced the erection of a building on said premises, which was completed in May following, and thereupon the property was used and occupied by the defendant exclusively for religious purposes. State, county and city taxes for the year 1890 were levied on the premises, which the plaintiff paid under his tax purchase. The district court found that the 1890 taxes were illegal and void, and rendered a decree for the plaintiff for the taxes for the year 1889. He has appealed.

The first argument of plaintiff is that real estate occupied and used exclusively for religious purposes is not exempt from taxation, unless the occupant is the owner. The proper solution of this question necessitates an examination of the provisions of the constitution and statute bearing upon the subject.

By section 2, article 9, of the constitution it is provided: "The property of the state, counties and municipal corporations, both real and personal shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempt from taxation, but such exemption shall be only by general law."

Section 2, article 1, chapter 77, Compiled Statutes, declares: "The following property shall be exempt from taxation in this state: First—The property of the state, counties and municipal corporations, both real and personal. Second—Such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes."

The language of the provisions quoted is plain. There is exempt from taxation all property used exclusively for religious purposes. It is the exclusive use for the purpose named which determines whether the property is subject to the burden of taxation or not. See *Omaha Medical College v. Rush*, 22 Nebr., 449; *Academy of the Sacred Heart v. Irey*, 51 Nebr., 755; *Washburn College v. Shawnee County*, 8 Kan., 344; *St. Mary's College v. Crowl*, 10 Kan., 442; *Gerke v. Purcell*, 25 O. St., 229. To hold that a religious society must be the absolute owner of the property occupied or used by it exclusively for church purposes to create the exemption would be to inject words into the constitution and statute which are not therein written. This we have no power to do.

In *Washburn College v. Shawnee County*, 8 Kan., 344, the court construed the provision of the constitution of Kansas, which reads, "All property used exclusively for state * * * literary, educational, scientific, religious, benevolent and charitable purposes * * * shall be exempt from taxation," and in the course of the opinion Brewer, J., observed: "To bring this property within the terms of the section quoted it must be 'used exclusively for literary and educational purposes.' This involves three things: first, that the property is used; second, that it is used for educational purposes; and third, that it is used for no other purpose. * * * Nor is ownership evidence of use. * * * This is too plain to need either argument or illustration. If the framers of the constitution had intended to exempt all property belonging to literary and charitable institutions from taxation, the language employed would have been very dif-

ferent. They would have used the simple, ordinary language for expressing such intention. The fact that they ignored 'ownership' and made 'use' the test of exemption, shows clearly that they recognized the essential distinction between the two, and established the latter rather than the former as the basis of exemption. * * * And this, as we have seen, was ignored as a rule of exemption; and that which was established was the present and exclusive use for certain designated purposes."

In *St. Mary's College v. Crowl*, 10 Kan., 442, Valentine, J., speaking to the same subject, said: "It is solely the use of the property which determines whether the property is exempt or not. *Washburn College v. Shawnee County*, 8 Kan., 344. It makes no difference who owns the property, nor who uses it. Property used exclusively for educational purposes is exempt, whoever may own it, or whoever may use it. Property not used exclusively for educational purposes (if otherwise taxable,) is not exempt, whoever may own it, or whoever may use it."

The provision of the constitution of Ohio relative to exemption from taxation provides: "Burying grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose * * * may, by general law, be exempt from taxation." See Constitution, art. 12, sec. 2. This provision was under consideration in *Gerke v. Purcell*, 25 O. St., 229, the court saying: "With the exception of a limited amount of personal property, which is authorized to be allowed to individuals, the property that may be exempted from taxation depends either upon its ownership, or the use to which it is applied, or upon both. The exemption of 'burying grounds,' 'houses used exclusively for public worship,' 'and institutions of purely public charity,' does not depend on the ownership of the property. The uses that such property subserves, constitutes the ground for its exemption." See *State v. Bell*, 45 N. W. Rep. [Minn.], 615.

The two cases cited by plaintiff are not in point. We are constrained to hold that the property in question was not liable for general taxes for the year 1890.

It is next insisted that defendant is estopped from claiming the invalidity of these taxes, by reason of an alleged former adjudication in a cause between the parties. The court below made no finding on this issue tendered by the reply, and this court is unable to pass upon the question, for the reason that certain exhibits introduced in evidence on the trial are not incorporated in the bill of exceptions. In view of this fact, it can not be determined whether a prior adjudication was established or not.

Finally it is claimed that the defendant, having stipulated in the lease to pay the taxes on the property, is thereby estopped from urging their invalidity. This argument is fallacious. The society, by the provision in the lease, did not preclude it from urging the invalidity of any taxes that should be assessed against the property. Its obligation was to pay the legal taxes, and no more. Notwithstanding the premises were used exclusively for religious purposes, yet they were not exempt from any special assessment that might be legally levied by the city of Omaha. See *City of Beatrice v. Brethren Church of Beatrice*, 41 Nebr., 358. The decree is

AFFIRMED.

CLINTON ORCUTT, APPELLEE, V. E. E. POLSLEY ET AL., APPELLANTS.

FILED JANUARY 24, 1900. No. 9,112.

1. **Witnesses:** EVIDENCE. Witnesses should state facts, and not mere conclusions.

2. **Executions:** LIST OF LIENS: CERTIFICATION: OFFICER'S SEAL. Section 491*c* of the Code of Civil Procedure requires certain designated officers to certify, under their hands and official seals, the amount and character of all liens appearing of record against

real estate levied on which are prior to the lien of such levy. Some of the officers designated in said statute are by law required to have an official seal, others are not. *Held*, That it was not the intention of the legislature that such officers as are not by law required to have an official seal shall certify to such liens under an official seal, but that a certificate under the hands of such an officer is sufficient.

3. ———: ———: ———. Under a statute requiring an officer to certify to the "character" of such liens, it is sufficient if their general character be stated in such certificate.

4. **Mortgage-Foreclosure:** SUMMONS: INDORSEMENTS. On foreclosure of mortgage it is not necessary that the summons should have indorsed thereon the amount for which plaintiff seeks to recover, to entitle him to a deficiency judgment.

5. **Conflicting Evidence:** REVIEW. A finding on conflicting evidence will not be disturbed on review.

APPEAL from the district court of Douglas county. Tried below before POWELL, J. *Affirmed.*

Lane & Murdock and *W. A. Saunders*, for appellants.

Charles W. Haller, contra.

NORVAL, C. J.

This suit was commenced in the district court of Douglas county by Clinton Orcutt, against Polsley, Bingham and Homan and others, to foreclose a mortgage upon certain lots situate in the city of South Omaha. The defendants named appealed to this court from an order confirming the sale, and from a judgment rendered for a deficiency remaining after applying such proceeds of such sale to the payment of the amount found due on the debt. The summons was indorsed only, "Foreclosure of mortgage." On the appraisement of the property sold, the sum of about $800 was deducted from its appraised value, on account of delinquent taxes, a large part of which are claimed by defendants to be invalid local improvement assessments. The property sold for two-thirds of the appraised value, after deducting the amount of said taxes. The principal errors urged by said Polsley, Bingham and Homan are, the deducting by the appraisers

from the value of said real estate the amount of said taxes, and the rendering of the deficiency judgment under the summons so indorsed. It is further urged that the appraisement of said real estate was far below its fair market value.

As to the first objection, we would say that we fail to find any evidence of record which in any manner tends to establish the fact that any of the taxes so deducted were assessments for local improvements, either valid or invalid. The certificate of the county treasurer characterizes them merely as delinquent taxes for certain years. An affidavit is on file, to which this court is referred as containing evidence that certain local improvement assessments were by the county treasurer included in the amount of taxes designated in said certificate; but, without discussing the proposition whether a matter of record can be established by the mere affidavit of a person who has examined such record, we are convinced, on a careful reading of this affidavit, that it consists of conclusions wholly, which must be disregarded, and that the only evidence of record touching the character of these liens is the certificate of the county treasurer.

The sufficiency of this certificate is, however, questioned by said defendants, on the ground that it is not made under the official seal of the county treasurer, they claiming that it is so required to be made by the statute. It is true that section 491c of the Code of Civil Procedure does require the county clerk, the clerk of the district court, the county treasurer and the treasurer of the village or the city wherein real estate sold under legal process is situate to certify, under their hands and official seals, the amount and character of all liens existing thereon, which are prior to the lien sought to be foreclosed, as the same may appear of record in their respective offices. It will be noted that some of the officers named in the statute are required by law to have an official seal, while others are not so required. It would seem to be a very reasonable interpretation of the stat-

ute to construe it, which we do, as being the intention of the legislature that such officers mentioned therein as the law required to have an official seal should certify under seal, while those whom the law does not require to have a seal should certify under their hands only, as was done by the treasurer in this instance. It is not presumed that the legislature intended that an officer should do what it is impossible for him to perform. Therefore, the manner of certifying to these liens by the county treasurer was correct, and constituted no error.

It is also urged that said certificate fails to satisfy the aforesaid statute, in that the character of the lien is stated only generally, as, taxes or delinquent taxes for certain years, stating the amount of such taxes for each year. We think that it is sufficient to state their character, as was done in this instance, as that they were for taxes for certain years, and we fail to find any error in the treasurer's certificate in that respect.

It is further objected that the court below erred in rendering a deficiency judgment against the makers of the mortgage, for the reason that the summons was indorsed only "Foreclosure of mortgage," and that no indorsement of the amount for which plaintiff sought to take judgment appeared on said summons. This was not an action for the recovery of money only, and the summons was, therefore, not deficient because it contained no indorsement of the amount sought to be recovered.

It is further contended that the property sold was appraised at less than its fair market value. There are on file affidavits of persons who testified to a higher value than that fixed by the appraisers, also affidavits of others who testified to a lower value, and we are not disposed to disturb the finding of the lower court in favor of the appraisement on evidence thus conflicting. We find no error in the record, and the judgment of the lower court is, therefore,

AFFIRMED.

WESTERN SEED & IRRIGATION COMPANY V. ROBERT H. MORTON.

FILED JANUARY 24, 1900. No. 9,127.

Pleading: SUFFICIENCY: REVIEW: TRANSCRIPT. An assignment of error relating to the sufficiency of a petition can not be considered, where a copy of the pleading is not included in the transcript.

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

Joel W. West, for plaintiff in error.

Byron G. Burbank and *Lake, Hamilton & Maxwell, contra.*

NORVAL, C. J.

This proceeding was instituted in this court to review a decree of the district court of Douglas county. The transcript consists merely of a copy of the decree. A reversal is asked on the sole ground that the petition of the plaintiff below does not state a cause of action. As a copy of the pleading assailed has not been brought to this court, the decree must be

AFFIRMED.

CITIZENS STATE BANK V. J. A. PENCE ET AL.

FILED JANUARY 24, 1900. No. 9,133.

1. **Appeal to District Court:** PLEADINGS. On appeal to the district court a plaintiff is not required to state his cause of action in the same language in which it was pleaded in the court from which the appeal was taken. It is sufficient that the identity of the cause of action is preserved.

2. **Pleading:** ANSWER: DEMURRER. The filing of an answer after a special demurrer to the petition is overruled is a waiver of an exception to the decision of the court on the demurrer.

3. **Principal and Agent:** RATIFICATION. A principal must adopt the unauthorized contract of his agent as a whole, or not at all. He can not adopt the portion that is beneficial and reject the remainder.

4. **Ultra Vires:** PLEADING. The defense of *ultra vires* is not available under a general denial.

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

J. R. Hanna, for plaintiff in error.

Ganoe & Howard, contra.

NORVAL, C. J.

Mat S. Good was charged by the Citizens State Bank of Greeley Center with having disposed of certain chattels which he had mortgaged to the bank, and then absconded from the state. Subsequently Good was located in Faulkner county, in the state of Arkansas, and the bank procured to be issued by the executive of this state requisition papers for the arrest and return to Nebraska of the said Good to answer the crime of disposing of mortgaged chattels, and procured one James P. Paxton, a resident of Greeley county, to be appointed, and named in the requisition papers as the special agent of the state to bring Good back from Arkansas. Pursuant to such appointment, Paxton went to Conway, Faulkner county, in April, 1891, and, in the attempt to arrest Good by the deputy sheriff of that county, Good shot and killed Paxton. The sheriff of Faulkner county telegraphed the facts to the bank; and inquired what should be done with the remains of Paxton; and received in answer thereto a telegram stating: "Forward the remains here immediately. Write full details. Is Good arrested?" Thereupon the sheriff of Faulkner county went to J. A. Pence and J. D. Slade, undertakers at Conway, and delivered them said telegram from the bank, and procured them to take charge of the remains and prepare the same for shipment to said bank. The express company refused

to receive the remains of Paxton unless placed in a metallic casket, so such a casket was furnished by the undertakers, and the body, after being properly prepared, was placed therein and shipped by the undertakers by express to the Citizens State Bank of Greeley Center, which paid the express charges thereon and received the remains on their arrival at that place. The bill of the undertakers, amounting to $128.60, the bank refused to pay; and this action to recover the same was instituted in the county court, where the bank recovered judgment. On appeal to the district court by the plaintiffs they obtained judgment for the full amount of their claim, with interest. The bank has brought the cause here for review.

In the district court the defendant interposed a motion to strike from the petition certain paragraphs therein, for the reason they set forth a new or separate and different cause of action from the one pleaded by the plaintiffs in the county court, which motion was sustained. Plaintiffs subsequently filed an amended petition, which was likewise assailed by a motion to strike out certain allegations contained therein, which motion was denied; and the first complaint made in this court relates to said ruling. The cause of action stated in the amended petition was identical with that declared upon in the county court, namely, on an account for a casket, one suit of clothes, a suit of underwear and for services in embalming the body of Paxton. The facts were pleaded with more particularity in the district court than in the court from which the appeal was prosecuted; nevertheless, the identity of the cause of action was fully preserved. The plaintiffs were not required to state their cause of action in the district court in the same language as it was set forth in the county court.

Another argument advanced that the sustaining of the motion to strike out a portion of the original petition was *res judicata* as to the motion directed against the amended petition, since the averments assailed in the

two pleadings were substantially the same. The contention is not well taken. Both decisions were made by the same trial judge, and he had the undoubted right to change his ruling in case he was convinced he had committed an error in disposing of the first motion.

The defendant demurred to the amended petition on the grounds following: 1. The plaintiffs have no legal capacity to sue. 2. The facts stated in said amended petition are insufficient to constitute a cause of action. The demurrer was overruled; thereupon the defendant answered by a general denial. The first ground of demurrer was waived by filing an answer to the merits. See *Cox v. Peoria Mfg. Co.*, 42 Nebr., 660. The amended petition, as a cause of action, averred the facts already detailed in this opinion. It is true it was not pleaded specifically that the directors of the bank authorized the incurring of the indebtedness; but such averment was wholly unnecessary, since it was alleged, in substance and effect, that the debt was created at the special instance and request of the bank. The telegram to the sheriff in Arkansas constituted him the agent of the bank in the matter, and was sufficient authority to him to procure the remains of Paxton to be properly prepared and shipped to Nebraska. The amended petition stated a cause of action against the bank, and the evidence adduced on the trial fully sustained the averments therein contained. It is argued that the telegram contained no suggestion as to whom the remains should be sent. The fair and only inference to be drawn from the message is that the remains were to be shipped to the bank, and it would pay the charges. The bank received the remains on their arrival in Greeley Center and paid the charges of the express company for transportation. It is immaterial that Paxton was in Arkansas as the agent of the state; and had the bank not authorized the sheriff of Arkansas to have the remains of Paxton shipped to this state, the bank would not have been legally bound for the expense incurred. But it directed the debt to be

created, and it can not escape liability on the ground that Paxton had been commissioned by the governor of Nebraska to receive the fugitive from the officers of Arkansas. Nor is it important that the legislature of this state made an appropriation for the relief of the widow and orphan children of Paxton. Such appropriation did not pay the debt of the plaintiffs which the defendant incurred.

In argument, it is said the cashier of the defendant had no power to send the telegram in question. The sheriff and plaintiff acted without notice of that fact, and the bank received the remains. It is a familiar rule that a principal must adopt the acts of his agent as a whole. He can not adopt what is beneficial and reject the remainder. This doctrine should be applied against the bank.

It is also urged that the contract was *ultra vires*. This defense was not pleaded, and was unavailable under a general denial. The judgment is right, and no reversible error appearing in the record it is

AFFIRMED.

A. HEATER V. JAMES W. PEARCE ET AL.

FILED JANUARY 24, 1900. No. 9,096.

1. **Officers:** FAILURE TO APPROVE STAY BOND. An officer, charged with approval of stay bonds, who does not comply with the statutory requirements, is guilty of a breach of official duty.

2. ———: ———: ACTION ON BOND. In such case the judgment creditor may maintain an action against such officer on his official bond for the recovery of such damages as he may have sustained.

3. ———: STAY BOND: LIABILITY OF SURETIES. Sureties on a stay bond can not, in an action against them on such bond, plead their lack of legal qualification to become sureties on such bond.

4. ———: ACTION ON BOND: DAMAGES. In an action against an officer on his official bond for damages for wrongfully approving a stay bond, where no actual damage is proved, the plaintiff is entitled to a judgment for nominal damages and costs.

5. **Nominal Damages:** HARMLESS ERROR. The failure to award nominal damages is not reversible error, where it does not affect a substantial right or entitle the plaintiff to costs.

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

Daniel F. Osgood and *R. D. Sutherland,* for plaintiff in error.

H. H. Mauck, S. A. Searle and *G. W. Stubbs, contra.*

SULLIVAN, J.

The plaintiff, A. Heater, being the assignee and owner of a judgment recovered by Heater & Keim against F. P. Bonnell for $344.15, instituted this action against the defendants in error as sureties on the official bond of James W. Pearce, who was clerk of the district court of Nuckolls county during a portion of the year 1890. The action was grounded on the alleged misconduct of Pearce in approving an undertaking given to stay the execution of said judgment. A trial of the cause resulted in a decision in favor of the defendants. The plaintiff brings the record here for review.

The principal defense to the action was that one of the sureties on the stay bond was insolvent, and was not a freeholder, and that, therefore, the right to enforce the judgment against Bonnell by execution was never suspended. With certain exceptions, not necessary to be here noticed, the statute gives a stay of execution on all judgments for the recovery of money only, in case the defendant "shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering the judgment until paid." See Code of Civil Procedure, sec. 477*c*. Section 477*d* of the Code of Civil Procedure is as follows: "Officers approving stay bonds shall require

affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment." Without complying with the requirements of this section, Pearce approved the stay bond tendered in behalf of Bonnell. In doing so he was, we think, clearly guilty of a breach of official duty due from him to the plaintiff. The bond was in due form; it was signed by the requisite number of sureties, and was apparently effective to prevent the collection of the judgment by execution or otherwise. That there was a defect in the proceeding which would have entitled the plaintiff to an order quashing it, was not disclosed by the record. It was the duty of the clerk to ascertain, in the mode prescribed by the statute, whether the sureties on the undertaking were sufficient sureties, and whether they were freeholders of Nuckolls county. The judgment plaintiff was justified in assuming that this duty had been performed and that the proceeding was operative. That the plaintiff was, by the official misconduct of Pearce, prevented from issuing execution at once to enforce his judgment against Bonnell, seems to us hardly debatable. The proceeding to obtain a stay was not void; it was merely irregular, and, therefore, capable of amendment. See *State v. Russell*, 17 Nebr., 201. By it Bonnell lost the right of appeal; and his sureties could not, of course, plead their lack of qualifications as a defense to an action against them on the bond. It has often been held that a strict compliance with the law is necessary to entitle a judgment defendant to a stay of execution, but we know of no case holding that a stay bond, in due form, is void and incapable of producing any legal result because one of the sureties did not, at the time of the signing, possess the kind or quantity of property required by the statute. Discussing a similar question, Sanderson, J., in *Murdock v. Brooks*, 38 Cal., 596, said: "Whether the undertaking was accompanied by the affidavit of the sureties does not appear upon the

face of the complaint, but it does appear from the facts there stated that further proceedings were never taken upon the judgment, and that Brooks had the full benefit of a stay pending his appeal. Such being the case, can he or his sureties be heard to say that the undertaking is void because all the forms of the statute, through their omission, were not complied with? It seems to be settled that the failure of the sureties to justify, if such was the case, constitutes no defense. This rule is deduced from the proposition, which no one disputes, that a party may waive a compliance with statutory conditions which are merely directory and intended solely for his benefit. The provisions of the statute which require the residence and occupation of the sureties to be stated, the penalty of the undertaking to be double the amount of the judgment, and the affidavit of the sureties that they are worth the amount specified in the undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution, are directory, and a compliance therewith may be waived by the respondent either expressly or impliedly by failing to take any advantage of their non-observance and treating and accepting the undertaking as sufficient." We entertain no doubt that the act of Pearce in approving the stay bond was a breach of official duty, for the consequences of which his sureties must answer. See extended note to *Babcock v. Carter*, an Alabama case, reported in 67 Am. St. Rep., 193. But it is contended that plaintiff has not been damaged, because Bonnell was insolvent, and had no property which might have been reached by execution or other process at any time after the judgment was recovered. The general finding of the court in favor of the defendants includes, doubtless, a finding that no actual damage resulted from the wrongful act of Pearce; but we think, nevertheless, that the plaintiff was entitled to a judgment for nominal damages and costs. It has been sometimes said that the failure to award nominal damages is not reversible error, because it does not af-

fect a substantial right. But the rule is otherwise where a judgment for such damages will result in the establishment or preservation of some right, or will entitle the plaintiff to costs. See 1 Sutherland, Damages [1st ed.], p. 13; *Kenyon v. Western Union Telegraph Co.*, 100 Cal., 454; 8 Am. & Eng. Ency. Law [2d ed.], 558 and cases in note 2. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WORLD MUTUAL BENEFIT ASSOCIATION V. ADA WORTHING.

FILED JANUARY 24, 1900. No. 9,088.

1. **Sufficiency of Evidence:** REVIEW. A verdict supported by competent evidence will not be set aside, unless clearly or palpably wrong.
2. **Instructions:** REVIEW. An instruction, the giving of which is not assigned as error, is the law of the case, whether right or wrong.
3. ———: JURY. The jury are bound to follow the instructions given by the court, and act on them in making up their verdict.
4. **Pleading:** DEFENSE. A defense not pleaded can not be considered in the decision of the case.
5. **Instructions:** ASSIGNMENTS OF ERROR: REVIEW. An assignment of error directed against a group of instructions will be considered no further than to ascertain that one of the instructions complained of was properly given.
6. **Evidence:** ASSIGNMENTS OF ERROR: REVIEW. An assignment of error that the district court erred in refusing to admit the evidence of a certain witness will be overruled, if the record shows that a portion of the evidence was, in fact, admitted.

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

James W. Carr, for plaintiff in error.

T. J. Mahoney, contra.

SULLIVAN, J.

This action was instituted by Ada Worthing against the World Mutual Benefit Association to recover the sum of $1,000, claimed to be due on a policy of life insurance issued by the defendant to Zeno Worthing. The insurance was originally taken out for the benefit of Vina Worthing, the wife of the insured, but, for reasons not necessary to mention, the old policy was, in June, 1894, superseded by a new one in which the plaintiff was designated as the beneficiary. The trial of the cause to a jury in the district court of Douglas county resulted in a verdict and judgment against the defendant. One of the contentions of counsel for the company is that the policy was obtained by means of false representations made by Zeno Worthing in regard to the condition of his health at and before the time of applying to the defendant for insurance. This question was fairly submitted to the jury under proper instructions, and their finding, being supported by competent evidence, and not being clearly and palpably wrong, must be permitted to stand.

Another contention is that the policy lapsed on account of a failure on the part of the insured to pay an assessment which became due on May 15, 1894. Upon this point the court instructed the jury as follows: "You are instructed that by the issuance of the policy sued on, the defendant waived all of the objections on the ground of failure to pay promptly an assessment due prior to the issuance of said policy, and you are further instructed that any default in payment, or failure to make payment within the time required, prior to the actual issuance of the policy sued on, is wholly immaterial for the purposes of this case and you should not consider any such default in the making up of your verdict." The giving of this instruction is not assigned as error, and we have, therefore, no occasion or authority to review it for the purpose of determining whether it is right or wrong.

It became the law of the case, and the jury were bound to follow it and act on it in making up their verdict. COBB, C. J., discussing this question in *Omaha & R. V. R. Co. v. Hall*, 33 Nebr., 229, used this language: "The fourth and sixth instructions given by the court at the request of the defendant, if followed by the jury, they could not find for the plaintiff upon the theory first above stated, upon the evidence in the case. It is not necessary to decide, nor do I, whether the law is correctly given in the said instructions. It is the duty of the jury in all cases to follow the instructions given them in charge by the court, and if they do not do so the verdict should be set aside and a new trial ordered." To the same effect are: *Aultman v. Reams*, 9 Nebr., 487; *Limburg v. German Fire Ins. Co.*, 90 Ia., 709; *Howell v. Pugh*, 25 Kan., 96; *Irwin v. Thompson*, 27 Kan., 643; *Ryan v. Tudor*, 31 Kan., 366; *Cunningham v. Magoun*, 18 Pick. [Mass.], 13.

A further contention of the defendant is that Zeno Worthing failed to make prompt payment of assessments for July and August, 1894, and that, by reason of such failure, the new policy lapsed, and was never reinstated. This defense was not pleaded, and it was, therefore, not a material issue in the case. The only default of payment relied on in the answer as constituting a forfeiture was the one which occurred on May 15, 1894, while the old policy was outstanding. But, if such an issue had been raised by the pleadings, the general finding in favor of the plaintiff would still have to be sustained, under the evidence and the law as stated in the instructions given by the court at the instance of the plaintiff. Under these instructions the jury might have found that the defendant did not give due notice to the insured of the time when the July and August assessments were payable; and they might also have found that, if the policy had lapsed, the conditions required for reinstatement had been fully complied with.

Whether some propositions laid down in the special charge of the court to the jury were too favorable to the

plaintiff we can not determine, since the giving of the instructions complained of are assigned *en masse* in the petition in error. We are satisfied that all the instructions given at the plaintiff's request are not erroneous, and beyond that point we can not inquire, under the settled practice of this court. See *Diers v. Mallon*, 46 Nebr., 121; *Kaufmann v. Cooper*, 46 Nebr., 644; *McCormal v. Redden*, 46 Nebr., 776; *Oltmanns v. Findlay*, 47 Nebr., 289; *Fairfield v. Kern*, 48 Nebr., 254; *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Nebr., 321; *Flower v. Nichols*, 55 Nebr., 314; *Kloke v. Martin*, 55 Nebr., 554; *McIntyre v. Union P. R. Co.*, 56 Nebr., 587; *Missouri P. R. Co. v. Palmer*, 55 Nebr., 559. The instructions in question must, therefore, so far as they go, be regarded as the law of the case.

It is finally insisted that the judgment should be reversed, because of the exclusion of the testimony of Vina Worthing, the widow of the deceased. Only part of the testimony of this witness was excluded, and, under repeated decisions of this court, the assignment of error is not sufficient to warrant a review of any particular ruling. See *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Nebr., 380; *Sigler v. McConnell*, 45 Nebr., 598; *Kearney Electric Co. v. Laughlin*, 45 Nebr., 390. The judgment of the district court is

AFFIRMED.

WALTER A. WOOD HARVESTER COMPANY V. JOHN DOBRY.

FILED JANUARY 24, 1900. No. 9,110.

1. **Bailment:** CONVERSION. A bailee who fails, or refuses, to surrender trust property to the owner in accordance with the express or implied terms of the bailment is liable in an action for conversion, unless he can show a prior lawful seizure of the property under judicial process against the owner, or some other legal and valid excuse.

2. **Summons:** CONSTRUCTIVE SERVICE: JUDGMENT. A summons served constructively on a resident of the state, who has neither ab-

sconded nor concealed himself with intent to defraud creditors, or to avoid the service of process, does not confer jurisdiction over the person of the defendant, nor justify the rendition of a judgment condemning his property.

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

John W. Templin and *Frank J. Taylor*, for plaintiff in error.

SULLIVAN, J.

John Dobry sued the Walter A. Wood Harvester Company for the conversion of a quantity of binding twine, and recovered judgment against it in the district court of Howard county for the sum of $449.63. The property in controversy belonged to the plaintiff, and was originally turned over by him to the Walter A. Wood Mowing & Reaping Machine Company, to be kept in store in the city of Omaha. This company placed the twine in the immediate custody of one T. C. Northwall, and afterwards withdrew from business in Nebraska. Northwall brought an action against Dobry before a justice of the peace of Douglas county, and caused the twine to be seized under an order of attachment, and sold for the satisfaction of his claim. The theory of the defendant in this case is that it is not liable, because (1) it never had the actual possession of the property; and (2) Dobry's title and right of possession were extinguished by the attachment proceeding. There was ample evidence before the jury to warrant a finding that the defendant had succeeded to the trade and business of the Walter A. Wood Mowing & Reaping Machine Company in this state, and that it had, as such successor, exercised dominion and authority over plaintiff's property. The defendant's manager, Mr. J. D. Van Buren, testified that his company had a claim against the twine for freight and storage. He also said that while the property was not directly in the possession of the defendant, it was under

its control. It further appears that when its claim was paid, it gave an order for the surrender of the property to Mr. Dobry. Northwall refused to comply with the order, but grounded his refusal on the fact that he had caused the property to be taken under the writ of attachment. He did not deny having held it under the authority of the defendant.

The defendant being in the possession of plaintiff's property, it was its obvious duty to surrender it on demand and payment of just charges, unless there had been a prior lawful seizure of it under judicial process issued against the owner. See 3 Am. & Eng. Ency. Law [2d ed.], 756. We are entirely satisfied that there was no such seizure. In the first place, it is clear from the evidence that the jury were justified in finding that there was no effective levy of the order of attachment; and, in the second place, it appears, beyond controversy, that the attempted levy was the result of Northwall's wrongful conduct, and that it neither disturbed his actual possession nor altered, in any manner, plaintiff's right in the property. Dobry did not reside in Douglas county, nor was he served with summons therein. He was not a non-resident of the state; neither had he absconded nor had he concealed himself with the intent of defrauding his creditors, or for the purpose of avoiding the service of a summons. There was, therefore, no authority to make service upon him by publication; and the attempt of the justice to acquire jurisdiction by proceeding under section 932 of the Code of Civil Procedure was manifestly abortive. We are not aware of any authority for constructive service of summons in actions on contract, except that contained in section 77 of the Code of Civil Procedure. See Maxwell, Practice in Justices' Courts [4th ed.], p. 202. The commencement of the action in Douglas county was wrongful. See Code of Civil Procedure, sec. 60. Every step taken in the prosecution of the case was wrongful. The judgment in favor of Northwall was void, and the purchase by him of the twine,

when sold under the special execution, was without legal force or effect. The defendant had at no time a valid excuse for refusing to account for the property of the plaintiff which it had received from its predecessor and held in trust. The judgment is right, and is

AFFIRMED.

MCCORD-BRADY COMPANY ET AL. V. JOHN R. MONEYHAN.

FILED JANUARY 24, 1900. No. 9,128.

1. **Contracts:** EXTRINSIC EVIDENCE: QUESTION FOR JURY. Where extrinsic evidence regarding the effect intended to be given an equivocal instrument is contradictory, the question should be submitted to the jury.

2. ——: ——: INSTRUCTIONS: REVIEW. An instruction to the effect that a waiver of provisions contained in a written instrument must be proved by evidence which is clear and unequivocal, is erroneous.

ERROR from the district court of Burt county. Tried below before FAWCETT, J. *Reversed.*

McCabe, McGilton & Rach, Edward A. Peterson and *H. H. Bowes,* for plaintiffs in error.

M. R. Hopewell, contra.

SULLIVAN, J.

On April 10, 1896, John R. Moneyhan executed to McCord-Brady Company a demand note for $194.31 and a chattel mortgage on his stock of merchandise in the village of Craig. Earl Stanfield, an agent of the mortgagee, took immediate possession of the mortgaged property, and, with Moneyhan's consent, proceeded to sell the same in the usual course of trade. On April 13, 1896, Charles H. Miller, another agent of McCord-Brady Company, went to Craig, and, with the assistance of Moneyhan, made an invoice of the stock. A day or two

after the invoice was completed Miller sold the property to H. H. Smith & Co. for $209. This action was then instituted by Moneyhan against McCord-Brady Company and H. H. Smith & Co., on the theory that the sale was unlawful and amounted to a conversion of plaintiff's property. The principal question in dispute is whether the sale made by Miller was authorized. The oral testimony bearing upon this point is conflicting; but defendants produced at the trial documentary evidence which they claim is conclusive in their favor. The writing upon which they rely is as follows:

"CRAIG, NEB., April 13, 1896.

"This is to certify that according to the tenor of one certain mortgage given by me to McCord-Brady Company I grant and give unto Charles H. Miller, their agent, the full possession and right to sell the stock of goods described in said mortgage, the proceeds of said sales to apply to the discharge of their claim. Signed this 13th day of April, A. D. 1896. J. R. MONEYHAN."

We can not agree with counsel for the defendants that this document, standing alone, necessarily implies a waiver by Moneyhan of his right to have the goods sold according to the terms of the mortgage. The course pursued by the trial court was correct. The instrument was properly submitted to the jury to be read in the light of the circumstances surrounding the parties at the time of its execution. The extrinsic evidence being contradictory, the question could not have been properly determined by the court.

The court instructed the jury as follows: "You are further instructed that to justify the private sale of the stock of goods by McCord-Brady Company to H. H. Smith & Co., the waiver by Moneyhan of the conditions of sale expressed in the mortgage must be clear and unequivocal, and must be established by a preponderance of the evidence." The giving of this instruction was prejudicial error. The gist of the action being the alleged

wrongful sale made by one of the defendants to the other, their liability depended entirely on whether Moneyhan had waived his right to the notice for which the mortgage provided. Conceding that the burden was on defendants to establish such a waiver, we know of no rule requiring them to do more than produce the greater weight of the evidence upon the issue. The language employed by the court was calculated, we think, to impress the jury with the idea that a bare preponderance in favor of defendants would not justify a finding in their favor. Since there is to be another trial, it ought, perhaps, to be further remarked that the court, in receiving expert evidence of the value of the goods, went to the utmost limit of its discretion, and, perhaps, farther than it should have gone. The judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

ISAAC S. LEAVITT V. ELLEN E. J. BELL ET AL., APPELLANTS, AND IRA B. COOK, ADMINISTRATOR, APPELLEE.

FILED JANUARY 24, 1900. No. 11,063.

1. **Law of the Case:** SECOND APPEAL. The determination of questions presented to this court, in an apppellate proceeding, becomes the law of the case, and, ordinarily, will not be re-examined when the cause is again brought up for review.

2. **Tax Liens:** INTEREST. Interest due on delinquent taxes constitutes part of the tax lien on property upon which the original tax is a charge.

3. **Liens:** JUNIOR INCUMBRANCERS. A junior incumbrancer who, to protect his lien, takes up a superior lien is entitled to interest from the date of payment on the entire sum paid to discharge such superior lien.

4. **Review:** MISTAKES IN COMPUTATION. Where a decree brought here for review is found to be erroneous, because of a mistake in computation, the error will be corrected in this court, or the cause will be remanded with direction to the district court to render the proper judgment.

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

Howard B. Smith, for appellants.

William D. Beckett and *J. W. Woodrough, contra.*

SULLIVAN, J.

When this cause was before us on a former appeal, the judgment was reversed, with instructions to the district court to set aside the original decree, and render a new one in conformity with the views expressed in the opinion. See *Leavitt v. Bell,* 55 Nebr., 57. It is now claimed that the judgment pronounced in obedience to the mandate is erroneous, because the amount paid by the mortgagee in satisfaction of the tax liens against the several lots should not have been added to the mortgage debt, and thus made a general charge against the entire property. This question was, on the first appeal, decided adversely to the contention of appellants. That decision is the law of the case, the rule being: "The settled doctrine of this court is that the determination of questions presented to this court in reviewing the proceeding in a cause in the district court becomes the law of the case for all subsequent proceedings, and, ordinarily, will not be made the subject of re-examination." See *Ripp v. Hale,* 45 Nebr., 567; *Coburn v. Watson,* 48 Nebr., 257; *Fuller v. Cunningham,* 48 Nebr., 857; *Omaha Life Ass'n v. Kettenbach,* 55 Nebr., 330; *Mead v. Tzschuck,* 57 Nebr., 615; *Hayden v. Frederickson,* 59 Nebr., 141, 80 N. W. Rep., 494; *Home Fire Ins. Co. v. Johansen,* 59 Nebr., 349, 80 N. W. Rep., 1047.

Appellants also contend that the decree is erroneous, because it allows Cook interest upon the amount paid by him to Leavitt as accrued interest on the tax-liens. In this particular the court committed no error. The doctrine is established by abundant authority that the owner of a real estate mortgage has the right, in order

to protect his security, to pay delinquent taxes upon the property covered by the mortgage. And it is equally well settled, we think, that the entire amount paid to redeem the premises becomes, in equity, a part of the mortgage debt. The interest due upon delinquent taxes is as much a part of the tax-lien as is the sum charged in the first instance against the property. We have been able to discover neither reason nor authority for holding that a junior incumbrancer is not entitled to interest on the entire sum paid by him to discharge a senior lien. Direct authority upon the question is not at hand, but we refer, as in some measure sustaining our view, to *Butterfield v. Hungerford*, 68 Ia., 249; *Johnson v. Payne*, 11 Nebr., 269; Jones, Mortgages, secs. 77, 1134; Willard, Equity Jurisprudence, pp. 446, 448; 9 Ency. Pl. & Pr., 434. But while the amount found due Cook on account of money expended by him in redeeming from the tax sale is correct, we discover an error in computing the amount due on the mortgage according to its terms. The trial court found there was due on May 13, 1899, the sum of $10,900. The true amount then due was $10,248. The judgment is reversed, and the cause remanded with direction to the district court to render a decree correcting the error indicated. Aside from the amount due him on account of taxes, Cook is entitled to a decree for $6,000, with interest thereon at nine per cent per annum from July 1, 1891.

REVERSED AND REMANDED.

CALEB J. BAKER V. C. PRIEBE ET AL.

FILED JANUARY 24, 1900. No. 9,131.

Contract: BAILMENT: CONDITIONAL SALE. The written instrument, set out in the opinion, construed, and *held* to be a contract of bailment of personal property for hire, and not one of conditional sale or sale of personal property on condition.

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

The opinion contains a statement of the case.

Stevens & Cochran, for plaintiff in error:

The fundamental distinction between a bailment for hire and a conditional sale is that in the former the identical thing delivered, in the same or in an altered form, is to be restored, and the title is not changed; while in a sale there is no obligation to return the specific property, but the party receiving it is at liberty to return another thing of equal value, either in the form of money or otherwise. The relation of debtor and creditor is established for the value of the property, and the title to the property is changed. See *Sturm v. Baker*, 150 U. S., 312; *Chickering v. Bastress*, 130 Ill., 206; *Harrison v. Lenz*, 47 Ill. App., 170; *Kaut v. Kessler*, 114 Pa. St., 603; *Andrews v. Richmond*, 34 Hun [N. Y.], 20.

Personal property in the possession of a bailee is not liable to levy of attachment or execution for his debts; and he can not by sale and delivery convey any title to a purchaser. The principle of *caveat emptor* applies, and the bailor may replevy even from a *bona fide* purchaser. See *Kitchell v. Vanadar*, 12 Am. Dec. [Ind.], 249; *Emerson v. Fisk*, 19 Am. Dec. [Me.], 206; *Russell v. Favier*, 36 Am. Dec. [La.], 662; *Dunlap v. Gleason*, 93 Am. Dec. [Mich.], 231; *Burton v. Curyea*, 89 Am. Dec. [Ill.], 350; *Miller Piano Co. v. Parker*, 35 Am. St. Rep. [Pa.], 873; *McClelland v. Scroggin*, 35 Nebr., 537.

Clark & Allen, E. H. Wooley and *E. J. Murfin, contra.*

References: *Hine v. Roberts*, 48 Conn., 267; *Campbell Printing Press & Mfg. Co. v. Oltrogge*, 13 Daly [N. Y.], 247.

HOLCOMB, J.

The determination of this case hinges upon the proper construction to be given to the following contract:

"Contract for Rent of Goods from C. J. Baker, 307 South 6th Street, St. Joseph, Mo.

"C. Priebe, May 8th, 1895, the undersigned, agree to the following: We hereby rent from C. J. Baker, 307 South 6th street, St. Joseph, the following described property:

No.	Articles.	Size.	Quality.	Value of each.	Rent per month.	Total rent.
1	Wall tent.....	60x90	6½ oz. drill	$230.00	$90.00	
3	Wall tent	12x14	10 oz. duck	21.00		
1	Family tent.....	14x24	.....	30.00		
1	Refreshment.....	9x19	.....	17.00		
1	Marquette.....	12 ft.	.....	14.00		
2	Single gas lamps (outside)..	.....	.....	4.80		
2	Single gas lamps (inside) ..	.....	.....	2.15		
2	Double gas lamps (inside).	.....	.....	4.30	7.75	
1 doz.	S. H. cots, $6.00, 1 table, $1.75.....	.....	.....	$323.25 7.75		
				$331.00		

To be used for medicine business; to be used at various towns; to be shipped from St. Joseph, Mo., via St. Joseph and G. I. R. R.; to be returned from ..... via ..... on the .... day of ..... of 189..

"The conditions of this contract are:

"First. That the rent shall begin from the time of delivery from the store of C. J. Baker and continue until the above rented articles are returned and delivered to C. J. Baker again.

"Second. Should the above rented articles be detained longer than the above mentioned period, we agree to pay per for the extra time the goods are so delayed.

"Third. We further agree that the above mentioned goods shall not be packed or shipped when wet or damp,

and to pay all damages arising therefrom; the same to be charged against the undersigned.

"Fifth. We further agree to pay all damages caused by fire, storms, mildew, or other causes, including damages caused by marking, painting or otherwise defacing the above rented property; and to return the above mentioned property to C. J. Baker, in as good condition as when received, except so far as the same shall have suffered from reasonable use.

"Remarks.

"Signed,

C. PRIEBE,
"By GEO. W. WEBB, *Agt.*

"For value received, we hereby guarantee the above contract.

C. PRIEBE."

The property therein described was in the possession of, and being used by, the person signing the same, and others, in selling a quack nostrum—a "medicine fakir business," as counsel for defendants aptly term it. The property was attached for the debts of the individuals engaged in the business mentioned, and replevied by the plaintiff, who claimed the ownership thereof.

The trial court construed the contract as a conditional sale, and peremptorily instructed the jury accordingly. In our opinion, this view was erroneous. From a careful examination of the terms of the contract, we fail to discover any element in it from which it can be inferred that a sale upon any terms was intended by the parties when entering upon the contract. It has every evidence of a bailment for hire, and nowhere do we find any language which can be construed as an evidence of sale.. It is true, as stated by counsel, that the possession of the property is an indicium of ownership; but possession, in this instance, is equally consistent with their special property therein as bailees. It is urged that the rental for the property is so great as to indicate a conditional sale. We do not so regard it. This might be true, if, with other facts or circumstances, a sale could be in-

ferred; but, standing alone, the fact possesses no value for that purpose. If a person secures a profitable bargain in the hiring of personal property, no different application of legal principles is to be made on that account. It may be observed that the nature of the property, if in continuous use, is such as to make its utility short-lived. The contract entered into was no doubt regarded by the bailor as somewhat venturesome, and not free from hazard; and this fact may well have influenced the price per month. The form of the contract is such, in general terms, as would, ordinarily, be used by a person engaged in the business in which plaintiff appears to have been engaged, where the renting or bailment of his property was carried on as a part of the business. If the contract is to be construed as a conditional sale, what are its terms? When is the property to be paid for? What amount is to be paid? And, as between the parties to the transaction, when does the full title pass to the vendee? Under its terms, the bailee may return the property at any time he desires. He is under no obligation to keep it for any specified length of time, and is to pay rental for the time he retains it. He is under obligation to return the identical property mentioned in the contract, this being one of the chief distinguishing features between bailment and a conditional sale. In *McClelland v. Scroggin*, says Judge POST, the other judges concurring: "In every conditional sale or sale upon condition, the vendor can waive the condition and sue for the purchase price; this is one criterion." See 35 Nebr., 545. Applying the criterion given to the case at bar, it can not be said the vendor can sue for the purchase price, because none is given, nor are we able to determine it from anything that appears in the contract.

In *Harrison v. Lenz*, 47 Ill. App., 170, the following language is used: "When the identical article delivered is to be restored in the same or an altered form, the contract is of bailment, and the title to the property is not changed. But when there is no obligation to restore

the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return, and the title to the property is changed." The supreme court of Pennsylvania says: "An agreement by which one places his personal property in the hands of another, without any obligation of sale on the part of the one, or the right of purchase at any time in the other, is not a conditional sale but a bailment." See *Kaut v. Kessler*, 114 Pa. St., 603; also, *Dunlap v. Gleason*, 93 Am. Dec. [Mich.], 231. Nothing is shown by the parol evidence which changes the character of the written instrument; nor are there any circumstances disclosed surrounding the transactions inconsistent with the plain terms of the agreement. We know of no way, by any reasonable construction of the language used or inferences to be drawn therefrom, whereby the agreement can be regarded as a conditional sale of the property mentioned upon any terms whatsoever. It occurrs to us that it is not susceptible of such construction without reading into the contract that which it does not contain and omitting or disregarding much that it does. Entertaining the views as herein expressed, it follows that the judgment of the lower court must be reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED.

EDWARD H. MERRIFIELD V. FARMERS NATIONAL BANK OF PAWNEE CITY, NEBRASKA.

FILED JANUARY 24, 1900. No. 9,122.

1. **Attachment:** MOTION TO DISSOLVE: EVIDENCE: REVIEW. On the hearing of a motion to dissolve an attachment, error can not be predicated upon the admission of improper evidence. It is presumed that the trial judge, in arriving at a conclusion, considered only proper and competent evidence, and disregarded that which was improper.

2. ——: ——: ——: ——. In reviewing the ruling of a trial court on a motion to dissolve an attachment, this court will not reverse a decision thereon, if supported by competent evidence, because the evidence is conflicting, unless it is against the clear weight of evidence.

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

G. E. Becker and *J. W. Porter*, for plaintiff in error.

Lindsay & Raper, contra.

HOLCOMB, J.

In this action, founded upon a promissory note, an affidavit of attachment was filed, setting forth that the defendant "has property and rights in action, which he conceals and has assigned, removed, disposed of, and is about to dispose of his property, or a part thereof, with intent to defraud his creditors." A writ of attachment was issued and levied upon property as belonging to the defendant. The defendant moved to dissolve the attachment, one of the grounds therefor being that the statements alleged in the affidavit for an attachment were untrue. Upon the issue thus made evidence was submitted by affidavits, and the examination of witnesses in open court. The motion to dissolve was overruled, to which ruling exceptions were taken, and the property attached ordered sold to satisfy the judgment obtained in the action. The case is brought here to secure a reversal of the order of the trial judge overruling defendant's motion to dissolve the attachment.

Much of the brief of counsel for plaintiff in error is devoted to an argument of the alleged errors of the trial judge in the admission of evidence on the hearing of the motion to dissolve the attachment. It is unnecessary for us to discuss this phase of the case, further than to say that the trial judge is presumed, in arriving at a conclusion on the motion to dissolve, to have considered

only proper and competent evidence, and to have disregarded that which was improper; and, if the conclusion reached is supported by sufficient competent evidence, it will not be disturbed by this court. See *Enyeart v. Davis*, 17 Nebr., 228; *Willard v. Foster*, 24 Nebr., 213; *Bilby v. Townsend*, 29 Nebr., 220.

The remaining question to be considered is one of fact and not of law. Counsel argue earnestly that the transactions which led to the attachment proceeding were entered into in good faith by the defendant, and with no intent to defraud his creditors; and that his vendees purchased the property *bona fide*, and for a good and valuable consideration. It would be profitless for us to enter into an examination of each of the several transactions as disclosed by the evidence, or to endeavor to determine whether the several transfers of property were fraudulent as to defendant's creditors to the extent of avoiding the contracts evidencing the several transfers. The vendees are not parties to the suit, and their rights or interests in the property attached are not therein determined. We are of the opinion, from an examination of the evidence, that it is sufficient to warrant the conclusions reached by the trial judge; and the fact that it is conflicting, or that other views might be entertained regarding the motives actuating the defendant in the disposition of his property, would not be ground sufficient for a reversal by this court of the order sustaining the attachment. See *Mayer v. Zingre*, 18 Nebr., 458; *Johnson v. Steele*, 23 Nebr., 82; *Britton v. Boyer*, 27 Nebr., 522. Perceiving no error in the ruling complained of, the same is upheld and

AFFIRMED.

BURWELL IRRIGATION COMPANY V. WILLIAM D. LASHMETT.

FILED JANUARY 24, 1900. No. 9,094.

1. **Work and Labor:** PLEADING. A petition for the recovery, *quantum meruit*, for work and labor performed by the plaintiff for defendant, examined, and *held* to state a cause of action.
2. **Conflicting Evidence:** REVIEW. Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached.
3. **Estoppel:** PLEADING. An estoppel, to be available as a cause of action or defense, must be specially pleaded.

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

Charles A. Munn and *Guy Laverty*, for plaintiff in error.

A. M. Robbins and *C. I. Bragg, contra.*

HOLCOMB, J.

This action was begun in the lower court for a recovery, *quantum meruit*, for labor alleged to have been performed by defendant in error for plaintiff in error in the construction of an irrigation ditch. A jury was waived, and trial had to the court, which resulted in favor of the plaintiff below. Defendant brings the case here for review.

While several errors are assigned as ground for reversal, but two are argued in brief of counsel, and they only will be considered in determining the cause. It is urged that the petition does not state facts sufficient to constitute a cause of action, and that the finding of the trial court is not sustained by any competent evidence. The petition, in substance, alleges that the defendant is a corporation organized under the laws of the state of Nebraska; that during the month of November, A. D.

1894, the plaintiff had some conversation with one J. M. Morris in regard to work on an irrigation ditch then about to be dug by the defendants, and that on or about the 21st day of November, A. D. 1894, one James Wilson, who was then the engineer and in charge of the construction and excavation of said ditch, inquired of plaintiff if he would go to work on said ditch at once; that plaintiff replied that he would go to work on the following day with quite a force of men and teams, and that he, Wilson, then directed plaintiff where to commence work, and told plaintiff it was necessary he should get to work on the next day in order to save certain water rights of the company; that plaintiff then supposed he was going to work for the said J. M. Morris, and was not advised to the contrary until long afterwards, and alleges that said Morris had no contract on said ditch, but was employed by the defendant as its foreman; that plaintiff and the men under him worked nine and one-half days, and that the value of the work and labor was $194.87; that payment and deductions to the amount of $8.62 had been made, leaving still due for said work and labor the full sum of $186.25, and that afterwards, and on the 15th day of December, 1894, the said Morris, while in the employ of the said defendant, made and delivered to plaintiff a "time check," as follows:

"No. 6. BURWELL, NEBRASKA, Dec. 15, 1894.

"Burwell Irrigation Co., to J. M. Morris, Contractor. The bearer, Dug Lashmett, worked to the amount of $186.25 on the Burwell ditch, in full.

"Payable the 15th and 30th of each month.

"J. M. MORRIS, *Foreman.*"

That afterwards, and on the 15th day of December, 1894, he presented said time check to the said defendants, and said defendants then and there agreed to pay the same on the 15th day of the next month, saying that it could not then pay the same, because no estimate had been made on said work; that afterwards, on the 15th

day of January, 1895, and at other times, the time check was presented for payment, which was then and there refused, and that there is now due from the defendant to this plaintiff, on account of the work done and performed, over and above all just credits, the full sum of $186.25, for which, with interest, judgment is prayed. In construing the petition, for the purpose of determining its sufficiency, it is only necessary to ascertain whether it contains sufficient material allegations to state a cause of action against the defendant. It is the spirit of modern law to look to the substance rather than to the form of a pleading. If its form or manner of construction is objectionable because of indefiniteness or faulty arrangement, such defect may be reached by a proper motion. It is not for this court to hold the petition bad because it may not be a model in construction or artistic in arrangement. It is provided by the Civil Code that the petition shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without repetition. As we analyze the petition under consideration, it states that the plaintiff was employed by one Morris, acting as the foreman of the defendant, to perform the labor mentioned in his petition; that the engineer in charge of the construction of the ditch also procured him to begin work, and directed where the same should be done; that at the time he supposed he was working for Morris as contractor, but later ascertained that Morris had no contract, and that he was in fact acting as foreman for said company in the construction of its ditch, and that plaintiff performed the work for the company, and not for Morris as contractor, and that as foreman he gave plaintiff a "time check," or a statement of the amount due for work performed, which was accepted by the company, and payment thereof agreed to be made on the 15th day of the month following; that the work was reasonably worth the amount stated; that it was due from defendant to plaintiff, followed by a suitable prayer for relief. Entertaining, as we do, this view

as to a proper construction of the averments in the petition, it is evident that a cause of action is stated therein, and that the objection thereto is not well taken. In *Tessier v. Reed*, 17 Nebr., 105, it is held that a petition which alleges that the defendant is indebted to the plaintiff for a specific sum then due and payable for goods, wares, and merchandise sold and delivered by the plaintiff, states a cause of action. Applying the rule quoted to the case at bar, it may be said the petition herein alleges that the defendant is indebted to the plaintiff for the sum mentioned, which is the reasonable value for work and labor done and performed for the defendant by the plaintiff at its instance and request, through its foreman and engineer in charge, and, therefore, states a good cause of action. See, also, *Rathburn v. Burlington & M. R. Co.*, 16 Nebr., 441.

It is urged by counsel for plaintiff in error "that the court erred in finding in favor of the plaintiff and against the defendant, because said finding is not sustained by any competent evidence." The defendant, in its answer, avers that the services, which form the basis of plaintiff's action, were performed for J. M. Morris, and not for the defendant; that Morris had a contract with the defendant for excavating certain parts of its ditch at a stipulated price per yard; that said contract was afterwards abandoned, and full settlement made with Morris therefor; that said Morris was never its foreman, and was never in its employ except under said contract. It is thus made to appear that the only issue is in regard to the party for whom the services were rendered. There is no controversy as to the rendition of the services or the value thereof, or that the labor was performed in the construction of the ditch belonging to the defendant. The evidence is conflicting, and from it different conclusions may be reached, according to the credibility of the different witnesses and the relative importance attached to different portions of the testimony. The plaintiff testifies that he did the work under the direction of Morris

and the engineer in charge; that at the time he supposed Morris had a contract with the defendant company, and that he was working for Morris, but subsequently learned that Morris had no contract, and that the work was being done for the company; that at the time he settled for his work, he was given a "time check" by Morris as foreman, and presented the same to the company, and that payment was promised in thirty days, and that no objection was made to the order or "time check" by the officers of the company. The Morris mentioned in the pleadings was a witness, and testified relative to the matter in dispute as follows:

"Q. You may state, Mr. Morris, if, pending negotiations for this work of excavating defendant's ditches, you had had any conversations with the plaintiff, William D. Lashmett, in regard to working on that ditch under you.

"A. Yes, sir.

"Q. Had you completed your contract with him? That is the price?

"A. No, sir. I had not.

"Q. You may state, Mr. Morris, whether you sent Mr. Lashmett, the plaintiff, to work on the ditch.

"A. I did not.

"Q. You may state, if you know of your own personal knowledge, who did send him to work, if you know from him or any of the defendants.

"A. Yes, sir. I know from him and the defendants both.

"Q. You may state what you learned in regard to his employment from the defendants.

"A. Why, the defendants told me they put him to work. I afterwards put him to work in a certain section, I forget the number of it. He worked about a day and a half for me there. When I came up there the defendant told me he put him to work.

"Q. He told you he had put him to work?

"A. Yes, sir.

"Q. Which one of the defendants was it you had this conversation with?

"A. Wilson."

Wilson was the engineer in charge of the work. After testifying as to the abandonment of the contract under negotiations between the witness and the company, the witness further testifies as follows:

"Q. What was said in regard to their paying the men that were engaged in doing the work and the manner that was to be done?

"A. Well, he just said, we will have to make arrangements to get money and pay them.

"Q. Was anything said in regard to your giving time checks to the men as though they were still in your employ and what was to be done with them?

"A. Well, I tried to have some kind of permanent settlement with them in regard to what should be done, and there was a certain piece of work that I was not to have any account of, but I was to pay for that. I had this man Lashmett do it, and I paid him. I was told to go ahead and give time checks and gave lots of them. Some were for 3, 4, and 10 dollars, some were as high as $20 and $25. They were taken up and they gave their time checks in place and they paid in that way.

"Q. Now you say there was a small part of the work which Lashmett the plaintiff did, that you was to settle for?

"A. There was a small part that had never been finished and I had Mr. Lashmett do, he put in only a short time, a day and a half or such a matter and I gave him feed for the same. I had him work with a new machine.

"Q. You may state if you gave Mr. Lashmett a time check for the work he had done.

"A. I did.

"Q. You may state if this time check, as you call it, was given on your own behalf, or on behalf of the irrigation company.

"A. I gave it to the irrigation company, the same as all others; signed it as foreman."

The officers of the company testify that a contract was entered into between the company and Morris for the excavation of the ditch at a stipulated price per yard, and that the work done by the plaintiff was for Morris as contractor under his said contract. It also appears that the contract, soon after it was agreed upon, was abandoned by both parties thereto, and, by the consent of both, burned up. It is established by the evidence that, as a part of the contract which was being negotiated with Morris, a construction bond was to be given by him, which was never done, and the failure of which was one of the causes which led to its abandonment.

It is quite apparent, from a consideration of all the evidence bearing upon the question, that the contract was never, in fact, consummated. As a part of the contract, the construction bond mentioned was to be given, which was never done; and part payment, under its terms, was to be made in the securities of the company, and this was not acted upon or sought to be carried out by either of the parties. Whether the contract, as far as it had been consummated, was delivered, in a legal sense, is in doubt. The testimony all goes to show that the company never recognized Morris as a contractor, and made all payments for work, pending the consummation of the contract until its abandonment, direct to the persons rendering the services, and upon orders by Morris as foreman, similar to the one given to the plaintiff herein. It may fairly be concluded from the evidence that the arrangement between Morris and the company, during the time the contract was held awaiting the giving of the construction bond and before its abandonment, was of a temporary character, the company retaining control of the work and directing its prosecution until the contract with Morris was completed, intending to relinquish their control and supervision of the work to him when the contract had been fully executed.

The secretary of the company gave the following testimony:

"Q. Wasn't there thirty or forty or fifty of those checks issued by Mr. Morris?

"A. Possibly there was.

"Q. And were honored by the company.

"A. Yes, sir.

"Q. And as far as you know there was no objection to that form—no objection to his signing as foreman as far as you know?

"A. Not at a certain time there was not. I don't think there was.

"Q. During the time and up to the time you made the settlement with him, there wasn't any objection?

"A. I don't think there was.

"Q. Then the basis of the settlement was that you was to take the work, and pay for the work, and he was to turn over these tools, that is he was to turn over the use of the tools?

"A. Yes, sir.

"Q. And that made the settlement?

"A. Yes, sir.

"Q. And that was all there was to it?

"A. That was right.

"Q. That was all there was to it?

"A. Certainly."

The president testifies as follows:

"Q. State to the court what you know about it. [The contract.]

"A. There was a contract made with J. M. Morris for to excavate the canal from the head to the foot of it for so much per yard. He made the contract and the contract was made and signed by the company and J. M. Morris on condition that he had a bond signed for security to the company. The bond never was signed.

"Q. Mr. Brownell, I believe you say that all of the contracts that had been let by Morris, subcontracts that had been let by Morris, were in that settlement, assigned over to the company, the Burwell Irrigation Company, except the one that he was to work on himself?

"A. They may not have been in that settlement, but they were assigned over. The company assumed the contracts, all of them, with that exception, and that was no contract at all. He was simply working there by days work."

Wilson, the engineer, testifies as follows:

"Q. Do you know what terminated it? [The contract.]

"A. The failure of Morris to comply with the terms of his agreement and give a bond acceptable to the company.

"Q. Yes, and in regard to it. What became of it?

"A. I requested Mr. Morris to see if he could not get other bondsmen and proceed on the work on the contract, and he protested that he couldn't, that it would be impossible for him to do so and I told him that it would be advisable for him to try to keep the thing quiet for a day or two until he could ascertain whether he could get bondsmen or not, and I urged him to go ahead with the contract, because it was a remarkably good contract for the company, and being interested in the company I wanted the contract carried out. He made no effort and was very anxious to cancel the contract. I told him that the matter would have to be submitted to the board of directors and myself and Mr. John Doran were appointed a committee to make a settlement with Mr. Morris."

It is disclosed by the testimony that Morris was never paid any sum under his alleged contract, except possibly such sums as were paid directly to the persons performing the services, and that all such were paid except the plaintiff in this action. Much of the testimony bears on the question as to whether the plaintiff had said he would release the company, and look to Morris for compensation. When the contract with Morris was abandoned, it appears that more or less was said as to amounts owing for work prior to that time, and the amount due plaintiff received some attention, defendant insisting that plaintiff at that time agreed to release the company from liability and look to Morris. Whatever may be the

truth, there was no agreement founded upon any valid consideration. This is recognized by the defendant, who urges that the alleged agreement operates as an estoppel, and, therefore, precludes a recovery in this action. This evidence, if valuable for any purpose, discloses that the defendant was conscious of its liability for the labor performed by the plaintiff, and sought in this manner to relieve itself of responsibility. While it is urged that the alleged agreement to release the company estops the plaintiff from recovery in this action, it need but be stated that no estoppel is pleaded, and this contention is now unavailing. See *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Nebr., 749. Where the evidence is conflicting, and the judgment is supported by competent evidence, as we think it is in this case, under the uniform decisions of this court it should not be disturbed, though a different conclusion might have been reached. See *Hunt v. Huffman*, 41 Nebr., 244; *Ripley v. Larsen*, 43 Nebr., 687; *Blodgett v. McMurtry*, 34 Nebr., 782.

From the foregoing it is apparent that the judgment of the trial court should remain undisturbed, and the same is accordingly

AFFIRMED.

FRANK THOMPSON, EXECUTOR, ET AL., APPELLEES, V. EVALINE LA RUE ET AL., APPELLANTS.

FILED JANUARY 24, 1900. No. 9,092.

1. **Creditors' Bill:** DEFENSE: EVIDENCE. A judgment was obtained in the county court of the county in which the judgment debtors resided, and a transcript thereof filed in the district court, upon which execution was duly issued and returned *nulla bona*. Action in the nature of a creditors' bill was begun, and the debtors answering alleged and offered proof of ownership of a small tract of real estate of uncertain value in another county subject to execution. Evidence examined, and *held* insufficient to defeat plaintiffs' right of recovery in their equity action.

2. ———: ———: ———. *Held*, That the exhaustion of the remedy at law against an indorser on the instrument merged into judgment, and who was not a party to the judgment proceedings, is not essential to the maintenance of an equitable action against the judgment debtors.

3. ———: ———: ———. *Held*, That the judgment is sustained by the evidence.

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

Charles H. Sloan, for appellants.

F. B. Donisthorpe, contra.

HOLCOMB, J.

A judgment was obtained in the county court, in the county in which the judgment debtors resided, and a transcript thereof filed in the office of the clerk of the district court for the same county. An execution on the judgment was issued out of the district court, and delivered to the sheriff of the county, and by him returned indorsed: "After diligent search, I am unable to find anything on which to levy." The judgment creditors thereupon began proceedings, in an equitable action, to set aside an alleged fraudulent transfer of real estate and subject the same to the satisfaction of the judgment debt. The plaintiffs, appellees, pleaded in their petition the procurement of the judgment; that it remains in full force and unsatisfied; the issuance and return of the execution unsatisfied; the insolvency of the judgment debtors; and the alienation of the real estate, described in the petition, without consideration, and for the purpose of hindering, delaying and defrauding the creditors of the vendors. Although the sufficiency of the petition is challenged, we think it contains all necessary averments.

The appellants, the judgment debtors and their vendees, after generally denying the allegations of the petition, aver that the transactions complained of were made

in good faith, for a valuable consideration, and with no intention to defraud the creditors of the vendors. In addition to these general allegations, the judgment debtors, being husband and wife, in their separate answer, pleaded "that the real estate for which the original debt was contracted to the plaintiff is in the state of Nebraska, is subject to levy of execution, and said original indebtedness was secured by mortgage thereon." It may here be mentioned that the plaintiffs, in their equity action, sought to subject to the satisfaction of their judgment other real estate than that involved in the appeal proceedings, and that as to such property the court found the same to be a homestead, and not subject to fraudulent alienation. All parties acquiescing in the judgment of the court regarding such property, no further mention need be made of it.

With respect to the real property involved in this appeal the court finds the facts as follows: "The court further finds that on or about the 16th day of November, 1895, the defendant George A. La Rue, being joined by the co-defendant Evaline La Rue, conveyed by deed of general warranty to the said co-defendant Alettie Edmindson, the following described real estate, to-wit: Lot number 20 in W. V. Fifield's subdivision of lot number 15 in the village [now city] of Geneva, Fillmore county, Nebraska. The court also finds that said pretended conveyance was without consideration, and for the purpose of defrauding the creditors of the said George A. La Rue and Evaline La Rue, and hindering and delaying them in the collection of their debts; that said deed was fraudulent, and vested no title in and to said real estate in the said Alettie Edmindson; and that the said Alettie Edmindson took no title to said real estate by virtue of said warranty deed, and that the said George A. La Rue was the lawful owner of the said real estate at the time of the rendition of the aforesaid judgment. The court finds that by reason of the filing of the transcript of the said judgment in the office of the clerk of the district court

of said county, the judgment became and is a valid and subsisting lien on the aforesaid real estate. The court also finds that the said warranty deed from George A. La Rue and wife to the said Alettie Edmindson is a cloud on the title to said real estate, in fraud of the rights of this plaintiff as judgment creditor, and that plaintiff is entitled to have same removed of record." The court found due the plaintiffs on the judgment $532.80, with interest and costs, and rendered judgment annulling the transfer, decreeing the title of the property to be in the said George A. La Rue, and that the judgment is a valid lien against the same. From this judgment defendants appeal.

It will be observed that the defendants, vendees of the judgment debtors, tender no issue of ownership of property by their vendors in another county subject to execution, and as to them they can not now be heard to urge that the action in equity should abate until such property is taken by the ordinary process of execution and applied in satisfaction of the judgment, or some portion thereof. The judgment creditor, having had his execution duly issued and returned wholly unsatisfied, is entitled to maintain his equity action for the satisfaction of his debt; and the fact that the debtors may have other property in another county subject to execution would not be available to a voluntary alienee, unless properly presented by a suitable plea raising that issue. See *Leonard v. Forcheimer*, 49 Ala., 145.

It remains to be seen whether the allegation of the judgment debtors regarding their ownership of real property in the state subject to execution, and the proof thereunder, ought to defeat the plaintiff's action. It appears from the evidence that the judgment debtors had no property in the county of their residence subject to levy under an execution. This is borne out by the sheriff's return, as well as all other evidence bearing on the subject. All evidence touching any property owned by the judgment debtors subject to levy is in regard to

an acre tract of land in Lancaster county near the city of Lincoln. The question then is, had the plaintiffs exhausted all their remedies at law, or, in other words, had the debtors sufficient property subject to execution with which to satisfy the judgment and costs? It is shown that the real estate in Lancaster county is mortgaged to secure the debt which had been reduced to judgment, and which plaintiffs were trying to have satisfied by their equitable action. It is quite probable that, had its value equalled or approximated the amount of the debt, the plaintiffs would have resorted to their mortgage and by foreclosure proceedings obtained satisfaction of the debt. It also appears that the taxes levied thereon have not been paid for several years, the number thereof, or the amount of the taxes not appearing from the testimony. The defendant La Rue, being the only witness who testified as to the value of this property, testifies as follows:

"Q. What is your business?

"A. I have been farming.

"Q. During that time have you been engaged somewhat in buying and selling real estate?

"A. Yes, sir.

"Q. Do you know what the reasonable market value is now or that acre of land was in the fall of 1895?

"A. I considered—

"Q. Do you know what its fair market value was at that time or the present time?

"A. I know by inquiry of men right there; what they place it at.

"Q. I ask you the question; answer yes or no?

"A. Yes, I know.

"Q. What is the fair market value now and what was it during the fall of '95?

"A. I consider it worth the purchase price.

"Q. How much is that?

"A. $575."

Mention is made in the testimony of crop failures, general depression in business and the inability of the de-

fendants to meet the taxes assessed against the property, from all of which it may be fairly inferred that the value placed thereon by the defendant, an interested witness, was much greater than could be realized from a sale of it. While the testimony upon this point is of an indefinite and unsatisfactory character, we entertain no doubt about this property being entirely inadequate to satisfy the plaintiff's claim. From a full consideration of the evidence, it does not appear that the judgment debtors possessed sufficient property, without resort to a court of equity, to satisfy the judgment, and this view of the case is decisive of its merits.

From the foregoing it can not be said that the plaintiffs have an adequate and effective remedy at law for the satisfaction of their debt, and unless such is the case, this action is well founded, and the right to maintain it settled on both principle and authority. See *Smith v. Taylor*, 25 Nebr., 260; also, Smith, Equitable Remedies of Creditors, p. 74, sec. 50 and cases therein cited.

Some evidence was offered and reference made by counsel in their briefs as to the liability of the indorser upon the note merged into the judgment which forms the basis of the equitable action, and it is suggested that the plaintiffs had not exhausted their legal remedy against such indorser. Suffice it to say that this question was not raised by the pleadings, and that plaintiffs having obtained their judgment, the defendants are now precluded from defeating an action for its satisfaction by urging that others are also liable on the instrument on which the judgment was founded. See *Storm v. Waddell*, 2 Sandf. Ch. [N. Y.], 494. The judgment of the trial court is amply supported by the evidence, and is, therefore,

AFFIRMED.

JOHN H. BOWER V. JAMES CASSELS ET AL.

FILED JANUARY 24, 1900. No. 9,098.

1. **Appeal to District Court:** PROCEDURE: DISMISSAL. After the trial of a case upon its merits and a judgment in his favor, one joint obligor, on an appeal to the district court from such judgment, moved to dismiss the appeal because the action in justice court had been dismissed as to his co-obligor, who could not be served with summons, which motion was sustained. *Held*, That the motion went to the merits of the controversy, which could not properly be determined and disposed of in a summary proceeding of that character.
2. ———: DEFECT OF PARTIES: WAIVER. That the defendant, having tried the case without objection upon the issues joined, waived thereby any defect of parties to the action.
3. ———: HEARING ON MOTION TO DISMISS. That, in a motion to dismiss an appeal, the court can not consider the merits of the controversy, and will confine its inquiry to the question, whether the appeal has been properly taken and perfected.

ERROR from the district court of Perkins county. Tried below before GRIMES, J. *Reversed.*

John H. Bower, pro se.

B. F. Hastings, contra.

HOLCOMB, J.

No briefs are filed in this case by defendant in error. The plaintiff in error complains of the order of the district judge dismissing an appeal to that court from a judgment rendered against him by a justice of the peace. It appears from the record that the original action was begun in justice court against the defendant upon a joint promissory note. Summons was served upon defendant Cassels and returned not found as to Cutler. Attachment proceedings in the same action were begun against Cutler on the ground that he was a non-resident of the state, the writ being returned by the officer not served, because he could find no goods or personal property of

the defendant on which to levy. Several continuances were had by agreement of the parties in court. The defendant answered by way of counter-claim and set-off, and also alleged that he was the principal maker of the note sued on, the defendant Cutler being only a surety thereon. The plaintiff amended his bill of particulars, setting forth another cause of action in addition to the note originally sued on. The plaintiff, after the issues were thus joined, asked to have the action as to Cutler dismissed, because service of summons could not be had upon him. The record shows no action thereon by the justice before whom the cause was tried. A trial was had, resulting in a verdict in favor of the defendant on his counter-claim and set-off, upon which judgment was rendered. From this judgment plaintiff appealed to the district court in the manner prescribed by statute. In the district court defendant and appellee moved to dismiss the appeal, because "the note sued on in this action is signed by this defendant and William J. Cutler, joint obligors thereon, and the plaintiff has dismissed this action against the said William J. Cutler while the same was pending before J. M. Sheridan, justice of the peace." This motion was sustained by the district court, and the appeal dismissed.

It is unnecessary, as we view the question before us, to discuss the subject of non-joinder of parties defendant, or the effect of the motion of plaintiff asking to dismiss the action against the party not served with summons. The proceedings were properly begun, and the motion evidently was regarded as proper in prosecuting the case under the provisions of section 84 of the Code of Civil Procedure, wherein it is provided that, in an action against defendants jointly indebted, plaintiff may proceed against the defendants served, unless the court otherwise direct. See Code of Civil Procedure, sec. 84. Whatever virtue may be in defendant's objection because of the alleged defect of parties, the same goes to the merits of the case, and can not be disposed of on a mo-

tion to summarily dismiss the appeal. Under the issues joined in the justice court, not only was the amount due on the obligation, which plaintiff alleged was his individually, tried without objection, but other matters, constituting a further cause of action, and by way of counter-claim and set-off, were tried and determined. The defendant thereby waived his objection on the ground of defect of parties. See Maxwell, Pleading & Practice, p. 87, ed. 1885; Pomeroy, Remedies & Remedial Rights, sec. 287; Bliss, Code Pleading, sec. 411. It will be observed that the judgment appealed from was in favor of the defendant on his counter-claim and set-off, and the dismissal of the appeal leaves the case as tried and adjudicated in the lower court, reinstates the judgment therein rendered, and, if unreversed, is a final determination of the controversy. The right of the plaintiff to appeal from the judgment thus rendered against him and have the case heard *de novo* can not be doubted. See *Dale v. Hunneman*, 12 Nebr., 224. It is a rule of general application, so far as our knowledge extends, that, on a motion to dismiss an appeal, the court will not consider the merits of the controversy, and will confine its inquiry to the question whether the appeal has been properly taken and perfected under the statutory provisions governing the same. See *Hines v. Cochran*, 35 Nebr., 828; *Killinger v. Hartman*, 21 Nebr., 320; Elliott, Appellate Procedure, sec. 522. It follows, therefore, that the judgment dismissing the appeal is erroneous, and should be reversed, which is accordingly done, and the case remanded to the district court for further proceedings in accordance with law.

REVERSED.

CHAMBERLAIN BANKING HOUSE, APPELLANT, V. GEORGE C. ZUTAVERN ET AL., APPELLEES.

FILED FEBRUARY 9, 1900. No. 9,143.

1. **Homestead:** EXEMPTION. A homestead of less value than $2,000 is exempt from forced sale on execution issued on an ordinary judgment.

2. ———: WIDOW: HEAD OF FAMILY. A widow with whom resides her children and grandchildren, who are under her care and maintenance, is the "head of a family," and is entitled to the benefits of the law exempting homesteads from sale on execution.

3. ———: LEVY OF EXECUTION: ACTION OF DEBTOR: DUTY OF CREDITOR. Where a debtor takes the necessary steps after the levying of an execution upon his lands to have his homestead interest therein determined, it is the duty of the creditor to make application as provided by law for the appraisal of the premises, and his failure so to do will be sufficient ground for vacating the sale of the homestead.

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

M. B. C. True and *Roscoe Pound,* for appellant.

W. B. Comstock, contra.

NORVAL, C. J.

This is an appeal from an order of the district court refusing to confirm a sheriff's sale of real estate made upon execution, and vacating such sale.

The objections interposed to the sale were:

1. That the property was exempt to the defendant Wood as a homestead.

2. That, after the levy of the execution and before the sale, said defendant served a written notice upon the sheriff holding the writ that she claimed the real estate as a homestead, and that the same was, therefore, exempt

from sale on execution, and that the judgment creditor failed to have her homestead right determined.

As to whether the property was the homestead of the defendant, the evidence adduced on the hearing in the court below was conflicting. That introduced by the defendant tended to show that she is a widow, sixty-nine years old, a resident of the state; that she resided upon the land in question as a home, with her servants; and that, during a greater portion of the time, certain of her children and grandchildren resided with her and were under her care and maintenance, and that the land was of less value than $2,000. The evidence was sufficient to establish that the real estate was not subject to forced sale on execution. See *Dorrington v. Myers*, 11 Nebr., 388. Moreover, the judgment creditor failed to have the homestead right of the defendant in the property determined. See *Quigley v. McEvony*, 41 Nebr., 73.

The sale was properly vacated, and the order appealed from is

AFFIRMED.

Rehearing denied.

MARY E. CASEY ET AL., APPELLEES, V. COUNTY OF BURT ET AL., APPELLANTS.

FILED FEBRUARY 9, 1900. No. 11,025.

1. **Statute:** DRAINAGE OF SWAMP LAND: JURISDICTION OF COUNTY BOARD: COMMON-LAW BOND. The provisions of section 4, article 1, chapter 89, Compiled Statutes, relating to drainage of swamp lands, must be strictly complied with before a county board can acquire jurisdiction to establish and construct a drain thereunder; and a bond that fails to comply with the provisions of said section 4 is void, and confers no jurisdiction upon the board to act, although such bond may be a good common-law bond.

2. **Void Tax Unenforceable.** A tax levied in a void proceeding is unenforceable.

3. **Delay: LACHES: NOTICE.** Mere delay of a party in proceeding against a void tax will not constitute laches, particularly when the record fails to show affirmatively that he had notice of the levy.

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

H. H. Bowes and *W. G. Sears,* for appellants.

H. W. Pennock, contra.

NORVAL, C. J.

In 1885 one L. D. Peterson, with others, filed in the office of the county clerk of Burt county a petition praying for the establishment of a ditch in said county, under the provisions of article 1, chapter 89, of the Compiled Statutes, 1897. Accompanying said petition was a bond, a copy of which follows:

"Know all men by these presents, that we, Lewis Peterson and J. P. Morden, all of the county of Burt, state of Nebraska, are held and firmly bound unto the county of Burt in the state of Nebraska, in the sum of two hundred dollars lawful money of the United States, for the payment of which well and truly to be made, we do jointly and severally bind ourselves and our lawful representatives. The conditions of the above obligation are such, that, whereas Lewis Peterson et al did on the 26th day of May A. D. 1885, file a certain petition with the county clerk of Burt county, Nebraska, praying that the county commissioners of said county would cause a view and the location of a ditch running partly through township 21, 22, and 23, all in range 11, Burt county, Nebraska.

"Now, if upon view of said route in said petition described the said commissioners shall find in favor of the location of said ditch, then this obligation shall be void, otherwise to be and remain in full force and effect.

"Dated this 2d day of June A. D. 1885.

"L. D. PETERSON.
"J. P. MORDEN."

No other bond was filed in said proceeding. After the filing of said petition and bond, other steps prescribed in said chapter 89 were taken, and said ditch was established and completed, the same being extended, however, more than 160 rods beyond one of the termini designated in the petition, and assessments were levied upon the land affected thereby. Among the owners of land so affected was one Jacob Darst. Afterwards, title to this land vested in Mary E. Casey, Laura D. Barnard, Lizzie Darst and Allora Darst, who commenced this suit in said Burt county, seeking to enjoin the treasurer thereof from collecting the tax so imposed, and to remove the cloud of such levy from the title to said land on the ground that said bond is not in conformity with the provisions of section 4 of article 1 of said chapter 89; that the commissioners changed the route of the ditch more than said statute permitted; and that the provisions of said chapter are unconstitutional and void. On the trial of the case below, a decree was rendered in favor of plaintiffs as prayed in their petition, and the defendants appeal therefrom.

If any of the objections urged against said bond in the lower court are valid to the extent that such bond must be declared to be void, the decree must be affirmed. We will, therefore, proceed to examine some of such objections. In *Dakota County v. Cheney*, 22 Nebr., 437, this court decided that the jurisdictional steps necessary in a proceeding to establish and construct a ditch and levy a tax under the provisions of said chapter are as follows: First, a petition; second, a bond; third, that the proposed improvement is a necessity, and will be conducive to the convenience, health and welfare of the public; fourth, statutory notice. A bond is, therefore, a jurisdictional prerequisite; and if the bond in question is void, the county commissioners were without jurisdiction to levy such tax, and all their acts in such proceeding were void. Under section 4 of said article and chapter, a petition for such improvement must be filed with the county clerk,

setting forth certain facts, and accompanied by a good and sufficient bond signed by two or more sureties, to be approved by the county clerk, conditioned for the payment of all costs that may occur in case said board of county commissioners shall find against such improvement. It will be observed, by reading the bond filed in the proceeding, that the conditions thereof do not comply with those prescribed in said statute, and such fact is conceded by counsel for appellants; but it is claimed that it is a good common-law bond, and that, if it is, it is sufficient to confer jurisdiction upon the county commissioners, at least, in the absence of objections to its sufficiency. It is a principle of law well established by the decisions of this court that statutes of the nature of the one in question are to be strictly construed, and that, in order to sustain assessments levied under the provisions of such enactments, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power. See *Harmon v. City of Omaha*, 53 Nebr., 164; *Smith v. City of Omaha*, 49 Nebr., 883. Therefore, before a county board can acquire jurisdiction of a proceeding of this nature, a bond complying strictly with the provisions of section 4 of said chapter must be filed and approved. With the provisions of this section, the bond in several important respects fails to conform. There are no sureties on the bond; the liability of the principals is limited to a specific sum, and it is not conditioned for the payment of the costs that may occur in case the board finds against such improvement, as the statute requires, but only provides that if, upon view of said route in the petition described, the commissioners shall find in favor of the location of said ditch, then the obligation to be void, otherwise to be in force. If such a bond is upheld in this case, there could be no reason why a bond providing a penalty limited to one cent, or to nothing, should not also be sustained. Under the conditions of the bond filed, it can be seen that, although the county board might have determined in favor of the loca-

tion of the ditch, it might have decided against the improvement, on the ground that it was not necessary, or that it was not conducive to the public convenience, health or welfare; still the bond would not have been enforceable, and the county would have had recourse on no one for the expense and cost of such proceeding. We know of no rule of law that would so truly subserve the interests of both the public and the taxpayer as the one heretofore announced, which is that a strict compliance with the provisions of statutes of this nature must be shown before the benefits or rights sought to be secured under it can be obtained or enforced. It being plain, therefore, that this bond failed in many respects to comply with the provisions and requirements of said section 4, it must be held to be void; for which reason jurisdiction over the matter was not acquired by the county board, and its acts thereunder, including the levy of the tax upon the land of plaintiffs, were void and of no effect. It is urged, however, that even if the bond be void, the plaintiffs are estopped from proceeding against the tax, they being guilty of laches in permitting so long a time to elapse between the levy and the commencement of the suit. There is no evidence in the record that either they or their grantor had notice of the proceedings complained of. Furthermore, the proceedings in the matter were void, not merely irregular; and we do not perceive that there was imposed upon them any duty to act promptly in the matter. See *Harmon v. City of Omaha, supra.*

The conclusion reached makes it unnecessary to discuss other questions raised in the briefs of counsel. The decree of the lower court is, therefore,

AFFIRMED.

HERMAN F. MOSEMAN ET AL. V. STATE OF NEBRASKA, EX REL. JOHN M. HENCH, COUNTY ATTORNEY.

FILED FEBRUARY 9, 1900. No. 11,067.

Joint Assignment of Error. A joint assignment of error in a petition in error made by two or more persons, which is not well taken as to all who joined therein, will be overruled as to all.

ERROR from the district court of Dixon county. Tried below before EVANS, J. *Affirmed.*

W. A. Martin and *R. G. Strong*, for plaintiffs in error.

McCarthy & Pearson and *Joshua Leonard, contra.*

NORVAL, C. J.

This was a proceeding in quo warranto instituted in the court below by the state, on the relation of the county attorney of Dixon county, to test the right of respondents to act as trustees of the village of Emerson, to oust them therefrom, and install Louis Swartz, James McHenry, Ed L. Ross, Charles C. Bondreau and Jacob Jansen therein. The respondents, Michael Schindler and Charles P. Jacobson, answered the application, each disclaiming all right and title to the office of trustee of said village, and to any privileges or franchises belonging thereto, and averring that his term of office as trustee expired in the spring of 1899 pursuant to the election and qualification of his successor in office, as set forth in the information of the relator. The other defendants answered, setting up their title to the offices of trustees. The trial resulted in a judgment being entered ousting the respondents from said offices and instating therein Swartz, McHenry, Ross, Bondreau and Jansen. All the respondents joined in a motion for a new trial and have filed a joint petition in error herein.

Under article 1, chapter 14, Compiled Statutes, 1897, the respondents were the duly qualified and acting trustees of the village of Emerson at and prior to the village election held on April 4, 1899. The legislature of 1899 passed an act with an emergency clause amending sections 41, 42 and 60 of said article and chapter, and repealing the original sections, which act was approved by the executive on April 1, 1899, or three days prior to the holding of the election that year in the village of Emerson, and at which election Swartz, McHenry, Ross, Bondreau and Jansen respectively received the highest number of votes for the office of trustee of said village. The original sections provided for the election of five trustees for each village to serve for the term of one year and until their successors are elected and qualified. The amendatory act made provision for the same number of trustees, "two of whom shall be elected to serve one year, three of whom shall be elected to serve two years, said election to take place at the first annual election after passage of this act; and at each alternate election thereafter two shall be elected to serve two years and three shall be elected to serve two years." The respondents, or rather a portion of them, assert title as hold-over officers, claiming that the persons instated as their successors were elected under the provisions of the original act and not in accordance with the amendatory sections, and, as said amendatory law had been approved by the governor prior to the election in April, 1899, the original sections were not then in force, and the election was, therefore, a nullity. We are precluded, in this proceeding, from inquiring into or passing upon the merits of this contention, for the reason that the respondents all joined in a motion for a new trial, and, jointly, have prosecuted error to this court, while two of them, Schindler and Jacobson, admitted the averments of the petition and disclaimed all right and title to the offices of trustees. The judgment as to them was, therefore, not erroneous. The doctrine has been often stated by this court that a joint assign-

ment of errors in a petition in error, made by two or more persons, which is not well taken as to all who joined therein, will be overruled as to all. See *Gordon v. Little*, 41 Nebr., 250; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Nebr., 618; *Small v. Sandall*, 45 Nebr., 306. Applying this rule to the case at bar, the judgment must be

AFFIRMED.

JAMES P. BALL V. CHARLES H. BEAUMONT ET AL.

FILED FEBRUARY 9, 1900. No. 9,145.

1. **Pleading:** LEGAL FICTIONS. Under the reformed procedure it is unnecessary, in a pleading, to state legal fictions. The pleader should state the facts which constitute his cause of action in ordinary and concise language.

2. ———: FACTS IMPLIED BY LAW. It is not necessary, in a pleading, to state facts which the law implies.

3. ———: LOWER COURT: IDENTITY OF ISSUES. A cause appealed to the district court must be tried in that court upon the issues presented in the lower court.

4. ———: ———: PLEA OF IMPLIED FACTS NOT DEPARTURE. The statement, in a pleading filed in an appellate court, of a fact implied by law, but which was not stated in the pleading filed in the inferior court, does not change the issues.

5. **Amendment:** PROOF. Where a pleading has been amended by leave of court, it is error to exclude proof in support of its averments, on the ground that the amendment should not have been allowed.

ERROR from the district court of Perkins county. Tried below before GRIMES, J. *Reversed.*

John H. Bower, for plaintiff in error, argued that averments in the answer may cure a complaint defective in material allegations, citing *Ogden v. Ogden*, 60 Ark., 70; *Lyon v. Logan*, 68 Tex., 521; *Haggard v. Waller*, 6 Nebr., 271; *Insurance Co. v. Kelley*, 24 O. St., 345.

While it was true that under the Code, as at common law, the petition should show a promise, the word "prom-

ise" need not be used, for the law always implies a promise to do that which a party is legally liable to perform. See Andrew's Stephen's Pleading, p. 86.

A. F. Larson and *C. P. Logan*, for defendant in error, argued that, in an action upon a joint contract, all who are jointly liable must be joined, citing *Fox v. Abbott*, 12 Nebr., 328; *Leach v. Milburn Wagon Co.*, 14 Nebr., 106; *Bowen v. Crow*, 16 Nebr., 556.

Morning & Berge also appeared for defendant in error.

SULLIVAN, J.

This action was commenced in the county court of Perkins county and removed thence by appeal. The bill of particulars upon which the case was tried alleged that the plaintiff, James P. Ball, on October 4, 1892, paid to the Delaware County State Bank of Manchester, Ia., for the use of Beaumont and Penn, and at their request, the sum of $800, by reason of which fact there was due him $834, with interest thereon at eight per cent from April 1, 1893.

In the petition filed in the district court, the cause of action was stated as follows: "The plaintiff alleges that on the 15th day of April 1893, he paid the State Bank of Manchester, Iowa, to and for the use of the defendants, and at their instance and request, the sum of eight hundred and thirty-four dollars, which sum defendants agreed to pay plaintiff. No part of said amount has been repaid, and there is now due thereon from the defendants to the plaintiff the sum of $834, and interest from the 15th day of April, 1893."

Beaumont filed an answer in due time, and the case being called for trial, an objection was made to the introduction of evidence on the ground that the facts stated in the petition were insufficient to constitute a cause of action. Thereupon the plaintiff, without waiting for a ruling upon the objection, asked and obtained leave to amend his petition by adding to the statement

above set out the words: "which sum the defendants agreed to pay plaintiff." After the amendment had been made, defendant's counsel objected to the introduction of any evidence, for the reason that the issues on which the case was tried in the county court had been materially changed. The court sustained this objection, and gave judgment in favor of the defendants. The judgment is manifestly erroneous, and must be reversed. The amendment added nothing but a fiction to the statement already made.

Under modern procedure, the petition should set forth, in ordinary and concise language, the facts constituting the plaintiff's cause of action. See Code of Civil Procedure, sec. 92. There is no rule requiring fictions to be pleaded. It may be that to some extent fictitious averments are still permitted; but they are certainly not required. Neither the letter nor the spirit of the law now requires a party to plead what is not true. The facts stated in the county court, and in the original petition in the district court, disclose a duty resting on the defendants to repay the money expended by the plaintiff at their request and for their use. From this duty the law infers a promise, and it was unnecessary to plead it. The rule is, that what the law implies need not be averred. The plaintiff might have rested his case on the legal duty alone; but the statement, in terms of a promise by the defendants to perform their legal obligation, was, at most, harmless. See *Tessier v. Reed*, 17 Nebr., 105; *Small v. Poffenbarger*, 32 Nebr., 234; *Gannis v. Hooker*, 29 Wis., 65; *Farron v. Sherwood*, 17 N. Y., 227; *Jordan v. Morley*, 23 N. Y., 552; *Kraner v. Halsey*, 82 Cal., 209, 22 Pac. Rep., 1137; *Busta v. Wardell*, 3 S. Dak., 141, 52 N. W. Rep., 418; Bliss, Code Pleading [1st ed.], 152; 4 Ency. Pl. & Pr., 926.

The purpose of the action in both the county court and district court being to recover a sum of money paid out by the plaintiff for the benefit of the defendants, and at their request, the substantial indentity of the issues was

preserved. See *Levi v. Fred*, 38 Nebr., 564; *Sells v. Haggard*, 21 Nebr., 357; *Thompson v. Campbell*, 43 Nebr., 556.

But even if it were true that the original case had lost its identity, the court would not have been justified in denying plaintiff a trial on the merits. The amended petition was properly before the court; it had a legal standing; it stated a cause of action, and the plaintiff was entitled, as matters then stood, to sustain its averments by proof. The regularity of prior proceedings could not be questioned by an objection to testimony offered at the trial. The judgment is

REVERSED.

THE CITY OF LINCOLN V. MARIE T. PIRNER.

FILED FEBRUARY 9, 1900. No. 9,089.

1. **City of First Class:** CHARTER: INJURY: DEFECTIVE SIDEWALK: LIABILITY. The provision of the charter of cities of the first class, requiring real estate owners and occupants to maintain certain sidewalks, and making them liable for injuries occasioned by reason of the defective condition of any such sidewalk, does not relieve such cities from the duty of keeping their streets in good repair and fit for use.

2. ———: NOTICE: SCUTTLE-HOLE. A city, in the absence of actual notice, is not, ordinarily, liable for failing to discover the existence of a defect in a scuttle-hole which had been properly constructed, and was apparently safe and secure.

3. ———: ———: ———: ORDINARY CARE AND PRUDENCE. In such case, the test of liability is, whether the municipal authorities did everything which, under the circumstances, ordinary care and prudence required them to do.

4. **Injury:** DEFECTIVE SIDEWALK: DUTY OF CITY'S AGENTS. Where an injury was occasioned by a defective sidewalk, an omission of duty is not to be inferred from a failure of the agents and servants of the city to search for defects in the sidewalk where there was no reason to suppose defects existed.

5. **Instructions.** An instruction relating to a matter submitted to the jury, and which states correctly a proposition of law applicable to the evidence, is not erroneous.

6. **Statute:** NOTICE. A statute requiring notice to be given to a city of the time, place and cause of an injury resulting from an accident for which it may be liable should receive a liberal construction by the courts.

7. ——: ——: SUFFICIENCY. Such notice is sufficient if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident happened.

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

Joseph R. Webster and *John P. Maule*, for plaintiff in error, argued that the evidence did not make a case of negligence against the city; and that there was no proof to charge the city with notice of defects. See *Cooper v. Milwaukee*, 72 N. W. Rep., 1130; *Hanscom v. Boston*, 141 Mass., 242; *Wakeham v. St. Clair Tp.*, 51 N. W. Rep., 696; *Gubasko v. New York*, 1 N. Y. Supp., 215; *Lohr v. Philipsburg*, 30 Atl. Rep., 822; *Burns v. Bradford*, 20 Atl. Rep., 998; *Hart v. Brooklyn*, 36 Barb., 226; *Dewey v. Detroit*, 15 Mich., 307; *Denver v. Saulcey*, 38 Pac. Rep., 1098; *Jackson v. Boone*, 20 S. E. Rep., 46; *Dittrich v. Detroit*, 57 N. W. Rep., 125.

The city charter, as amended in 1899, makes the lot-owner liable primarily, and casts obligation on him to keep the walk in repair; and thereby relieves the city of liability. The theory of all former decisions, holding cities liable for defective sidewalks, had been based on the duty of the city to *exercise its granted powers*, no *duty* being elsewhere imposed. But this provision imposed elsewhere, on the lot-owner, this duty before impliedly resting on the city. The duty, having been thus expressly cast on the owner, no longer rests on the city, by any rational implication. The city was merely the agent or political arm of the state, whereby the enforcement of this obligation might be *coerced*. Under this form of statute, municipal liability could not logically be held to exist. Under the former statute the courts held a

city liable from a sort of necessity, arising from reasons of public policy, as the liability was imposed nowhere else; and powers were given the city to impose it on the owner. If the city failed to exercise the power efficiently, it was itself held liable—the liability being by statute imposed nowhere else. Now that the obligation was directly imposed on the owner, the reason for the rule of municipal liability was gone. Hence the question of municipal liability, under this act, was a new one, arising in this case as one of first intention, not controlled by decisions made under the former law. Counsel cited *Arkadelphia v. Windham*, 49 Ark., 139; *Winbigler v. Los Angeles*, 45 Cal., 36; *Young v. Charleston*, 20 S. Car., 116; *Detroit v. Blackeby*, 21 Mich., 84; *Pray v. Jersey City*, 32 N. J. Law, 394; *French v. Boston*, 129 Mass., 592; *Marquette v. Cleary*, 37 Mich., 296; *Morgan v. Hallowell*, 57 Me., 375; *Jones v. New Haven*, 34 Conn., 13.

In case of a latent defect, not obvious to the passer-by, there was no presumption of notice from mere lapse of time. The city was not a warrantor of safety for one using the street, nor was it bound to make inspection for detection of latent defects. The nature of municipal organization and action was such, and the condition of a crowded urban community such, that constant and critical inspection for latent defects was never imposed and could not reasonably be required. Counsel cited *Cooper v. Milwaukee*, 72 N. W. Rep., 1130, decided November 16, 1897.

N. C. Abbott also appeared of record for plaintiff in error.

Tibbets Bros., Morey & Anderson, for defendant in error, argued that the notice, being definite enough to enable authorities to find the place, was sufficient. Counsel cited *Fopper v. Wheatland*, 18 N. W. Rep. [Wis.], 514; *Teegarden v. Town of Caledonia*, 50 Wis., 292, 6 N. W. Rep., 875; *Brown v. Town of Southbury*, 1 Atl. Rep.

[Conn.], 819; *Thompson v. Jones*, 4 Wis., 124 [106]; *Worthington v. Hylyer*, 4 Mass., 196; *Wall v. Town of Highland*, 39 N. W. Rep. [Wis.], 560; *Owen v. City of Fort Dodge*, 67 N. W. Rep. [Ia.], 281; *Hein v. Fairchild*, 87 Wis., 258, 58 N. W. Rep., 413; *Fuller v. Hyde Park*, 37 N. E. Rep. [Mass.], 782; *Mecklem v. Blake*, 19 Wis., 419, 397*; *Sargent v. Lynn*, 138 Mass., 599; *Lyman v. Hampshire*, 138 Mass., 74; *Tenny v. Beard*, 5 N. H., 58.

The petition was sufficient, and there was no variance between the facts stated in the petition and the proof.

Counsel last named, together with *W. E. Stewart*, in a supplemental brief cited Compiled Statutes, 1899, p. 200; *City of Lincoln v. Grant*, 38 Nebr., 369; *City of Lincoln v. Finkle*, 41 Nebr., 575.

SULLIVAN, J.

Marie T. Pirner fell through a coal-hole in the sidewalk on P street in the city of Lincoln, and as a result of the accident sustained injuries, for which she was awarded damages in an action brought against the city in the district court of Lancaster county. The purpose of this proceeding is to secure a reversal of the plaintiff's judgment. The defendant claims exemption from liability under the following provision of its charter: "It is hereby made the duty of all real estate owners and occupants to keep the sidewalks along the side or in front of the same in good repair, free from snow, ice and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of defective condition of any sidewalk." The claim that this provision relieves cities of the class to which it relates from the duty of maintaining their sidewalks and keeping them safe and fit for use was fully considered in *City of Lincoln v. O'Brien*, 56 Nebr., 761, and decided adversely to the contention of the defendant.

It is next contended that the court erred in charging the jury on the subject of constructive notice. The law undoubtedly is, as claimed by counsel for defendant, that

a city, in the absence of actual notice, is not, ordinarily, liable for failure to discover the existence of a defect in a scuttle-hole which has been properly constructed and is apparently safe and secure. The action being grounded on negligence, the test of liability is whether the municipal authorities did everything which, under the circumstances, ordinary care and prudence required them to do; and the rule is that an omission of duty is not to be inferred from a failure to search for defects in a sidewalk where there is no reason to suppose defects may be found. See *Cooper v. City of Milwaukee*, 97 Wis., 458, 72 N. W. Rep., 1130; *Duncan v. City of Philadelphia*, 173 Pa. St., 550; *Hanscom v. City of Boston*, 141 Mass., 242. The jury were told that if the scuttle-hole in which the plaintiff was injured had remained in a defective condition for such a length of time that the authorities, in the exercise of ordinary diligence, should have discovered the defect, notice to the defendant would be presumed, and proof of actual notice would not be necessary to entitle the plaintiff to recover. This instruction was not erroneous. It imposed no duty upon the city beyond that of ordinary care. It did not, it is true, cover the entire question, but it laid down a correct proposition of law applicable to the evidence, and was not in any respect misleading, especially when considered in connection with the fourth paragraph of the charge, which is as follows: "Negligence is the gist of this action and the burden of proving the negligence on the part of the defendant city, as alleged in plaintiff's petition is upon the plaintiff, and before she would be entitled to recover in this action, she must prove the negligence so alleged in her petition on the part of said defendant, by a fair preponderance of the evidence, and in this case, if you find from the evidence that the said scuttle-hole in controversy was constructed in such manner as was considered, exercising ordinary reason and prudence, ordinarily safe, to persons passing along and over the same, using ordinary care and diligence, or that said scuttle-hole

became out of repair and became unsafe and defective, and that said defendant city through its authorities, had no knowledge of the same, and that such defective condition had not existed a sufficient length of time or that said defective condition existed in such manner, that by the exercise of ordinary care and diligence, the said defendant city could not have known it, then and in that event the said defendant city would not be liable and your verdict should be accordingly." By the instruction quoted the jury were informed, in unmistakable terms, that, if the defective condition of the coal-hole was of such a character that the city authorities could not have discovered it by the exercise of ordinary care, the city would not be liable. In other words, the right of the plaintiff to a verdict in her favor was, by the fourth instruction, made to depend upon the accident having resulted from a defect in the sidewalk which was so evident and open to view that actual knowledge of it must, in the usual course of events, have reached the agents and servants of the city, if they had faithfully performed the duty imposed upon them by law in seeing that the public streets were safe for those having occasion to use them. The jury, following the instructions of the court, could not have found for the plaintiff without first finding that the defect in the sidewalk was a visible defect—one which ought to have been discovered and remedied by the city authorities before the accident happened. The conclusion of the jury upon this point is a just one. It is an eminently fair deduction from all the evidence in the case.

The only other assignment of error which we shall notice challenges the legal sufficiency of the statement, or account, of the accident filed by the plaintiff in the office of the city clerk. The statute provides that "to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and

the time, place, nature, circumstances and cause of the injury or damage complained of." See Compiled Statutes, 1899, ch. 13*a*, sec. 36. The notice given by the plaintiff described the place of the accident as being "in front of lot 13, in block 45 on 'P' street in the city of Lincoln, near the west side of what is commonly known as the Carr block." The description was in all respects accurate, except that the number of the block should have been 34 instead of 45. Whether there was a block numbered 45 abutting on P street does not appear. Although the notice was ambiguous, it conveyed to the city authorities, with reasonable definiteness, a description of the place where the accident happened, and was, therefore, sufficient. It was said, in *City of Lincoln v. O'Brien, supra,* that the statute is a harsh one and should be liberally construed by the courts. The rule of construction to be deduced from the adjudged cases is that if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident occurred, there is a substantial compliance with the law. See *City of Lincoln v. O'Brien, supra; La Crosse v. Melrose,* 22 Wis., 459; *Harder v. Minneapolis,* 40 Minn., 446. The Carr block, according to the evidence, is a well known building on P street in the city of Lincoln, and the coal-hole described in the notice was near the west side of it. This being so, we can not believe that any person possessed of ordinary powers of perception could have failed to locate the place of the accident, if he had made an honest effort so to do. It would be a singularly heavy-witted and purblind official who, with the plaintiff's notice in his hand, could not go out and readily find the *locus in quo.* In the absence of proof that there was a block numbered 45 on P street, there is nothing to indicate that the notice had even a slight tendency to mislead. The erroneous part of the description was mere harmless surplusage. There is no reversible error in the record, and the judgment is, therefore,

AFFIRMED.

ANNA D. KRUEGER V. JOHN JENKINS ET AL.

FILED FEBRUARY 9, 1900. No. 9,146.

1. **Country Road:** TITLE: ADVERSE POSSESSION. Title to a part of a country road can not be acquired by adverse possession.

2. **Abandonment of Highway:** UNUSED PARTS: STATUTE. The proviso of section 3, chapter 78, Compiled Statutes, 1899, "That all roads that have not been used within five years shall be deemed vacated," applies only to roads which have been entirely abandoned. It does not apply to the unused parts of a road lying on either side of the line of travel.

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

Charles W. Haller, for plaintiff in error, argued that an injunction would be allowed in a proper case of this kind; the reply alleged an adverse possession against a private person. The statute of limitations applies to counties. The maxim, *Nullum tempus occurrit regi*, had no application to cities and school districts; and cited *Zimmerman v. County of Kearney*, 33 Nebr., 620; *Republican Valley R. Co. v. Fink*, 18 Nebr., 82; *Schock v. Falls City*, 31 Nebr., 599; *Meyer v. City of Lincoln*, 33 Nebr., 566; *May v. School District*, 22 Nebr., 205; Compiled Statutes of Nebraska, ch. 18, art. 1, sec. 20 and the sections following; *Brewer v. Otoe County*, 1 Nebr., 373; *May v. School District*, 22 Nebr., 205; *Callaway County v. Nolley*, 31 Mo., 393; 1 Wood, Limitations [2d ed.], sec. 53; Buswell, Limitations & Adverse Possession, sec. 98, last foot-note; Compiled Statutes of Nebraska, Code Civ. Proc., sec. 1121, or Laws of Nebraska, 1881, ch. 32; Compiled Statutes of Nebraska, ch. 78, sec. 3.

The name of *H. L. Day* was printed upon the plaintiff's brief as appearing for the defendant in error. But he filed no brief, and made no argument.

SULLIVAN, J.

This action was commenced by Anna D. Krueger against the county of Douglas and its commissioners to enjoin the appropriation for road purposes of a small piece of land claimed by plaintiff as part of her farm. The defendants answered the petition, alleging that the *locus in quo* had been duly condemned and set apart as a highway. The reply admitted the condemnation proceedings, but alleged by way of avoidance that the public had lost its rights by non-user and a continuous adverse occupancy for more than ten years by the plaintiff and her predecessors in title. The court sustained a general demurrer to the reply, and gave judgment in favor of the defendants. The petition in error presents two questions for decision.

It is first contended that the plaintiff, and those through whom she claims title, having inclosed the disputed strip and occupied it exclusively under a claim of ownership for more than ten years, the rights of the public had become extinguished before the present controversy arose. In support of this proposition reference is made to *May v. School District*, 22 Nebr., 205 and *Meyer v. City of Lincoln*, 33 Nebr., 566. In the first of these cases it was held that a school district may avail itself of the statute of limitations as a defense to an action brought to enforce payment of a warrant issued by its authority. The correctness of the decision is not doubted, but its relevancy is denied. It is difficult to understand how the maxim, *Nullum tempus occurrit regi*, could be applied so as to prevent a municipal or public corporation from alleging the statute of limitations as a defense to an action on a stale claim. The second case decides that a party may acquire title to a portion of a city street by continuous adverse occupancy, under a claim of right, for ten years. The doctrine of this case, which is sanctioned by many decisions in other jurisdictions, was approved in *Lewis v. Baker*, 39 Nebr., 636, where it was held: "When

a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant." It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys and other public places within their corporate limits. See Compiled Statutes, 1899, ch. 14, art. 1, secs. 104, 106. They may maintain ejectment to recover possession of them; they may, speaking generally, vacate them either in whole or in part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. See Compiled Statutes, 1899, ch. 14, art. 1, sec. 77. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the same degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trusts, municipal corporations are on the same footing with private individuals and equally affected by the limitation laws. See *Powers v. Council Bluffs*, 45 Ia., 652; *Evans v. Erie County*, 66 Pa. St., 222; 2 Dillon, Municipal Corporations [3d ed.], 676.

The right involved in this litigation is one belonging exclusively to the public at large. Neither Douglas county nor its citizens have any peculiar interest in it. A county does not hold the legal title to country roads within its borders; it has no power of disposition over them; it has no proprietary interest in them; in performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public. A county being a mere political subdivision of the state, created for the

purposes of government, it ought not to be bound by limitation laws any more than the state itself. And, as to property or rights held exclusively in trust for the general public, the decided weight of authority is that such laws have no application. But this question is no longer one of general interest, and the discussion of it will not be further extended. The legislature of 1899 added to section 6 of the Code of Civil Procedure the following proviso: "Provided, however, that there shall be no limitation to the time within which any county, city, town, village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots." This amendment can not, of course, have any effect upon the decision of this case, and, without being in any degree influenced by it, we hold that the plaintiff could not, by encroaching upon the highway and setting up a nuisance, divest the public of the rights which it acquired by the condemnation proceedings.

The next contention of the plaintiff is that the part of the road now in dispute became vacated by non-user under section 3 of the road law. See Compiled Statutes, 1899, ch. 78, sec. 3. This section provides: "All roads within this state which have been laid out in pursuance of any law of this state, or of the territory of Nebraska, and which have not been vacated in pursuance of law, are hereby declared to be public roads; Provided, That all roads that have not been used within five years shall be deemed vacated." Considering that county roads are scarcely ever used to their full width, the construction for which plaintiff contends would, if it were sustained, be disastrous to the interests of the public. But such construction is not admissible. The law has reference to entire roads, not to the unused parts of a road, lying on the sides of the beaten path. Discussing this subject, Johnston, J., in *Webb v. Butler County*, 52 Kan., 375, 34 Pac. Rep., 973, said: "It is clear that the vacation statute invoked was never intended to vacate a part of the width

of a road not actually used where there is travel over the entire length of such road."

The judgment of the district court is right, and is

AFFIRMED.

HOMAN J. WALSH V. GEORGIA PETERSON.

FILED FEBRUARY 9, 1900. No. 9,077.

1. **Lost Note:** BURDEN OF PROOF: INSTRUCTIONS NOT PREJUDICIAL ERRORS. In an action to recover on a lost note, instructions in regard to the burden of proving the loss are not prejudicially erroneous, where it appears conclusively that the note was non-negotiable and had been delivered to the defendant.

2. **Authority of Agent:** PAYMENT OF PRINCIPAL BEFORE DUE. Payment by a debtor of the principal of his note, before due, to an agent of the payee who has neither the possession of the note nor authority to collect it, is made at the risk of such debtor.

3. ———: INTEREST: PRINCIPAL. Authority to collect interest on a debt does not carry with it an implied agency to collect the principal of the debt before it is due.

4. **Evidence:** CLAIM OF AGENCY: QUESTION OF MIXED FACT AND LAW. Where evidence adduced to support a claim of agency is disputed, the question is one of mixed law and fact for the consideration of the jury, to be aided by instructions from the court.

5. **Admission of Evidence:** ERROR WITHOUT PREJUDICE. The admission of evidence which could not have influenced the jury in the conclusion reached is, at most, error without prejudice.

6. ———: PORTION OF CONVERSATION: CROSS-EXAMINATION. Where a witness has related a portion of a conversation or transaction on his direct examination, he may be cross-examined as to the entire conversation or transaction.

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

Charles O. Whedon, for plaintiff in error, argued that the law declared that a check drawn upon a bank must be presented within a reasonable time, at the end of

which time the risk terminated as to the drawer, and became the risk of the holder. If the holder, after such reasonable time, permitted the deposit to remain in the bank, and the bank failed, the loss must fall upon the holder, citing: Daniel, Negotiable Instruments, sec. 1590; *Taylor v. Sip*, 30 N. J. Law, 284; *Farwell v. Curtis*, 7 Biss. [U. S.], 160; Story, Promissory Notes [7th ed.], sec. 493; *Purcell v. Allemong*, 22 Gratt. [Va.], 739; *Grange v. Reigh*, 93 Wis., 552; *Lloyd v. Osborn*, 92 Wis., 93; *Griffin v. Kemp*, 46 Ind., 176; *Himmelman v. Hotaling*, 40 Cal., 111; Tiedeman, Commercial Paper, 443.

On the question involved in first syllabus counsel cited: *Bouscaren v. Brown*, 40 Nebr., 722; *Burlingim v. Baders*, 45 Nebr., 673; *McAleer v. State*, 46 Nebr., 116; *Nelson v. Johansen*, 18 Nebr., 180; *Runge v. Brown*, 23 Nebr., 817; *Gilbert v. Saddlery Co.*, 26 Nebr., 194; *Grimm v. Robinson*, 31 Nebr., 540; *City of Plattsmouth v. Boeck*, 32 Nebr., 297.

A court should not give undue prominence to certain portions of the testimony to the exclusion of the rest. See *Markel v. Moudy*, 11 Nebr., 213; *Kersenbrock v. Martin*, 12 Nebr., 376; *City v. Beckman*, 23 Nebr., 677; *First Nat. Bank v. Lowry*, 36 Nebr., 290; *Rising v. Nash*, 48 Nebr., 597.

A principal is bound equally by the authority which he actually gives, and by that which, by his own act, he appears to give. See *Webster v. Ray*, 17 Nebr., 579; *Oberne v. Burke*, 30 Nebr., 581 and cases cited; *Lorton v. Russell*, 27 Nebr., 372; *Bais v. Bank*, 27 Nebr., 577; *Creighton v. Finlayson*, 46 Nebr., 457; *Brown v. Eno*, 48 Nebr., 538; *Columbus Buggy Co. v. Hurford*, 1 Nebr., 146.

Ames & Pettis and *Ernest C. Ames*, for defendants in error, argued that there was no testimony or evidence in the record anywhere that tended to show that Libbie Peterson was ever given express authority to act as agent for anybody.

An agent, unless specially authorized, can accept nothing but money; if he accepts checks and they are not

paid, the principal is not bound. See *Hall v. Storrs*, 7 Wis., 217; *Harlan v. Ely*, 68 Cal., 522, 9 Pac. Rep., 947.

Authority to receive money for interest does not *ipso facto* give authority to receive money for principal. Nor did an agent's authority to receive payment give him authority to receive it before due. See *Smith v. Kidd*, 68 N. Y., 139.

SULLIVAN, J.

This action was brought in the district court of Lancaster county by Georgia Peterson to recover of Homan J. Walsh on a lost note. From a verdict and judgment in favor of plaintiff, defendant prosecutes error.

In 1876 Libbie Peterson loaned Walsh $6,000, the loan being evidenced by promissory notes which were renewed from time to time. The money involved in the transaction was owned in part by the plaintiff and Mrs. Agnes Folsom. The three women were sisters and lived together in Council Bluffs, Iowa. In May, 1888, the sisters decided to sever their relations as lenders, and the defendant thereupon executed a new note to Georgia for $2,000, due in three years, and one to Mrs. Folsom for $1,000, due in three years. The balance of the $6,000 belonged to Libbie and was loaned by Walsh for her to a Mr. Sholes. The interest on the Walsh notes was payable semi-annually and fell due on the first day of May and the first day of November. Sholes always paid the interest on his loan to the defendant, who remitted it to Libbie. To her, also, was sent, either by check or draft, the interest on the notes given to plaintiff and Mrs. Folsom. In whatever form the remittances were made, the money was received by Libbie, who paid over to her sisters the amount which they were entitled to receive. When the defendant's notes fell due, the time for payment was extended two years and interest coupons covering the period of extension were made and delivered to the respective payees. When interest payments were

made through Libbie to her sisters, she invariably received from them the coupons paid and transmitted them to Walsh. On January 3, 1893, Walsh had on deposit in the Capital National Bank of Lincoln a large amount of money, and, wishing to reduce his indebtedness, he wrote to Libbie Peterson, stating: "Now I want to pay off and take up my note of $3,000, and inclose herewith my check for that amount. There will be some interest due on the note. Please return the note and I will figure the interest due and remit it to you." On receipt, by Libbie, of this letter and the check for $3,000 which was drawn on the Capital National Bank and made payable to her order, she went to the receptacle where the three sisters kept their valuable papers, took out the two notes belonging to Georgia and Mrs. Folsom, and sent them to Walsh. At this time Georgia was seriously ill and it was not deemed advisable to mention business matters to her. A few days afterwards, however, upon being advised of what had been done, she objected to receiving payment of the principal of the note before it fell due, and declared her intention to go to Lincoln to see Mr. Walsh, and insist that he keep the money until May, when the note would become due. Libbie communicated these facts to Walsh. He then proposed to discount the May coupon, and sent Libbie a check for the same less the discount. Some question was then raised as to the correctness of the interest computation. Walsh acknowledged that he had made an error and, on January 26, sent Libbie a check "to correct interest due." Pending these negotiations, Libbie had failed and neglected to deposit the checks received from Walsh. On January 21, 1893, the Capital National Bank failed, and passed into the hands of a receiver. The $3,000 check had not been indorsed or delivered to the plaintiff. After the bank failed, Walsh sent Libbie a blank claim to be by her filled out and filed with the receiver. At the time Walsh sent Libbie the $3,000 check he also sent her a New York draft issued by the Capital National Bank

which was to cover interest due on the Sholes loan. Walsh suggested to Libbie, when he wrote her regarding the matter of filing a claim with the receiver, that she hold his checks until it should be known what depositors would receive, but insisted that the New York draft be filed with the receiver at once as it was a claim against the bank.

The plaintiff, in her petition, declared on a lost note, and demanded judgment. Defendant, after admitting the execution and delivery of the note, denied the other allegations of the petition, and pleaded payment. This plea was denied by plaintiff. On the trial the court ruled that the burden of proof was on the defendant. This ruling is assigned for error. We think the court was right, and that the defendant is wrong. When the case was submitted to the jury there was no material fact in dispute touching the loss of the note. It was indisputably established that the note, when last seen, was in the hands of the defendant, and that it no longer possessed the qualities of a negotiable instrument. In our view of the case, the only controverted fact was that of payment, which depended solely on the agency of Libbie Peterson. If she was the duly authorized agent of plaintiff with power to receive the $3,000 check from defendant for the principal of the note months before it became due, then the loss must fall on plaintiff, otherwise on defendant. It appears that all interest payments, but one, made on the notes of plaintiff and Mrs. Folsom were sent to Libbie Peterson. The remittance, in each instance, was by a single check payable to the order of Libbie. The distribution of the proceeds could not be made until she cashed the check. When she paid over to her sisters the interest due them, they turned over to her the coupons which she would transmit to Walsh. Both Libbie and plaintiff testified that the remittances were made in this manner for the convenience of defendant. Walsh insists, however, that in receiving the checks and making the distribution Libbie was acting for plaintiff and Mrs.

Folsom. The business relationship of Libbie Peterson to the litigants at the time she received the $3,000 check, was, therefore, the vital issue in the case. The defendant contends that Libbie had been for years the agent of plaintiff in the collection of the interest coupons, and that she was, therefore, the agent of plaintiff with power to collect the principal of the note. We think this position is not tenable. It does not necessarily follow that because an agent is empowered to collect interest on a note, he has also authority to collect the principal. See *Phœnix Ins. Co. v. Walter*, 51 Nebr., 182; *Campbell v. O'Connor*, 55 Nebr., 638; *Bull v. Mitchell*, 47 Nebr., 647; *Richards v. Waller*, 49 Nebr., 639; *Cooley v. Willard*, 34 Ill., 68; *Wilson v. Campbell*, 110 Mich., 580; *Brewster v. Carnes*, 103 N. Y., 556. Especially is this true where the principal is paid to an agent before the debt falls due. See *Smith v. Kidd*, 68 N. Y., 130; *Thompson v. Elliott*, 73 Ill., 221; *Security Co. v. Graybeal*, 85 Ia., 543; *United States Bank v. Burson*, 90 Ia., 191; *Schenk v. Dexter*, 79 N. W. Rep. [Minn.], 526. Libbie Peterson did not have possession of the Walsh notes at the time the $3,000 check was sent to her; she was without apparent authority to receive payment on behalf of her sisters. Yet the check was made payable to her order. Why? That she might receive the proceeds, pay her sisters, receive from them the notes and transmit them to Walsh at Lincoln. She could not rightfully obtain the notes until they were paid in full. Walsh directed her to send them to him so that he might compute the interest due. Plaintiff, consulting her own interests and directing her own affairs, might not have been willing to turn over the note to the maker in a distant city before full payment had been made. When Libbie obtained possession of these notes she was apparently not acting on behalf of plaintiff or Mrs. Folsom. They were certainly not benefited by her act. On the contrary they were prejudiced. But even if they had been benefited, the act of Libbie would not bind them, unless it was actually or apparently authorized.

The plaintiff did not know what had been done until several days after the notes had been sent to Walsh. When advised of the facts, she repudiated the transaction, and sought to be restored to her former position respecting the indebtedness. Libbie had complied with Walsh's request without the knowledge or authority of the plaintiff, who had received neither the check nor any part of its proceeds. Indeed, until the check was delivered, indorsed by Libbie, the plaintiff could not claim it. It was not all hers; neither was it all Mrs. Folsom's. The plaintiff, when she learned that her note had been surrendered, declared that Walsh should have kept the principal until the whole debt matured, so that she might receive the interest for the full period the loan was to run. She repudiated the acts of her sister in receiving the principal of the debt and in returning the note to Walsh. Whether these facts and circumstances were such as to constitute Libbie the agent of plaintiff, were for the jury to determine, and the court did right in submitting the question to them for their consideration. When evidence adduced to support a claim of agency is disputed or the inference is doubtful, the question is one of mixed law and fact for the consideration of the jury, to be aided by proper instructions from the court. See 1 Am. & Eng. Ency. Law [2d ed.], 967; *Nichols v. Hail*, 4 Nebr., 210; *New England M. S. Co. v. Addison*, 15 Nebr., 335; *Hankinson v. Lombard*, 25 Ill., 572; *Morrison v. Whiteside*, 17 Md., 452; *Bradstreet Co. v. Gill*, 72 Tex., 115; *State v. Bristol Savings Bank*, 108 Ala., 3.

Defendant complains that undue prominence was given by the court in its instructions to the question of agency. We do not think so, because that was the vital and decisive question in the case.

Defendant asserts that he was prejudiced by the introduction of evidence showing that he was an officer of the Capital National Bank at the time of its failure. In any view we take of this evidence, we can not see that it had any weight with the jury, or that it could have exerted

any influence upon their decision. The most that can be said of it is that it was error without prejudice.

The further claim is made that the court permitted certain matters to be inquired into on the cross-examination of one of defendant's witnesses. In this there was no error. Defendant on direct examination drew out certain facts, and plaintiff on cross-examination, as she had a right to do, undertook to bring to light the whole transaction. See *Davis v. Neligh*, 7 Nebr., 84; *Stanton County v. Canfield*, 10 Nebr., 387; *Fosbinder v. Svitak*, 16 Nebr., 499; *Barr v. Post*, 56 Nebr., 698; *Black v. Wabash, St. L. & P. R. Co.*, 111 Ill., 351; *Vogel v. Harris*, 112 Ind., 494; *Gemmill v. State*, 16 Ind. App. Ct. Rep., 154, 43 N. E. Rep., 909; *Blake v. Powell*, 26 Kan., 320; *Home Ben. Ass'n v. Sargent*, 142 U. S., 691; 8 Ency. Pl. & Pr., 105.

Upon the whole case as presented we conclude that there is no prejudicial error in the record, and that the judgment should be

AFFIRMED.

SAMUEL H. SWAYNE V. CHARLES A. HILL.

FILED FEBRUARY 9, 1900. No. 9,153.

Statute of Frauds: PROMISE TO PAY DEBT OF THIRD PARTY: INDEPENDENT CONTRACT: NEW CONSIDERATION. Where a promise to pay the debt of a third party is a new and independent contract founded on a new consideration of benefit to the promisor, or injury to the promisee, it is not within the statute of frauds, and need not be in writing.

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

F. I. Foss, for plaintiff in error, argued that how far one partner could bind the firm by a guaranty obliging the firm to pay, if some other person did not, had been much disputed. The later cases, however, decided that unless it could be shown that the giving of guaranties was necessary for carrying on the business of the firm in the ordinary way, one of the members would be held to have

no implied authority to bind the firm by them; for, generally speaking, it was not usual for persons in business to make themselves answerable for the conduct of other people. See *Sweetser v. French*, 2 Cush. [Mass.], 309; *Bank v. Bowen*, 7 Wend., 158; *Boyd v. Clum*, 7 Wend., 309; *Marsh v. Thompsonville Nat. Bank*, 2 Brad. [Ill.], 217; *Avery v. Rowell*, 59 Wis., 82; *Osborne v. Thompson*, 28 N. W. Rep., 260; *Moynahan v. Hanaford*, 42 Mich., 329.

Where a father made a parol promise to a child to convey to him or to her a tract of land if the latter would move on to the same, erect a house thereon and break up and cultivate the land, all of which was done in reliance upon the promise, equity would enforce the agreement. See *Ford v. Steele*, 31 Nebr., 521.

Counsel further cited *Dawson v. McFaddin*, 22 Nebr., 131; *Neale v. Neales*, 9 Wall., 1; *Fairfield v. Barber*, 16 N. W. Rep., 230.

The promise must be to answer for the debt, default or miscarriage of another. If the effect of the promise was to put an end to the obligation of the other, obviously the statute did not apply. Such a promise was collateral to nothing. It was an independent obligation not within the statute. It was equally obvious that a promise to answer for one's own debt was not within the statute. See 8 Am. & Eng. Ency. Law, 677; *Darst v. Bates*, 95 Ill., 493; *Cott v. Roat*, 17 Mass., 229; *Palmer v. Witcherly*, 15 Nebr., 98; *De Witt v. Root*, 18 Nebr., 567; *Smart v. Smart*, 97 N. Y., 559.

There was no legal presumption of an interest which any person had in any firm, no matter if his name did appear in the firm. It was simply a fact which had to be proven the same as any other fact.

E. S. Abbott, contra.

SULLIVAN, J.

An execution, issued on a judgment in favor of Charles A. Hill and against R. M. Mallory, was either levied, or

about to be levied, on the partnership property of Swayne & Mallory. To prevent the seizure of firm property, or else to secure the release of a levy already made, and also to avoid the institution, by Hill, of a suit in equity to determine the extent of Mallory's interest in the firm assets, Swayne orally agreed to pay the amount due on the execution. All further proceedings to enforce the judgment were then abandoned. Swayne afterwards bought Mallory's interest in the firm business, and thereby obtained the exclusive possession and ownership of the property against which the execution had been directed. He declined, however, to perform his contract with Hill, who thereupon brought this action to compel performance. The jury found in favor of the plaintiff, and judgment was rendered on the verdict.

Defendant insists that there was no consideration for his agreement to pay Hill's judgment, and that the agreement was, therefore, void. This argument is based on the hypothesis that there was no levy of the execution upon the property of the partnership. The evidence upon this point is conflicting; but it is sufficient to justify the conclusion that a valid levy was made. The alleged return of the constable on the back of the writ is without evidential value. The obvious truth in regard to this matter is that he made no official return. The certificate which he signed was canceled by his consent, and the substituted one never received either his signature or approval. But the validity of Swayne's promise to pay the judgment was not entirely dependent upon the effectiveness of the levy which the constable made, or attempted to make. The mere forbearance of the plaintiff to proceed under the execution, and the abandonment of his purpose to bring an equitable action against the partners, constituted a valuable and sufficient consideration for the defendant's promise. See *Bellows v. Sowles*, 55 Vt., 391; *Sanford v. Huxford*, 32 Mich., 313; *Packer v. Benton*, 35 Conn., 343; *Conradt v. Sullivan*, 45 Ind., 180; *Townsend v. Long*, 77 Pa. St., 143; *Muller v. Riviere*, 59 Tex., 640.

It is further contended that the promise of the defendant was a promise to answer for the debt of another, and that it was, and is, void under section 8 of the statute of frauds. We think the promise to pay the judgment was clearly a new and independent contract founded on a new consideration of benefit to the promisor, and injury to the promisee. The question is settled in this state by the following decisions: *Clopper v. Poland*, 12 Nebr., 69; *Fitzgerald v. Morrissey*, 14 Nebr., 198; *Clay v. Tyson*, 19 Nebr., 530; *Joseph v. Smith*, 39 Nebr., 259; *Rogers v. Empkie Hardware Co.*, 24 Nebr., 653; *Mathews v. Seaver*, 34 Nebr., 592; In *Fitzgerald v. Morrissey, supra*, it is said: "Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing."

There is no error in the instructions; the verdict is supported by sufficient evidence; the judgment is right, and is

AFFIRMED.

JACOB BAER V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1900. No. 11,097.

1. **Reception of Evidence:** JUDICIAL DISCRETION. The reception of evidence out of its regular order is not reversible error, unless it amounts to an abuse of judicial discretion.

2. **Assignment of Errors.** Errors which have not been specifically assigned will not be considered.

3. **Evidence.** Evidence examined, and *held* sufficient to sustain the verdict.

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

Ed L. Adams and *Hamer & Hamer*, for plaintiff in error:

The evidence did not warrant a conviction of rape. The state failed to prove that the prosecutrix was not the daughter or sister of the defendant. This was fatal. See Bishop, Criminal Procedure, secs. 77, 81, 84, 86; Maxwell, Criminal Procedure, pp. 621, 629.

Ed L. Adams argued that Meddles' name was indorsed on the information as one of the state's witnesses. After the state had rested and after the defense had rested, this man, over the objection of defendant, was permitted to testify as shown in the transcript. Counsel had never known of so flagrant a violation of the rules governing the admission of testimony. This was not rebuttal testimony. The state must first make its case, and the defendant was entitled to know all that the state would produce against him. Here was a man permitted to testify to that which should be a part of their case in chief. He was practically the last witness called. He testified to a conversation that he overheard where several parties were present. What opportunity was given to defendant for him to look up those parties and prepare to answer such statement? His case was ready to be given to the jury, and he had long before rested his case. It could not be said that it was proper as impeaching testimony.

C. J. Smyth, W. D. Oldham and *J. L. McPheeley*, for the state, argued that the defendant himself testified that he was forty-five years of age, and that he had only known the prosecutrix for about eleven years. "We submit to this honorable court that from this testimony it was shown conclusively to the jury that it was a physical impossibility for the prisoner to have been the father of the prosecutrix, as there was only five years difference in their ages. We also submit to the court that the fact that each of them testified that they had only known the other for about ten or eleven years is evidence tending

to show that they were not brother and sister. The fact that both parties appeared before the jury and testified in full view of the jury would be a circumstance that might have aided this other testimony in enabling the jury to reach the conclusion that the prisoner and the prosecutrix were not brother and sister. In other words, while this proof was not as conclusive as it might have been made by the state, yet, when the absence of such a relation as father and daughter, or brother and sister, was to the advantage of the prisoner, and tended to reduce the punishment of his crime, if he was guilty of the offense charged, for the court will readily see that a prosecution under section 12, where the relationship of father and daughter or brother and sister does not exist, is a less heinous and disgusting crime than a prosecution under section 11 of the Code, where such a relationship does exist. This fact alone would entitle the prisoner to the presumption of innocence of that grade of the crime until proof was tendered showing that the relationship did exist. Our theory is that the proof of want of relationship being to the advantage of the prisoner in the case, the evidence would be sufficient to sustain a finding that no relationship existed, and that there was sufficient proof to justify the jury in finding that Addie Hill was not the sister or daughter of Jacob Baer."

SULLIVAN, J.

The information, which was drawn under section 12 of the Criminal Code, charges the defendant, Jacob Baer, with having committed a rape upon the prosecutrix, Addie Hill. The trial resulted in a verdict for the state, and the court pronounced sentence accordingly. The alleged insufficiency of the evidence is the principal ground relied on for a reversal of the judgment.

It is claimed on behalf of the defendant that the evidence establishes an alibi, and that it fails to establish non-consent of the prosecutrix to the sexual act. Mrs.

Hill was a widow about forty years of age. She lived in the village of Lowell in Kearney county, and on the night in question was entirely alone. Being called as a witness, she stated that the defendant, about 2 o'clock in the morning of August 9, 1898, gained admission to her house by falsehood and deceit. As to what then transpired she testified as follows: "Well, he took hold of me and threw me to the floor and of course I tried to fight my way as well as I could; he is a large man and he told me then what he had come for and he said I had to submit to his wishes; I told him that I would not, and he said that I had to; of course I tried to fight and we went around the floor, I can tell you, many times, but he being a large man threw his weight on my shoulders and confined me a good deal but I tried as hard as I could to fight, and I never gave up to him, Once he says, 'Now are you going to do this?' I said, 'No, sir'; he said, 'You have to,' and I said, 'I will not,' and he says, 'You have to do this or you will die right here,' and I said, 'Well, I guess you will have to kill me, I think more of my character than I do of my life,' but he tried several times to make me say that I would submit to his wishes, but I would not; I fought as bravely as I could, me being a small woman. * * * He dragged me around and I could not help myself and finally he went away; he said that he was bound to have his wishes from me whether I was willing or not, and he fought me until he gained that, then he started to go away and he said that if I told it he would kill me; he said that there were others out there secreted in the weeds and it would not do any good for me to squeal because it would not help me any, and once when I found I could not do any more I called on the Lord to save me, and he said that it would not do any good for me to talk to my God, that He would not help me, that he had me now." There was other evidence to the effect that the prosecutrix complained immediately of the outrage; that she was scratched and bruised and her clothes torn; that Baer had been at

Minden drinking intoxicants on the night of August 8, and arrived at Lowell with his team about 2 o'clock on the morning of August 9; that the tracks of buggy wheels were found all the way from Mrs. Hill's front gate to the place where defendant was stopping. Some further incriminating circumstances were given in evidence, but we deem it unnecessary to make special reference to them here. The evidence adduced by the state was not directly controverted, except by the testimony of the defendant, who stated that when he arrived at Lowell on the morning of August 9 he went immediately to the home of his father-in-law and did not call upon Mrs. Hill. That the jury were justified in finding that the defendant had sexual relations with the prosecutrix at the time alleged in the information is a matter about which there is in our minds no disquieting doubt. Neither do we see in the evidence any reason to suppose that the woman at any time submitted voluntarily. The proof on this point is all to the contrary and tends, irresistibly, to show that Baer accomplished his criminal purpose by intimidation and superior force. Notwithstanding the attempt to show that he was a cripple and affected with numerous wasting maladies, there is, we think, abundant reason for believing that he was a man of unusual strength and activity, and that his powers were entirely adequate to the execution of the design imputed to him. It is said that some of the arguments employed by the prosecutrix to induce her assailant to abandon his project indicate on her part an attitude of non-resistance. The particular language to which attention is directed affords no such inference. When it became evident that further physical resistance would be unavailing, Mrs. Hill made an appeal for mercy, in which she reminded the defendant of the virtues and worth of his own wife, who would be dishonored by his trangression. This appeal was a futile one and possibly, as counsel contend, was not in the least calculated to dissuade; but that fact, if it be conceded, does not justify the inference that the resistance

was formal or the entreaty insincere. The jury having found that the accused was at the house of the complaining witness on the morning of August 9, they could not, without disregarding the evidence, have found that no crime had been committed.

But it is contended that the proof does not show that Baer and Mrs. Hill are not brother and sister, and that, therefore, the crime committed may have been more heinous and revolting than the one charged. In this connection it has been suggested by the attorney general that if one of two crimes was committed, the law presumes the commission of the one to which is attached the lighter penalty and which involves the lesser degree of turpitude. It will not be necessary to determine whether the presumption of innocence may be employed in any case to establish guilt; for, in our opinion, the evidence adduced upon the point in question is, in the absence of opposing proof, sufficient to sustain the finding of the jury. The accuser and the accused were witnesses at the trial, and, according to the testimony of both, while they had lived for several years in Kearney county and knew each other, they were only slightly acquainted. While testifying, each spoke of the other as though they were not related in any degree. The conversation which took place between them when they met at the door of Mrs. Hill's cottage on the night of the outrage was, also, a circumstance tending to show that they were not brother and sister. And these were not necessarily the only matters of which the jury took cognizance in reaching their conclusion. They may have noted an entire want of family resemblance between the parties. Indeed, it may have been apparent upon the most casual observation that they were not of the same nationality, race or color.* We do not, however, at this time decide that mere family resemblance, or the absence of it, is a relevant fact in a case of this kind. What we do decide, and all we decide in this behalf, is that there is no techni-

*See *White v. State*, 74 Ala., 31.—REPORTER.

cal defect in the state's proof and that the verdict rests upon sufficient competent evidence.

Another question of minor importance remains yet to be considered. The fifth and sixth assignments of error call in question the action of the court in permitting Frank Meddles to testify on rebuttal to the fact that the defendant declared in Minden on the evening of August 8 that he intended to satisfy his sexual passion before going home that night. This testimony was not properly rebuttal; but the order in which proof shall be introduced is a matter resting largely in the sound discretion of the trial court, and we discover no reason to believe that there was, in this instance, an abuse of discretion. In *Basye v. State*, 45 Nebr., 261, it was decided that "the order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal when no abuse of discretion is shown." This rule has been followed in *Davis v. State*, 51 Nebr., 301, and *Whitney v. State*, 53 Nebr., 287. See, also, *Rheinhart v. State*, 14 Kan., 318; *Blake v. Powell*, 26 Kan., 320; 1 Thompson, Trials, sec. 344; 8 Ency. Pl. & Pr., 132.

Other alleged errors argued in the brief of counsel for defendant have not been specifically assigned, and will not be considered. The judgment is

AFFIRMED.

FERDINAND ZIMMERER AND EMMA ZIMMERER V. THE FREMONT NATIONAL BANK.

FILED FEBRUARY 9, 1900. No. 9,101.

1. **Motion for New Trial:** ACCIDENT: SURPRISE: JUDICIAL DISCRETION. A motion for a new trial on the ground of accident or surprise is addressed to the sound discretion of the trial court in the furtherance of justice, and unless there appears to be an abuse of that discretion, the ruling upon such a motion will not be disturbed by a reviewing court.

2. **Motion to Strike.** A general motion to strike certain affidavits from the files is rightly overruled if such affidavits contain material and pertinent matters regarding the subject under consideration as well as statements which are objectionable. Such motion should be narrowed to the objectionable matter alone.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J. *Affirmed.*

Hamer & Hamer, for plaintiffs in error, argued that it was an accident which might come to any busy lawyer, which came to counsel for the defendants Zimmerer, and it was without fault upon his part or upon the part of his clients. The motion for a new trial should have been sustained. See *Horn v. Queen,* 4 Nebr., 114; *Smyth v. Castler,* 16 Nebr., 266; *Horn v. Queen,* 5 Nebr., 472; *Parker v. Kuhn,* 19 Nebr., 394; *Hendrickson v. Hinckley,* 17 How., 443; *Roggencamp v. Dobbs,* 15 Nebr., 621; *Leiby v. Heirs of Ludlow,* 4 O., 493; *Huntington & Macintyre v. Finch & Co.,* 3 O. St., 448; *Bank v. Doty,* 9 O. St., 505; *Thompson v. Sharp,* 17 Nebr., 72.

Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen had an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard was absolutely essential. See Black, Constitutional Law, sec. 212; *Stuart v. Palmer,* 74 N. Y., 183.

Fred W. Vaughn, for defendant in error.

HOLCOMB, J.

The record in this case discloses that a trial was had in the absence of the defendants and their attorney. A motion for a new trial, assigning many grounds therefor, was filed and overruled by the court. If defendants were entitled to a new trial for any cause, it was on account of "accident or surprise, which ordinary prudence could not have guarded against," and which was properly assigned as one of the grounds for a new trial. Considera-

tion of no other question will therefore be undertaken. Affidavits in support of the motion and counter-affidavits were filed and considered on the hearing. The defendants and their attorney were non-residents of the county in which the action was pending. It is made to appear from the affidavit of plaintiffs' counsel that the case had been continued twice out of courtesy to the defendants' counsel, and that at the beginning of the term at which a trial was had the case stood second on the trial list, but, to accommodate the defendants' counsel, and by consent of both parties in open court, the case was placed on the trial list as three and one-half, and it was agreed between counsel that it should not be tried before the following Thursday. On Thursday the case was reached and postponed twice, upon the assumption that the defendants and their counsel might come to the place of trial on incoming trains from the direction in which they resided. They not appearing, a trial was had in their absence. It also appears from the showing made by the defendants for a new trial that their attorney, after the case had been placed on the trial list for trial as above mentioned, made an arrangement with a resident attorney to advise him by telegram when the case was about to be reached for trial, and then left for another part of the state. Neither the counsel for the plaintiff nor the court had any knowledge of the private arrangement referred to. On the day of the trial the resident attorney was called away on business, and the case was thus allowed to proceed to a trial without the defendants being represented, either in person or by counsel. It appears that the attorney for the defendants had in the meantime received notice of the pendency of another trial in another county, a county seat contest, in a distant part of the state, where he went and was engaged in the trial of the case last mentioned for several days and until after the trial of the case at bar. No further inquiry was made regarding the trial of this cause, and no steps appear to have been taken to have

other counsel represent the defendants therein. In view of what had occurred when the case was placed on the trial list, counsel for the plaintiff and the court were justified in concluding, as it seems they did, that the case had been abandoned by the defendants. The resident attorney had in no way been employed in the case, and evidently looked upon his promise to notify the defendant's attorney by telegram when the case was about to be reached for trial as not being of such a nature as to require him to inconvenience himself or neglect his own business for that purpose. It was a slight courtesy which he was willing to extend, presuming that he would be in court and thereby have knowledge of the progress of the cases preceding this one.

In view of the foregoing we are to determine whether error was committed in the overruling of the motion for a new trial. At the threshold of the inquiry, it is proper to observe that it is a firmly established principle of law that a motion for a new trial on the ground of accident or surprise is addressed to the sound discretion of the trial court in the furtherance of justice, and unless there appears to be an abuse of that discretion, the ruling upon such a motion will not be disturbed by a reviewing court. In *Tingley v. Dolby*, 13 Nebr., 371, it is said: "Motions for a new trial are addressed to the sound discretion of the court, and this rule prevails whether the ground of the motion is that the verdict is against the weight of evidence, or for accident or surprise, newly discovered evidence, or like cause. But this discretion is a legal discretion." See *Sang v. Beers*, 20 Nebr., 365; *Green v. Bulkley*, 23 Kan., 130; Hayne, New Trial & Appeal, sec. 86. It is said in *McGuire v. Drew*, 83 Cal., 229: "The terms 'accident' and 'surprise,' though not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own, which ordinary prudence could not have

guarded against." The attorney for the defendants, when in court at the beginning of the term, was apprised of the fact that the case would probably be reached by the Thursday following or sooner, and there appears to have been an understanding that it should be, in effect, set for trial on that day. It appears from one of the affidavits that the trial judge suggested to counsel that he procure the assistance of a resident attorney to represent the defendants in the event that he should not return in time for the trial. This suggestion was not acted upon. The evidence also shows that he left on a different errand than to attend the county seat contest, and was to be absent but a couple of days. The resident counsel, who was to advise him by telegram when the case was about to be reached, was acting, if at all, as the agent of the defendants. When he was called away on business, he advised no one regarding his promise to the defendants' counsel. The counsel for plaintiff acted apparently in perfect good faith. The court was cognizant of the manner in which the case had been placed on the trial list, and permitted the trial to proceed in the absence of the defendants and their counsel, because there was no good reason for further delay. If the resident attorney who was to notify the absent counsel was in the least at fault, which we do not assume, his failure would be attributable to the defendants, under the well-established principle that those who were acting for them were acting as their agents. See *Kyle v. Chase*, 14 Nebr., 528; *Webster v. McMahan*, 13 Mo., 410; *Mulholland v. Heyneman*, 19 Cal., 605. While it appears that when counsel left the place of trial he intended to be gone for a couple of days only, no effort was made by him to explain his continued absence, or advise those directly interested of the same. Nor was any attempt made to secure a further postponement. The fact that he was engaged in another important trial would not excuse his absence in the case at bar. The work of the courts would soon be in a chaotic condition, if, as a matter of right, an attorney could require

the postponement of a case while he was engaged in other business. We think counsel's position in this case and the cause of his absence is fairly stated in the following excerpt from an affidavit filed by him in support of his motion for a new trial: "Affiant further says that the application to set aside the verdict and proceedings in this case is made in good faith in furtherance of justice, and not for the purpose of delay, and that the failure of affiant to be here and present the case upon the part of the defendants when it was reached for trial was because he was engaged in the actual and very real county seat controversy in Box Butte county heretofore described in his affidavit filed in this case in support of the motion for a new trial, and that affiant did not directly or indirectly do anything in the said county seat controversy with a view of delaying this case, or in any way putting off this trial, or in any way obstructing justice herein." All the circumstances surrounding the trial of the case were within the knowledge of the trial judge in the court below. During his lifetime he was known to be one of the most learned, painstaking and careful judges upon the bench. After a full hearing of defendant's application for a new trial he overruled the same. We can not, upon the record presented to us, say there was an abuse of the sound discretion which is always lodged in the trial court. We are rather constrained to say that the ruling was entirely just and is calculated to bring about a due, orderly and more certain administration of justice. In *Stout v. Lewis*, 11 Mo., 281, it is well said: "It is obvious that, in matters of this kind, the court possessing original jurisdiction enjoys advantages for determining them far superior to those enjoyed by this court. Any one the least conversant with the administration of justice in courts of original jurisdiction, must be aware of this. These motions are addressed to the sound discretion of those courts, to be liberally exercised in furtherance of justice. * * * An indiscriminate interference by this court with matters of

pure discretion in courts below, would, in the end, be productive of more injustice than a refusal to interfere in any case. In the review, justice might sometimes be done, but in the most of them it would be little more than a groping in the dark, in which the court could not satisfy itself whether it was doing right or wrong."

Attention is directed to the alleged erroneous ruling of the court in refusing to strike two certain affidavits from the files on the hearing of the motion for a new trial. An examination discloses that one of them was for the purpose of controverting defendant's affidavits showing a meritorious defense, and it would seem that an attempt was made to try the merits of the case upon the motion for a new trial, which was manifestly improper. In the other affidavit, however, only a part of it was devoted to a disputation of the defense alleged, and much was contained in it that was material and pertinent to matters properly before the court in deciding the motion for a new trial. The court doubtless considered only evidence that was proper under the motion under consideration. The defendant having moved generally to strike both affidavits from the files and without distinguishing the objectionable matter from the portions that were proper and material, the court rightly overruled the motion. Such a motion should be narrowed to the objectionable matter alone. See *Chicago, B. & Q. R. Co. v. Spirk*, 51 Nebr., 167; *Smith v. Meyers*, 54 Nebr., 1.

Observing no reversible error in the ruling complained of, the judgment of the court below is

AFFIRMED.

ANDREW PETERSON V. KINGMAN & COMPANY.

FILED FEBRUARY 9, 1900. No. 9,134.

1. **Garnishment:** SUMMONS: APPEARANCE: GOOD FAITH: PROTECTION FROM LIABILITY. A person served with summons in garnishment, commanding him to answer upon a day certain therein named, may appear in response to the summons at any time

after its service and answer touching his indebtedness to the person or corporation whose funds are sought to be reached by the proceedings in garnishment, and if, in so doing, he is acting in good faith, he will be protected from further liability on the indebtedness for which he is garnisheed.

2. ——: ANSWER: STATUTE: ORDER FOR SATISFACTION OF JUDGMENT. Upon the answer of a garnishee admitting his indebtedness to an execution debtor, the court before whom the same is made is empowered, under the provisions of section 249 of the Code, immediately to enter an order for the payment of the amount admitted to be due the execution debtor into court, for the satisfaction of the judgment debt or a part thereof.

3. ———: ORDER FINAL: APPEAL: EXECUTION. Such an order is final and conclusive, unless appealed from, and upon which execution may issue for its enforcement.

4. ———: COMPLIANCE WITH ORDER: DISCHARGE OF GARNISHEE. In garnishment proceedings, where the answer has been made in good faith before answer day, and an order entered by the court for the payment of money for the benefit of the execution creditor admitted to be owing to the execution debtor, the garnishee will be discharged from further liability upon such indebtedness, if he comply with the order of the court, notwithstanding he is subsequently, but before the payment, notified of an assignment of the account evidencing his indebtedness, and which assignment was made prior to the time of instituting garnishment proceedings.

5. **Entry of Order:** STATUTE: NOTICE OF ASSIGNMENT. Upon the entry of an order against a garnishee under the provisions of section 249 of the Code, he is not required to make further disclosures or take supplemental proceedings, because of a notification of an assignment of the indebtedness against him received thereafter.

6. **Judgment:** STATUTE: PROTECTION OF GARNISHEE. An order against a garnishee for the payment of money for the benefit of an execution creditor under the provisions of section 249 of the Code is enforceable by execution, and a garnishee, acting in good faith, will be protected from further liability to the same extent as if such order were a judgment against him.

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

O'Neill & Gilbert, for plaintiff in error.

Thomas F. Lee and *James H. McIntosh, contra.*

HOLCOMB, J.

A careful perusal of the record and briefs of counsel leads to the conclusion that this controversy is one of law rather than of fact. From the stipulated facts, we are of the opinion that it is not warrantable to draw therefrom the inference that either of the parties to the action have shown a want of good faith, or that there was collusion between the defendants herein, plaintiff in error, as garnishee and the judgment creditor in the garnishment proceedings. The action is the outgrowth of a contest between two creditors of an insolvent company, one of whom by garnishment proceedings, and the other as assignee, claims from the defendant payment of the indebtedness admitted to be owing to the insolvent company referred to. The plaintiff in the court below contends that the defendant should be required to pay to it, as assignee, the debt which is undisputed except for its alleged prior payment in garnishment proceedings. It is established that, prior to any notice of the assignment of the account upon which the plaintiff bases its right to a recovery, the defendant had been served with a summons in garnishment in aid of execution, had appeared in response thereto, acknowledged the indebtedness, and an order by the court was immediately entered under the provisions of section 249 of the Code, requiring him to pay the money into court for the use of the execution creditor. The summons in garnishment was served February 19, commanding the defendant, as garnishee, to answer March 25 following. The garnishee appeared in response to the summons, and made answer concerning his indebtedness to the judgment debtor on February 23, and an order by the court was made on the same day the answer was taken and immediately thereafter. Subsequently to the time the answer was made as above stated, and on the same day, the garnishee received notice through the mail from both the judgment debtor as assignor, and

the plaintiff as assignee, to the effect that the account against the garnishee, as well as the judgment rendered thereon, had been assigned to the plaintiff, who was authorized to receipt for and satisfy the same. It appears that the account had been assigned to the plaintiff long prior to the rendition of the judgment thereon in favor of the assignor, although no notice thereof was ever imparted to the defendant until after answer in the garnishment proceedings above mentioned. We do not think the garnishee was required to withhold his answer until the answer day mentioned in the summons. He may very properly appear before that date. The time mentioned in the summons in garnishment for him to appear was but a limit beyond which he could not go without subjecting himself to additional cost, and incurring a direct liability to the judgment creditor to be enforced as in other civil actions. The time allowed in which to answer is for his benefit. He may appear at any time after the service of summons, and, if acting in good faith, he will be protected in so doing. By appearing and answering he subjected himself to the jurisdiction of the court, which then was empowered to make any proper order in the proceedings. See *Mace v. Heath*, 34 Nebr., 54; *Hinckley v. St. Anthony Falls Water Power Co.*, 9 Minn., 44; *Steen v. Norton*, 45 Wis., 412. Soon after the garnishee had answered in the garnishment proceedings, he received notice of the assignment of the account, which, in his answer, he admitted owing to the assignor. The assignment apparently had been made a long time prior thereto, and before the commencement of the garnishment proceedings. The notices of the assignment were received before the garnishee paid the money into court under the order made prior thereto. If the garnishment proceedings were regular and valid, the plaintiff in error ought not again be required to pay the debt. We find no irregularity in the proceedings. As before stated, the garnishee was at liberty, at any time after service and before the answer day, to appear

and make disclosure regarding his indebtedness, and the court thereby obtained jurisdiction over the person; and upon such disclosure, where the answers were satisfactory, was authorized to enter a final order for the payment of the amount due in satisfaction of the claim of the judgment creditor. See *Schlueter v. Raymond Bros. & Co.*, 7 Nebr., 281; *Wilson v. Barney*, 8 Nebr., 39; *Clark v. Foxworthy*, 14 Nebr., 241; *Burlington & M. R. Co. v. Chicago Lumber Co.*, 18 Nebr., 303; *Union Nat. Bank of Omaha v. Hickey*, 34 Nebr., 300. When the order in the garnishment proceedings had been made it became of the same force and effect as a judgment upon which execution could issue for its satisfaction. The garnishee, therefore, was legally bound to comply with the order of the court, unless an appeal was taken therefrom. It was to him a matter of indifference whether the debt owing by him went direct to his creditor, or was applied on a just debt owing by such creditor. We can conceive of no reason why the garnishee should feel dissatisfied or care to incur more expense, or subject himself to needless inconvenience, regarding a matter about which he had no concern. Nor, in our opinion, was he under legal obligations, after the entering of such order against him, to take other and supplementary steps because of the subsequent notice he received as to the assignment of the account against him which had been reduced to judgment as herein stated. He occupied a neutral position, and it was incumbent upon him to deal fairly with both parties seeking the money due from him to his creditor. The execution creditor and the assignee stood upon an equal footing. Each made an effort to reach the funds in the hands of the garnishee, and under the legal maxim that the law serves the vigilant, and not those who sleep, the execution creditor has a superior claim to the money in the hands of the garnishee. As we understand counsel on both sides, it is undisputed that only before judgment is a garnishee legally obligated to make supplemental and further disclosures regarding

any information coming to him affecting the rights of any to the funds or property he is sought to be charged with in order to relieve him from further liability. The authorities are quite uniform in holding that after judgment against the garnishee, he is relieved from any further duty or obligation to appear and in supplementary proceedings make known any fact coming to his knowledge subsequent to such judgment. A satisfaction of the judgment of the court in the garnishment proceedings according to its terms is all that shall be required of him. See Drake, Attachment, secs. 576, 608; Rood, Garnishment, sec. 207; *Newman v. Manning*, 79 Ind., 218. We are of the opinion that an order to a garnishee for the payment of money under the provisions of section 249 of the Code, and under the authorities heretofore cited, is final and conclusive unless appealed from; that an execution may issue thereon as on a judgment, and that the same principles applicable to a judgment would apply in the case at bar, and the payment by a garnishee under such an order, even after notice of an assignment of the account by his creditor, would relieve him from any further liability thereon, either to the assignor or assignee of such account. It follows that the judgment of the lower court is erroneous, and the same is reversed, and the cause remanded for further proceedings in conformity with law.

REVERSED AND REMANDED.

ELKHORN VALLEY LODGE NO. 57, I. O. O. F., ET AL. V. THOMAS W. HUDSON.

FILED FEBRUARY 9, 1900. No. 9,138.

1. **Verdict:** EVIDENCE. A verdict of a jury will not be overturned by this court, unless obviously wrong, and not supported by any competent evidence.

2. **Search for Dead Body:** FINDING: REWARD. Where many persons are engaged in the search for a dead body, for the recovery of

which a reward is offered, and one acting on his own account, independent of others, and for the purpose of securing the reward, succeeds in finding the missing body, he will be entitled to the whole of such reward.

3. **Question of Fact.** In a controversy over the right to such reward, or to a portion of it, whether a person acted independently of others and on his individual account, or whether the discovery was the result of the joint action and combined efforts of several, is a question of fact to be tried as all other controverted questions of fact.

4. **Instruction:** INTEREST. Error can not be predicated upon an instruction by the trial court regarding the time of computation of interest on the sum found due, unless exception is taken to such instruction at the time it is given.

5. **Deposit of Money in Custodia Curiae.** A party, in order to avoid the payment of interest upon an admitted obligation, regarding which there is a dispute as to who is entitled to recover, must bring the money into court to abide its final judgment, unless the court otherwise direct its disposition under the provisions of section 48 of the Civil Code.

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

H. M. Uttley, for plaintiffs in error.

M. F. Harrington, contra.

HOLCOMB, J.

An action was commenced by the plaintiff, defendant in error, for the recovery of the amount offered as a reward for the finding and recovery of the body of one Barrett Scott. The defendant, an organization or lodge of the Independent Order of Odd Fellows, admitted in its answer the offering of the reward, and pleaded that it was ready to pay the same to whomsoever was found to be entitled thereto, and that it had been notified by others that they claimed a *pro rata* share of the reward. A number intervened on the trial of the case in the court below. The jury returned a verdict in favor of the plaintiff for the full amount named in the reward. Judgment was thereupon rendered in his favor, and the action was dismissed as to the interveners.

While counsel for defendant in error presents different matters of practice and procedure which are argued as reasons for affirmation of the judgment of the court below, we prefer to confine our consideration to the merits of the case as disclosed by the record. The case appears to have been fairly submitted to the jury, and unless its verdict is against the clear weight of the evidence, it will not, under the uniform holdings of this court, be overturned here.

In the trial of the action, the interveners appear to have conducted their case upon the theory that all persons engaged in the search for the body of the deceased person at the time it was recovered were entitled to share *pro rata* in the reward, regardless of whether their actions were the result of a joint effort of all in a concerted movement for the discovery of the missing body. The mere fact of being one of a party discovering a dead body for which a reward has been offered is not of itself sufficient to entitle one to share in the reward. It must further appear that the efforts put forth were in conjunction with the party who succeeded in the search, and with whom there was co-operation for that purpose; that such persons were acting in concert, and by their joint efforts the desired end was accomplished. In our opinion, the law in such cases is, and should be, that where one engages in an effort, the accomplishment of which would entitle him to a reward, on his own account and independent of others, and succeeds in the undertaking, he would thereby be entitled to such reward and would not be required to have it apportioned between himself and others engaged in pursuit of the same object. In the case of *Janvrin v. Town of Exeter*, 48 N. H., 86, cited by counsel for plaintiff in error, the court says: "Upon the other point informally reserved, we are of the opinion that all the parties who joined in performing the service for which the suit is brought, must join as plaintiffs. It is obvious that two or more persons may join in detecting and apprehending an offender,

and if they do so, they are jointly entitled to the reward, and should join in the suit. It is like other cases of joint service, and is governed by the same rules. *If, indeed, sundry persons separately undertake to secure a culprit, and one without concert with others succeeds in apprehending him, he alone is entitled to the reward, and alone should sue.* There may be cases where it might be difficult to determine whether certain persons did act in concert or not, but this can not affect the rule that those who have jointly performed the service should join in the suit." (Italics are ours.) In our view, the foregoing opinion states quite clearly the legal principles applicable to the case at bar, and which were in substance embodied in the instructions of the court to the jury trying the case. The evidence of the plaintiff was to the effect that he was so acting on his own account, and independent of others, in the search for the missing body referred to. The evidence shows, or tends to show, that he first found the body, that is, discovered it in the bed of the river and raised it to the surface, where others with him took charge of the remains. If the jury believed his statements, as it is evident that they did, they were warranted in finding a verdict in his favor. That issue having been fairly presented to them as triers of fact, their judgment thereon can not be overruled, unless obviously wrong, and unsupported by any competent evidence.

It is urged that the organization offering the reward should not be held for the interest on the amount of the reward offered, because it stood ready to pay the same to the person or persons entitled thereto as the same might be determined upon a hearing of the controversy. Unfortunately, the lodge has not placed itself in a position to successfully urge the contention raised by counsel. No exception appears to have been taken by the defendant to the giving of the instruction to the jury with respect to the computation of interest on the sum awarded as the amount of the recovery. This of itself is fatal to defendant's contention in this respect.

See *Lowe v. Vaughan*, 48 Nebr., 651; *Costello v. Kottas*, 52 Nebr., 15. It does not appear that the money was ever brought into court, or that the defendant sought to avail itself of the provisions of section 48 of the Code, and because of its failure so to do, in either case, it can not now complain because interest is required of it on the amount offered in the reward.

No error appearing in the record, the judgment of the lower court should be, and is,

AFFIRMED.

EASTERN BANKING COMPANY, APPELLEE, V. ANNA C. SEELEY ET AL., APPELLANTS.

FILED FEBRUARY 9, 1900. No. 10,919.

Foreclosure Sale: APPRAISEMENT: NOTICE TO OWNER. The owner of real estate which is about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisement. See *Maginn v. Pickard*, 57 Nebr., 642.

APPEAL from the district court of Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

Hamer & Hamer, for appellants.

N. P. McDonald and *McDonald & Squires*, for appellee.

HOLCOMB, J.

The appellants, defendants in foreclosure proceedings of a real estate mortgage, object to the confirmation of sale upon the sole ground that "no notice was given to the defendants, or either of them, of the time and place of the appraisement, and the said defendants were not permitted to give or produce evidence before the said appraisers concerning the value of the said premises." Upon the authority of *Tillson v. Benschoter*, 55 Nebr., 443, *Mills v. Hamer*, 55 Nebr., 445, and *Maginn v. Pickard*, 57

Nebr., 642, this objection can not be sustained. The order of the lower court confirming the sale is, therefore,

AFFIRMED.

FRANK THOMPSON ET AL., APPELLANTS, V. GEORGE W. WEST ET AL., APPELLEES.

FILED MARCH 7, 1900. No. 9,136.

1. **Repeal of Statute:** ABSENCE OF SAVING CLAUSE. In the absence of a general saving clause, the repeal of a statute will not affect a suit previously brought to enforce a right founded thereon or accrued thereunder.

2. ———: DEFICIENCY JUDGMENT. The repeal of the statute permittting the recovery of deficiency judgments did not affect actions then pending.

3. **Incorporated Religious Society:** POWER TO ACQUIRE REAL ESTATE. An incorporated religious society has no power to acquire or hold real estate for any purpose other than that of promoting the object of its creation.

4. **Contract:** ULTRA VIRES. A contract entered into by such a corporation for the purchase of real estate as a matter of speculation merely is *ultra vires* and void.

5. **Indorsee:** ILLEGAL NOTE: INNOCENT HOLDER: BURDEN OF PROOF. Where, in an action by an indorsee of a promissory note, it is established that the instrument was illegal in its inception, the burden is cast upon the plaintiff to show that he is an innocent holder for value and before due.

6. **Board of Trustees:** NOTICE: PARTICIPATION. The action of the majority of a board of trustees of a religious society will not bind the latter without notice to or participation therein by the other members of the board.

7. **Corporation:** CONTRACT: RATIFICATION. A corporation can not ratify a contract which it had not the power to make.

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

Morning & Berge, for appellants, cited Compiled Statutes of Nebraska, 1897, sec. 1717, and argued that this provision of the statute expressly gave the church

authority to acquire, hold, enjoy and dispose of all property, real and personal, which the defendant church may acquire by purchase, donation or otherwise, for the purpose of carrying out the intention of such church corporation. It was not contended by the defendant church that the money it received from the plaintiffs was used for any other purpose than to carry on the work of the church. It did not contend that it did not have legal capacity to borrow money. It did allege, however, in its answer, that it purchased from Ward S. Mills a certain tract of land for the sole and only purpose of speculation, and that such speculation was in nowise necessary for the purpose of carrying out its intention as a corporation. While it made this allegation in its answer, yet it expressly admitted that the money it received from plaintiffs was used by said trustees for the payment of debts of said church, and in the construction of its church building. Defendant church might now call it what it would, it did admit that whatever it did in connection with this matter was done by its trustees to further the interests of the church. If, in the case at bar, the church did go into a real estate speculation, and if that speculation had to do with the issues in this case, yet there was not a word of evidence that it was not all done to carry on the work of the church more successfully. The board of trustees was charged with the responsibility of managing the financial affairs of the church, and the board purchased said real estate for no other purpose but to build up and strengthen the financial interests of the church, which we contend it had a right to do. Counsel cited *Wright v. Hughes*, 12 Am. St. Rep. [Ind.], 416; *Spear v. Crawford*, 28 Am. Dec., 515, 14 Wend. [N. Y.], 20; *Rivanna Navigation Co. v. Dawsons*, 46 Am. Dec., 183, 3 Gratt. [Va.], 19; *Bissell v. Railroad Cos.*, 22 N. Y., 271.

The defense of *ultra vires* can not be urged by a corporation to the injury of an innocent third party. See *Bank of Genesee v. Patchin Bank*, 13 N. Y., 313; *Gansevoort*

v. Williams, 14 Wend. [N. Y.], 133; *Catskill Bank v. Stall*, 15 Wend. [N. Y.], 364; *Evans v. Wells*, 22 Wend. [N. Y.], 324; *Bank of Genesee v. Patchin Bank*, 19 N. Y., 312; *Mechanics' Banking Ass'n v. N. Y. Saugerties White Lead Co.*, 35 N. Y., 505; *Olcott v. Tioga R. Co.*, 84 Am. Dec., 298, 27 N. Y., 596.

Powers granted to a corporation may always be used by it subject only to express limitations imposed by its charter. See *Wright v. Hughes, supra; New England Ins. Co. v. Robinson*, 25 Ind., 536; *Booth v. Robinson*, 55 Md., 419; Green's Brice's Ultra Vires, p. 223.

Whatever irregularities there may have been in the proceedings of the board, when this money was borrowed by the defendant church from plaintiffs the trustees and the entire church had ratified said acts; and the defendant church is now estopped from pleading these irregularities. See *Scott v. Middleton*, 86 N. Y., 200; *Scott v. Trustees First M. E. Church of Jackson*, 15 N. W. Rep., 892, 50 Mich., 528.

Case was argued orally for appellants by *George W. Berge.*

T. F. A. Williams, for the First Christian Church of Lincoln, Nebraska, argued that the transaction upon which appellants based their claim to a deficiency judgment against the church was beyond the powers of the church corporation, citing Compiled Statutes, 1899, ch. 16, secs. 42 and 55; Taylor, Private Corporations, [3d ed.], sec. 297.

On the question of ratification and estoppel, counsel argued that the thing done by the trustees of the church was not *ultra vires* simply on account of a defect of power, nor was it a case of the irregular exercise thereof. What they did was absolutely prohibited by that section of the statute granting them whatever authority they possessed, as well as by the general statutory provision. Counsel cited 7 Thompson, Corporations, sec. 8320.

The district court had no jurisdiction to enter deficiency judgment in this action. In the absence of statute, at common law, the mortgagee, after default, could maintain ejectment to recover possession or sue on the note or foreclose the mortgage. All of these remedies he could pursue concurrently. See *Dimick v. Grand Island Banking Co.*, 37 Nebr., 399; *Bing v. Morse*, 51 Nebr., 842; 1 Beach, Modern Equity Jurisprudence [ed. 1892], sec. 499. A court of chancery could enter a deficiency judgment in the foreclosure action, if at all, only where the debt, without the mortgage, was such that a court of chancery would have jurisdiction of it and could enforce it. See Jones, Mortgages [3d ed.], sec. 1711; *Morgan v. Wilkins*, 6 J. J. Marsh. [Ky.], 28. In the case at bar there were no equitable elements, aside from the mortgage, on which to base a jurisdiction of the court to render a deficiency judgment herein. It is not a case of loss of securities or of mistake or of fraud, and the mortgagor never sold the property to anybody.

C. S. Rainbolt also appeared for appellees.

Morning & Berge, in reply, cited: *Barnitz v. Beverly*, 163 U. S., 118; *State v. City of Kearney*, 49 Nebr., 325; Bishop, Contracts, sec. 565; *Jackson v. Creighton*, 29 Nebr., 310; *White v. Rourke*, 11 Nebr., 519; *State v. Clarke*, 25 Nebr., 250; *State v. McPeak*, 31 Nebr., 139.

Counsel argued that the decisions of this court were numerous in which it had been held that the laws which prescribed the mode of enforcing a contract, and which were in existence when such contract was made, were so far a part of the contract that no change in these laws which seriously interfered with that enforcement was valid, because they impaired its obligation within the meaning of the constitution of the United States. Federal decisions are to the same effect.

NORVAL, C. J.

This was a suit to foreclose a real estate mortgage executed and delivered by one George W. West to Ward S. Mills to secure the payment of one principal note and coupon notes thereto attached. The principal note was transferred by the payee, Mills, to the First Christian Church of Lincoln, and by two of its trustees sold and indorsed to James Thompson, now deceased. A decree of foreclosure was entered, the mortgaged premises were sold and the sale confirmed, and a deficiency existing after the proceeds of sale were applied on the debt, a judgment therefor was asked against said church as an indorser of the paper, which request was denied. Plaintiffs appeal.

The only question raised is whether the court below erred in refusing to render a deficiency judgment against the church. It is disclosed by the record that certain of the trustees of the First Christian Church of Lincoln, and who assumed to act for it, purchased of Mills a number of vacant and unimproved lots situate in Mills' Second Addition to University Place. The lots were purchased for the purpose of speculation, or with the view of being resold at an advance over the cost price, but the title to the property was permitted to remain in the name of Mills, who, on the trustees making the sale of a lot, at their request executed a deed to the purchaser and the latter gave to Mills a note, secured by a mortgage on the property, for the unpaid purchase money. Mills thereupon indorsed and transferred the note and mortgage to the First Christian Church of Lincoln. One of these lots was sold to West, who executed the note and mortgage in suit to Mills for the amount of the purchase price remaining unpaid, and this note was indorsed without recourse by the payee and delivered to said church. Subsequently, the note and mortgage were transferred by certain of the trustees, in the name of the church, to James Thompson, plaintiffs' decedent.

The governing board of the trustees of the church corporation never held any meeting for the purpose of taking any action relative to, nor did such board, as a body, authorize, the purchase and sale of the lots, or the transfer of the note and mortgage in question.

The defendant church contends that no deficiency judgment could properly be rendered against it for the following reasons:

1. No judgment for a deficiency can be lawfully rendered in this state in a suit to foreclose a mortgage.

2. The contract relative to the purchase of the lots of Mills for the purpose of speculation was without the power of the First Christian Church of Lincoln, and therefore *ultra vires* and void.

3. The indorsement of the note and the sale thereof to plaintiffs' decedent was never authorized or sanctioned by the board of trustees of said church.

These propositions will receive consideration in the order stated. Prior to 1897 the following sections were parts of the Code of Civil Procedure of this state:

"Sec. 847. When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of the sale, the court shall have the power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor.

"Sec. 849. If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well

against such other person as the mortgagor, and may enforce such decree as in other cases."

It is plain enough that under the quoted sections, and prior to their repeal, it was proper in a foreclosure case, on the coming in of the report of sale, to enter a decree or judgment against the mortgagor and other persons liable for the payment of the mortgage debt. See *Davenport Plow Co. v. Mewis*, 10 Nebr., 317; *Clapp v. Maxwell*, 13 Nebr., 542; *Cooper v. Foss*, 15 Nebr., 515; *Grand Island Savings & Loan Ass'n v. Moore*, 40 Nebr., 686; *Hare v. Murphy*, 45 Nebr., 809; *Flentham v. Steward*, 45 Nebr., 640. But these sections of said Code were repealed by the legislature of 1897 (Laws, 1897, ch. 95), and by reason thereof it is strenuously argued by counsel for the church that the power to enter deficiency judgments is abrogated in all cases without regard to the date the debt was contracted, or whether proceedings may have been taken to enforce the same at the time the repealing statute was adopted. On the other hand, it is argued by counsel for plaintiffs that the repealing act of 1897 had no application to suits then pending, nor to causes of action then accrued, nor decrees already entered.

Whether or not a statute which denies the right to a deficiency judgment as to existing debts is unconstitutional as impairing the obligations of contracts, the court is not at this time called upon to decide, and we refrain from now entering upon a discussion of the question. Section 2, chapter 88, Compiled Statutes, declares that "whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit." If the jurisdiction of the district court to enter deficiency judgments exists independent of statute, as has been argued, it is too plain to require elaboration that it was not taken away by the repeal of sections 847 and 849 of said Code. On the other hand, if the power to render a deficiency judgment is purely statutory, as was intimated in *Devries v. Squires*, 55 Nebr., 438, it is equally

clear that as to pending suits such right was not abolished by the repeal of said sections, owing to the provisions of section 2, chapter 88, Compiled Statutes, quoted above. See *Kleckner v. Turk*, 45 Nebr., 176. The record conclusively shows that, long prior to the adoption of said repealing act, this suit was brought in the court below, a decree of foreclosure had been entered, the mortgaged premises sold thereunder, and the order denying a deficiency judgment against the church which is sought to be reviewed by this proceeding had been entered, and the cause docketed in this court. So that the repeal of said sections 847 and 849 can not be invoked to defeat the recovery of a deficiency judgment against the church. Sections 42 and 55, chapter 16, Compiled Statutes, follow:

"Sec. 42. The trustees or directors who may be appointed under the provisions of this subdivision, and their successors in office, shall have perpetual succession by such name as may be designated, and by such name may be legally capable of contracting and prosecuting and defending suits, and shall have capacity to acquire, hold, enjoy, dispose of, and convey all property, real and personal, which they may acquire by purchase, donation, or otherwise, for the purpose of carrying out the intentions of such society or association, but they shall not acquire or hold property for any other purpose."

"Sec. 55. No company or association incorporated under the provisions of this chapter shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate object of its creation."

The foregoing sections are taken from the chapter of the Compiled Statutes relating to corporations. Section 42 is especially applicable to religious societies, while section 55 is a general provision governing all incorporated companies. In view of these statutory provisions, the conclusion is irresistible that an incorporated

religious society, like the defendant herein, has no power to acquire, purchase or hold real estate for any purpose other than that of carrying out the purposes or objects for which the corporation was created. Argument or elaboration could not make the proposition plainer, or more readily understood. And it is equally clear that the buying and selling of real estate merely as a speculation, or for the profits realized, by a religious society, is forbidden by statute. The speculation in real estate by the First Christian Church of Lincoln, or rather by certain members of the board of trustees in the name of the church, was foreign to the legitimate objects of the church, and the contracts relating thereto are *ultra vires* and void. See Taylor, Private Corporations [3d ed.], sec. 297.

In 7 Am. & Eng. Ency. of Law [2d ed.], 718, the rule is stated thus: "As has already been stated, the power of a corporation to purchase real property is limited by the objects of its creation. Even where there are no express restrictions it can not purchase for a purpose foreign to those objects. When a corporation is created for the purpose of dealing in real estate its power to purchase the same is unlimited. But when a corporation is not organized to deal in land, as in case of railroad companies, banking companies, insurance companies, religious and educational corporations, etc., the purchase of land not needed in its business, for the mere purpose of holding and selling it again, is *ultra vires.* Nor can such a corporation purchase for any other purpose that does not tend directly to carry out its own legitimate objects." The text is fully sustained by numerous authorities cited in the notes on the same page. The record before us fails to show that the real estate venture entered into on behalf of the First Christian Church of Lincoln was to forward or promote the legitimate object of the association, but that the lands were bought, held and sold merely as a speculation.

It is argued in the brief of counsel for plaintiffs that

the proceeds derived from the sale of the lots were used to pay the indebtedness of the church and in the construction of its church building. It does not appear that the board of trustees of the First Christian Church so used and applied the money derived from the sales of the land. Moreover, this argument of plaintiff is aptly met by the following excerpt taken from the brief of defendant:

"If the mode of the application of the money is the factor that determines whether it is legitimate for a church to take part in a certain business, then a church corporation could secure a license and run a saloon or a billiard hall, or buy a circus outfit and tour the country, or trade horses, or construct a race track and pocket the receipts, provided only that the money so realized was applied to the payment of church obligations. It is not believed that counsel for appellants are so unacquainted with the proper functions of a church as to insist upon their argument. It has never been held that the innumerable avenues of the business world are thrown open to a church board to enter in and glean a profit for the church. The very conception of a church forbids it. It would be against public policy for the churches of the land to enter into the bitter competition of the market place. Religion, as exemplified by ecclesiastical bodies under such a regime, would become a hiss and a by-word, and public and private morals would suffer thereby."

It is insisted that James Thompson was an innocent holder of the note, and therefore the defense of *ultra vires* can not be invoked against the plaintiffs. The *ultra vires* of the transaction being fully established by the evidence, the burden was cast upon the plaintiffs to prove that James Thompson acquired the note and mortgage as an innocent purchaser for value before maturity and without notice. No such evidence having been adduced on the trial, plaintiffs can not claim the protection with which the law clothes an innocent pur-

chaser of negotiable paper before due. Moreover, Mr. Thompson was chargeable with notice of the powers of the defendant church under the statute and its articles of incorporation.

Complaint is made in the brief of plaintiffs that the articles of incorporation of the defendant church do not comply with the provisions of section 169, chapter 16, Compiled Statutes, in that said articles do not state the limit of indebtedness of the society, nor the manner in which it may enter into contracts, and by reason thereof it is insisted that there are no limitations or restrictions upon the power of the church to contract debts, and that it may enter into contracts, and charge its property to the same extent as an individual might do. A short answer to this argument is that said section 169 was not in force when the First Christian Church was incorporated, but was adopted at a subsequent date, and does not control. The articles conformed to the statute existing at the time they were adopted and the defendant was incorporated. Again, said section 169 has no application to the case at bar, but relates alone, as expressly stated in the preceding section but one, to "churches, parishes, and societies of all religious bodies, sects, and denominations in this state having a central governing body with spiritual jurisdiction extending over the whole state, or a part thereof, being more than six counties." The First Christian Church of Lincoln does not belong to the class above described, and hence does not come within the provision of said section 169. The uncontradicted evidence shows that the board of trustees, or body which governs the defendant church, never authorized the purchase of the lands already mentioned, nor the sale or indorsement of the note in controversy, but that the lands were bought by two of the trustees who negotiated and indorsed the note, for and on behalf of the church, without having been authorized in that behalf by the board of trustees, and without any meeting of the said board being called or held to take

action in relation thereto. The trustees could only bind the corporation by acting together as a board. A majority of them in their individual names could not act for the board itself, and bind the corporation. It has been held that a majority of a school district board can not contract for the erection of a schoolhouse without a notice to, or participation therein, by the other members of the board. See *People v. Peters*, 4 Nebr., 254. The same principle has been recognized in *Hutchinson v. Ashburn*, 5 Nebr., 402; *State v. Saline County*, 18 Nebr., 422; *State v. School District*, 22 Nebr., 48. The following authorities are more or less in point on the question under consideration: 3 Thompson, Corporations, secs. 3905, 3950; *Ross v. Crochet*, 14 La. Ann., 823; *Cammayer v. United German Lutheran Church*, 2 Sandf. Ch. [N. Y.], 186; *Plymouth v. Plymouth County*, 16 Gray [Mass.], 341; *North Carolina R. Co. v. Swepson*, 71 N. Car., 350; *People v. Coghill*, 47 Cal., 361. *Scott v. Methodist Church*, 15 N. W. Rep. [Mich.], 891, cited by plaintiff, lacks analogy. There, two of the three members of a religious corporation borrowed money on the church property secured by a mortgage, without being previously authorized to make the loan by two-thirds of the voting members present at a meeting of the society called for that purpose, and the mortgage was sustained because the society, with knowledge of the facts, subsequently ratified the loan.

In the case at bar there is no ratification for two reasons: First, it is not shown that the proceeds arising from the sale of the note were accepted and retained by the First Christian Church with knowledge of the facts. In the next place, the transaction relating to the real estate speculation carried on by two of the trustees, with which was intimately connected the transfer of the paper in question, it being part of the same transaction, was *ultra vires*, and without the power of the board of trustees and could not be lawfully ratified by such board. The contract was incapable of ratification. See *Tullock v. Webster County*, 46 Nebr., 211; *Gutta Percha &*

Rubber Mfg. Co. v. Village of Ogalalla, 40 Nebr., 775. The decree is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST ZERNECKE, DECEASED.

FILED MARCH 7, 1900. NO. 9,149.

1. **Passengers on Railroad:** INJURIES: RIGHT OF ACTION. By section 3, article 1, chapter 72, Compiled Statutes, a right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury was occasioned by his own criminal negligence, or by his violation of some express rule or regulation of the carrier actually brought to his notice.

2. ———: ———: PRESUMPTION. In an action for injuries sustained by derailment of a train, on which plaintiff was a passenger, the statute creates a presumption that the accident was caused by the negligence of the carrier, or by its wrongful act, neglect or default.

3. **Statute:** LIABILITY OF CARRIER: POLICE POWER. Said section 3, article 1, chapter 72, Compiled Statutes, making carriers liable, in absence of negligence, for injuries to passengers, is within the police power of the state.

4. ———: NO CONFLICT. Chapter 21, Compiled Statutes, is not amendatory of section 3, article 1, chapter 72, Compiled Statutes, nor do the two acts in anywise conflict, one with the other.

5. **Lord Campbell's Act:** LEGAL REPRESENTATIVE. Under chapter 21, Compiled Statutes, known as "Lord Campbell's Act," a right of action is given the legal representative of one who has died in consequence of injuries sustained while being transported by a railroad company, where the injured party could have maintained an action had he survived.

6. **Statutes in Pari Materia.** All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision.

7. **Constitution:** FOURTEENTH AMENDMENT: STATUTE NOT INIMICAL. Section 3, article 1, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment of the constitution of the United States, nor to section 3, article 1, of the constitution of this state, as tending to deprive railroad companies of their property without due process of law.

8. **Instructions:** CONSTRUCTION. Instructions should be construed together, and if, when so considered, they state the law correctly, applicable to issues and evidence, they will be sustained.

9. ———: FREE FROM REVERSIBLE ERROR. Instructions in this case examined, and *held* free from reversible error.

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

W. F. Evans, L. W. Billingsley, R. J. Greene and *M. A. Low,* for plaintiff, argued that section 3 on page 798 of the Compiled Statutes of 1897 has no application to the case at bar, or to cases of that character, but it refers entirely to actions brought to recover damages resulting from personal injuries where death ensued. It did not, and could not, refer in any way to chapter 15 of the General Statutes of 1873 (which creates or gives a rule of action for damages resulting from the death of a person), as it was passed six years before the act of 1873. During these six years how could an action have been maintained in this state for the death of a person, even though it were caused by carelessness or negligence? In whose name and for whose benefit would it have been brought? In what manner would the proceeds of the judgment have been distributed? Should the proceeds under this statute go to the estate of the deceased or to his widow or next of kin, or to either of them? The statute is silent in reference to all these matters, and they are not provided for in any way.

In construing a statute, we must look to the object in view; and never adopt any interpretation that will defeat the purpose of the statute, if it will admit of any other reasonable construction. See *The Emily and The Caroline,* 9 Wheat. [U. S.], 381; *Hagenbuck v. Reed,* 3 Nebr., 17.

Keeping in view this rule, which obtains in all courts of last resort, how can it be said that the act of 1867 applies to the case at bar? If the act in question refers to injuries resulting in death, why was the act of 1873 necessary? The last act includes by express words death

cases, but excludes all others. It is evident that the legislature, in passing the act of 1873, did not intend that it should refer to such cases as are included in the act of 1867.

The two statutes in question are inconsistent with each other:

1. The act of 1867 refers only to railroad companies, while the act of 1873 refers to any persons, company or corporation.

2. The act of 1867 refers only to injuries sustained by passengers while being transported over a railroad; the act of 1873 refers to any person, whether passenger, employé or third person.

3. Under the act of 1867, the railroad company shall be liable for all damages inflicted upon the person of passengers, without any limitation as to the amount, but under the act of 1873 the damages shall not exceed the sum of $5,000.

4. By a literal construction of the act of 1867, railroad companies are liable in all cases except where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice; but under the act of 1873 an action can not be maintained, except when the death of a person shall be caused by the wrongful act, neglect or default of the defendant. See *Hegerich v. Keddie*, 99 N. Y., 258-267.

How can it be said, in the face of these inconsistencies, that the two statutes refer to or include the same cause of action?

Section 3, article 1, chapter 72, is inimical to the 14th amendment of the constitution of the United States.

Case argued orally for plaintiff by *R. J. Greene.*

Stewart & Munger, for defendant in error, argued, *inter alia:* It is the contention of the plaintiff in error, as we understand it, that section 3, article 1, chapter 72, Com-

piled Statutes, does not apply in an action against a railway company for damages caused by injuries inflicted on the person of a passenger, being transported over his road, where such injuries cause the passenger's death; and that in such cases sections 1 and 2 of chapter 21 of the Compiled Statutes alone govern; and, further, that the statute of 1867 is not contrary to the fourteenth amendment to the federal constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law." This question must certainly be regarded as settled in this state. The statute of 1867 has been before this court many times; and has been attacked by so many able counsel, on so many points, that we might well rest by simply referring to the following decisions of this court, wherein they have passed not only on these questions now presented, but also upon almost every objection that could be taken against the statute by any exercise of ingenuity. We refer to *Chollette v. Omaha & R. V. R. Co.*, 26 Nebr., 159; *Omaha & R. V. R. Co. v. Chollette*, 33 Nebr., 143; *Missouri P. R. Co. v. Baier*, 37 Nebr., 235; *Union P. R. Co. v. Porter*, 38 Nebr., 226; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Nebr., 803; *Omaha & R. V. R. Co. v. Chollette*, 41 Nebr., 578; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Nebr., 448; *Chicago, B. & Q. R. Co. v. Hague*, 48 Nebr., 97; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Nebr., 161; *Fremont, E. & M. V. R. Co. v. French*, 48 Nebr., 638.

Case argued orally for defendant in error by *Thomas H. Munger.*

W. F. Evans, L. W. Billingsley and *R. J. Greene (M. A. Low* with them) replied, *inter alia*, as follows: The supreme court said in *Chicago, R. I. & P. R. Co. v. Young*, 79 N. W. Rep. [Nebr.], 558, speaking of decisions of cases (cited by the learned counsel for defendant in error): "The validity of this law has been assumed in many cases decided by this court." Whether these decisions were altogether sound in principle, counsel would not now stop

to inquire. They silenced opposition by their mere numerical strength; and, without acknowledging a servile submission to precedent, defendant felt bound to accept them as conclusive evidence of what the law was. Counsel respectfully but earnestly submitted that in this the court was clearly in error, as it has never "expressly held" or "distinctly affirmed" that the section in question was valid or constitutional. In all cases in which its validity or constitutionality had been raised this court had assumed, as it did in the *Young Case,* without an examination or a consideration, that it was valid.

NORVAL, C. J.

In 1894 Ernest H. Zernecke was killed in a train wreck while a passenger of the Chicago, Rock Island & Pacific Railway Company, and his wife, as administratrix of his estate, brought this action to recover damages therefor, for the benefit of herself and minor children. The train was wrecked by the criminal act of a third person, without fault on the part of the railway company. On the trial a verdict was rendered in favor of the plaintiff, and judgment was entered thereon, from which the railway company comes to this court on error.

On the trial the following instruction was given by the court, to which the defendant took exception: "The jury are instructed that if you find from the evidence, that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company, that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is his administratrix, and she and her children had a pecuniary interest in his life, and suffered loss by his death, then you should find for the plaintiff." Section 3, article 1, chapter 72, Compiled Statutes, declares: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal

negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The instruction quoted is within the provision of said section, aside from the omission to state exceptions contained in the statute, that the defendant was not liable for injury resulting from the criminal negligence of the person injured, or from his violation of some expressed rule or regulation of the company actually brought to the notice of the injured passenger. There is an entire absence of any evidence in the record before us tending to bring the case within either of the exceptions contained in said section 3; therefore the instruction was pertinent and proper, if said legislation is constitutional and applicable to the case at bar. The constitutionality of said section has been assumed by this court in numerous cases. See *Chollette v. Omaha & R. V. R. Co.*, 26 Nebr., 159; *Omaha & R. V. R. Co. v. Chollette*, 33 Nebr., 143; *Missouri P. R. Co. v. Baier*, 37 Nebr., 235; *Chicago, B. & Q. R. Co. v. Hague*, 48 Nebr., 97; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Nebr., 161; *Fremont, E. & M. V. R. Co. v. French*, 48 Nebr., 638. And the validity of said statute has been expressly decided in *Union P. R. Co. v. Porter*, 38 Nebr., 226; *Omaha & R. V. R. Co. v. Chollette*, 41 Nebr., 578; *Chicago, R. I. & P. R. Co. v. Young*, 58 Nebr., 678, 79 N. W. Rep., 556. The legislation is justifiable under the police power of the state, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers, as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight.

It is argued by counsel for defendant below that said section 3 is not applicable to cases of injuries causing the death of a passenger, the contention being that section

1, chapter 21, Compiled Statutes, is the law governing this class of actions, and that, under the provisions of said last named statute, the defendant should have been permitted to prove that the death of plaintiff's husband was not caused by any act of negligence on the part of the railway company, and that the jury should have been instructed that before there could be a recovery it was necessary to establish the fact that defendant company had been negligent in the premises. It is further argued that, if it be held that said first named statute is the law governing this class of cases, then the same has been repealed by said chapter 21, which is a later enactment, and that the two are in conflict. If the two statutes are in conflict, the argument is unanswerable. But it is believed that the two statutes do not in anywise conflict, one with the other. Said section 3, as already stated, makes a railroad company an absolute insurer of the safety of its passengers, save in cases falling within one or the other of the two exceptions mentioned in the statute. It gives or creates a right of action in favor of the injured passenger; and when it is established that a person is injured while a passenger of a railroad company, a conclusive presumption of negligence arises in every case except where it is disclosed that the injury was one caused by his own criminal negligence, or by his violation of some rule of the company brought to his actual notice. On the other hand, chapter 21, Compiled Statutes, known as "Lord Campbell's Act," creates a right of action in favor of the personal representatives of the deceased where none existed before. It is very broad in its terms, being applicable to all acts of negligence, whether on the part of a railway company or others. Under said section 3, article 1, chapter 72, a litigant establishes an act of negligence, or a default, on the part of the defendant railway company when the fact is disclosed that he was a passenger of such railway company, and while such passenger, was injured. In other words, a conclusive presumption of negligence

arises where the case does not fall within the exceptions of the law, and he has his right of action. Prior to the adoption of said section 3, in 1867, he would have had to affirmatively establish some act of negligence on the part of the railway company to entitle him to recover for injuries received while a passenger. From the time this section was passed until said chapter 21 was adopted in 1873, no right of action existed for negligence resulting in the death of a person. But said chapter, in broad terms, gives a right of action for the death of a person caused by the wrongful act, neglect or default of another, if the same is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof. Now, it is indisputable that, if Zernecke had been injured merely, and not killed, he could have recovered against the railway company under said section 3, article 1, chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21, and the fact of negligence or the defendant's wrongful acts or default is established when the evidence discloses the facts specified in said section 3 of chapter 72. The two statutes are not in conflict, for the reason that one creates a liability in favor of the passenger himself, and obviates the necessity of proving the negligence of the carrier, while the other statute gives a right of action, where none existed before, to the personal representatives of a deceased person in all cases, where such person could have recovered damages for his injury, if death had not ensued. See *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis., 69; *Philo v. Iowa C. R. Co.*, 33 Ia., 47. The rule is that all statutes *in pari materia* must be taken together and construed as if they were one enactment. See *Hendrix v. Rieman*, 6 Nebr., 516; *State v. Babcock*, 21 Nebr., 599; *People v. Weston*, 3 Nebr., 312. Statutes should be so construed, if possible,

as to give effect to every provision, and an act should not be placed in antagonism with another act, unless such was the manifest purpose and object of the legislature. See *McCann v. McLennan*, 2 Nebr., 286; *Burlington & M. R. R. Co. v. Webb*, 18 Nebr., 215; *State v. Babcock*, 21 Nebr., 599. Tested by these principles, the conclusion is irresistible that said section 3, article 1, chapter 72, Compiled Statutes, was not amended by chapter 21 of said statutes known as "Lord Campbell's Act."

It is further contended that section 3, chapter 72, is in conflict with the fourteenth amendment of the constitution of the United States, and with section 3 of article 1 of the constitution of this state, as tending to deprive railroad companies of their property without due process of law. This court has decided to the contrary in *Chicago, R. I. & P. R. Co. v. Young*, 58 Nebr., 678, 79 N. W. Rep., 556 and cases therein cited, and we see no reason for departing from the law as therein laid down. See *Clark v. Russell*, 97 Fed. Rep., 900; *Missouri P. R. Co. v. Mackey*, 127 U. S., 205; *Railroad Co. v. Mathews*, 165 U. S., 1; *Railroad Co. v. Paul*, 173 U. S., 404.

The following instruction was given by the court: "If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss, sustained by the wife and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualities, during what probably would have been his lifetime, if he had not been killed, so far as these several matters have been shown, by the testimony, and you may also, consider the value his services might have been, in the superintendence and attention to, and care of his family and the education of his children, but the amount you can allow, can not exceed the sum of $5,000." It is contended that in the portion of the instruction which

directed the jury that, in considering the question of what the value of the services of deceased might have been in the superintendence and care of his family and the education of his children, etc., the jury were not required to confine themselves to the evidence, but were "turned loose" without anything to guide them in ascertaining the value thereof. We do not think so. In a general instruction the jury were told that in case they found for the plaintiff, it must be for pecuniary damages alone, which they must find from the evidence the plaintiff and her children had suffered; and no doubt the jury considered the two instructions together in passing upon the element of damages. There was evidence on which to base the instructions, and we do not doubt, that, under the instructions, the jury gave it only its due weight. It is further argued that the court, in this clause of the instruction, should have used the word "probably" instead of the word "might." We have no doubt that the former word is the better of the two in that connection; but jurors are not given to nice distinctions in words, and we can not imagine that they were in anywise misled by the use of the one word rather than the other. We have carefully examined all the arguments adduced in the briefs of counsel, but fail to find any error reversible in the record, wherefore the judgment of the lower court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED.

FILED MARCH 7, 1900. No. 9,150.

Passengers on Railroad: PERSONAL INJURY: PRESUMPTION: STATUTE: LIABILITY OF CARRIER: LORD CAMPBELL'S ACT: STATUTES IN PARI MATERIA: FOURTEENTH AMENDMENT.

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

W. F. Evans, *L. W. Billingsley* and *R. J. Greene*, for plaintiff in error.

Stewart & Munger, *contra*.

NORVAL, C. J.

The facts and the questions of law in this case are identical with those in *Chicago, Rock Island & Pacific Railway Co. v. Zernecke, Administratrix*, 59 Nebr., 689, decided herewith. As the law applicable to the former case is also applicable in this, we do not deem it necessary to discuss it, and the judgment of the lower court is

AFFIRMED.

MARION H. MANDELL, APPELLEE, V. ZEPHANIAH A. WELDIN ET AL., APPELLANTS.

FILED MARCH 7, 1900. No. 9,164.

1. **Waiver.** Points not argued in this court will be deemed to be waived.
2. **Confirmation of Judicial Sale:** OBJECTIONS. Objections to the confirmation of a judicial sale will be disregarded on review when not brought to the attention of the trial court.
3. **Motion to Vacate is No Part of Bill of Exceptions.** A motion to vacate a sale, when filed, is a part of the record, and should not be embodied in the bill of exceptions.
4. **Motion to Set Aside:** CERTIFICATE OF CLERK. A motion to set aside a sale can not be considered, unless certified in the transcript by the clerk of the district court.

APPEAL from the district court of Buffalo county. Tried below before GREENE, J. *Affirmed.*

Francis G. Hamer, for appellants, cited: *Burkett v. Clark*, 46 Nebr., 466; Compiled Statutes, 1897, p. 547, ch. 24, sec. 2; *Furbush v. Barker*, 38 Nebr., 1; *Nash v. Baker*, 37 Nebr., 713; *Ecklund v. Willis*, 42 Nebr., 737; *Vought v. Foxworthy*, 38 Nebr., 790; *Kearney Land & Investment Co. v. Aspinwall*, 45 Nebr., 601; *Shelby v. Alcorn*, 36 Miss., 273.

Jacob Bailey and *Wm. Gaslin*, for appellee, cited: *Rector v. Rotton*, 3 Nebr., 171; *Fried v. Stone*, 14 Nebr., 402.

NORVAL, C. J.

This appeal was prosecuted from an order of the district court confirming the sale of real estate made under a decree of foreclosure. The defendants filed a motion in the court below, before the sale, to set aside the appraisement on the ground that the property was appraised too low; but as this objection is not argued, it must be deemed to be waived. See *Gulick v. Webb*, 41 Nebr., 706. It is the settled doctrine of this court that objections to the confirmation of a judicial sale of real estate must be specifically assigned in the motion filed in the lower court to vacate the sale. See *Ecklund v. Willis*, 42 Nebr., 737; *Hooper v. Castetter*, 45 Nebr., 67. The defendant, in the brief and at the bar, argued numerous grounds for vacating the sale, but in the transcript of the record there is not to be found a copy of any motion to set aside the sale, so we are not properly advised of the objections to the sale that were made in the district court. It follows that the objections argued can not now be considered. It is true that what purports to be a copy of the motion to vacate the sale is incorporated in the bill of exceptions, but that does not entitle the motion to be considered. It had no place in the bill of exceptions, and was improperly incorporated therein. The purpose of a bill of exceptions is to bring into the record that which would not otherwise there appear. A motion to set aside a sale becomes, when filed, a part of the record in the cause, and no more requires to be included in a bill of exceptions than does a petition in a cause, the instructions, or a judgment or decree. See *Eaton v. Carruth*, 11 Nebr., 231; *Chamberlain v. Brown*, 25 Nebr., 434; *Blumer v. Bennett*, 44 Nebr., 873. The order is

AFFIRMED.

MARY E. COX, APPELLEE, V. JOSIAH L. PARROTTE ET AL., APPELLANTS.

FILED MARCH 7, 1900. NO. 9,174.

1. **Decree of Foreclosure:** REVIEW: LIMITATION. This court can not review a decree of foreclosure when the same was rendered more than two years prior to the perfecting of the appeal.

2. **Judicial Sale:** MOTION TO VACATE: OBJECTIONS. On a motion to vacate a judicial sale, objections to the decree under which such sale was made can not be considered.

APPEAL from the district court of Buffalo county. Tried below before GREENE, J. *Affirmed.*

Hamer & Hamer, for appellants, cited: Pomeroy, Equity Jurisprudence [3d ed.], 1227, note; 2 Jones, Mortgages, sec. 1540; *Peabody v. Roberts*, 47 Barb. [N. Y.], 91; *Schadt v. Heppe*, 45 Cal., 433; *Bates v. Ruddick*, 2 Ia., 423; *Hosford v. Johnson*, 74 Ind., 479; *Jefferson v. Coleman*, 110 Ind., 515; *Shaw v. Heisey*, 48 Ia., 468; *Bolles v. Duff*, 43 N. Y., 469; *Catterlin v. Armstrong*, 101 Ind., 258.

S. M. Nevius, contra.

NORVAL, C. J.

On March 14, 1895, the district court of Buffalo county entered a decree of foreclosure in this cause, determining the priority of the several liens; and ordered, in case the defendants should fail for fifteen months to pay the costs, and pay the plaintiff and cross-petitioners the sums found by the decree to be due each, with interest thereon, that the defendants, excepting the cross-petitioners and the McKinley-Lanning Loan & Trust Company and Erastus E. Brown, be foreclosed of all equity of redemption, right, title or interest in the mortgaged premises; and that the property be sold by the sheriff, and the proceeds brought into court to be applied in satisfaction of the amounts found due the respective lienors in the

order of the priority of the liens as found by the court. A sale of the premises under this decree was had, a motion to set aside the same was filed and overruled, and the sale confirmed, from which order the Nebraska Land Growing & Investment Company appeals.

One of the points made in the motion to vacate the sale was that the premises were not sold free and clear of liens, but subject to the liens of the cross-petitioners and the McKinley-Lanning Loan & Trust Company and Erastus E. Brown, which were junior to the lien of the plaintiff. The objection is wholly unavailing. The property was sold in strict compliance with the terms of the decree of foreclosure. The fault, if any, was with the decree, which can not now be reviewed, since the same was rendered more than two years prior to the docketing of this appeal. The order is

AFFIRMED.

STATE OF NEBRASKA, EX REL. SHERMAN SAUNDERS, V. PHIL B. CLARK, AS COUNTY CLERK OF KNOX COUNTY, NEBRASKA.

FILED MARCH 7, 1900. No. 10,891.

1. **Constitutional Prohibition:** DIVISION OF COUNTY: MAJORITY VOTE. Section 2, article 10, of the constitution prohibits the division of a county where the proposition has not received a majority of the legal votes cast thereon.

2. ———: DOES NOT PRECLUDE LEGISLATURE: MAJORITY OF ALL VOTES CAST. The provisions of said section 2, article 10, of the constitution do not preclude the legislature from passing a law requiring that the question of county division shall receive a majority of all votes cast at the election at which the same was submitted to the electors, to effect the erection of a new county out of one then existing.

3. **Statutes:** NOT INIMICAL TO CONSTITUTION. Section 11, article 1, chapter 18, Compiled Statutes, is not inimical to section 2, article 10, of the state constitution.

4. ———: DIVISION OF COUNTY: MAJORITY OF LEGAL VOTES CAST. Under said section 11, article 1, chapter 18, Compiled Statutes,

to effect the division of a county, the proposition therefor must receive a majority of the legal votes cast at the general election, at which the same was submitted, whether cast for the filling of an office or on any proposition.

5. **Determination of Question of Adoption:** TOTAL VOTE PRESUMED TO BE HIGHEST VOTE: PRESUMPTION NOT CONCLUSIVE. In determining the question of whether the county division has been adopted, the total vote cast in the county, at the election at which the same was submitted, will be presumed to be the highest vote cast for any office or on any proposition. But this presumption, if not conclusive, may be overcome by proper evidence.

6. **County Canvassing Board:** ULTRA VIRES. A county canvassing board has no authority to find and declare the total vote polled at an election, and a finding, in that respect made by it, will be rejected as surplusage.

7. **Motion for New Trial:** REVIEW: EXCEPTION NECESSARY. An exception to the overruling of a motion for a new trial is necessary to obtain a review of the question presented by such motion.

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

Lambertson & Hall, William F. Norris and *W. D. Funk,* for the relator, argued that the question for the determination of the court is, whether the alternative writ of mandamus, heretofore granted in this case, be made peremptory. It is admitted that the question of county division was duly submitted, at the general election of 1898, to the electors of Knox county; that at said election 2,807 votes were cast on the question, 1,427 being in favor of and 1,380 against the proposition; that for governor 2,839 votes were cast, being the largest number cast on any proposition or for any candidate, voted for at such election; that the total number of names registered on the poll-books, as having voted, or attempted to vote, at said election was 2,993. From these undisputed facts the relator insists that it is the duty of the respondent to certify the number of votes, the name, boundaries and area of the new county to the secretary of state in compliance with law.

The relator rests his contention upon three propositions: First, that the statute of 1897 relating to counties, repealing section 2, chapter 26, Session Laws of 1895 (Session Laws, 1897, p. 186, ch. 21), contravenes the constitution of the state and is void; second, that, if said statute be held valid, it must be construed in harmony with the constitution; and, under such construction, a majority vote was cast in favor of county division, and it was carried; third, that, if the statute of 1897 be held valid, as an independent statute, a majority of the vote cast was in favor of county division.

Counsel for relator cited *Bayard v. Klinge*, 16 Minn., 221; *State v. Babcock*, 17 Nebr., 193; *State v. Lancaster County*, 6 Nebr., 474; *Gillespie v. Palmer*, 20 Wis., 572; *State v. Roper*, 47 Nebr., 417; *Tecumseh Nat. Bank v. Saunders*, 51 Nebr., 801.

The cause was argued orally, for the relator, by *Frank M. Hall, Esq.*

Solomon Draper, *E. A. Houston*, *W. L. Henderson* and *W. R. Ellis*, for the respondent, criticised the application of *State v. Babcock*, *supra*, to the facts in this case; and said relator's counsel was inconsistent in the various uses of *Bayard v. Klinge*, *supra*, which they had made in their brief. Counsel for respondent also cited and quoted from *State v. Nelson*, 34 Nebr., 162.

The case was argued orally, for the respondent, by *W. L. Henderson* and *W. R. Ellis*.

NORVAL, J.

At the general election held in November, 1898, there was submitted to the electors of Knox county the proposition to divide said county and erect the county of Dewey. The vote was taken as ordered, and the result was canvassed by the various election boards, who made return thereof to the county clerk of Knox county. The respondent, as county clerk, together with two electors of the county, canvassed the returns, and entered the re-

sult thereof in the proper records. The said canvassers found and certified that there were cast on the question of county division 2,807 votes, of which 1,427 votes were in favor of the affirmative of the proposition, and the negative received 1,380 votes; that 2,839 votes were cast for the several candidates for the office of governor, which was the highest vote cast for any office or on any proposition, and the names of 2,993 persons were entered on the poll-books as having voted at said election. The relator contends that said proposition received the requisite affirmative vote to compel the erection of a new county, and he instituted this action in the court below for a peremptory writ of mandamus to compel the respondent, as county clerk of Knox county, to certify to the secretary of state, in compliance with the provisions of section 11, chapter 18, Compiled Statutes, the name, boundaries and area of the proposed new county. The district court denied the writ, and error proceeding has been prosecuted by the relator.

Section 10, article 1, chapter 18, Compiled Statutes, makes provision for the submission to a vote of the people the proposition to form a new county out of one or more of the existing counties. Section 11 of the same article and chapter provides: "If it shall appear that a majority of all the votes cast at any such election, in the county interested, is in favor of the erection of such new county or counties, the county clerk of said county shall certify the same to the secretary of state, stating in such certificate the name, territorial contents, and boundaries of such new county or counties; whereupon the secretary of state shall notify the governor of the result of the election, whose duty it shall be [to] order an election of county officers for such new county or counties, at such time as he shall designate, and he may, when necessary, fix the place of holding election, notice of which shall be given in such manner as the governor shall direct," etc.

It will be observed that the legislation just quoted

requires for the adoption of the proposition to create a new county out of an existing county that the affirmative of such question shall receive a majority of all the votes cast at the election at which the same was submitted. The respondent insists that the question of erecting a new county out of the county of Knox did not carry by the requisite vote prescribed by statute. The relator, on the other hand, insists, that the writ should issue herein against the respondent, and he bases his contention upon the propositions following:

First. That said section 11, heretofore quoted, is inimical to the provisions of section 2, article 10, of the state constitution, and is therefore void.

Second. Though said section 11 be declared valid, it must be interpreted in harmony with the constitution, and when so construed, the question of county division received the requisite affirmative vote, and was adopted.

Third. That if said section 11 be sustained, then, under the adjudications of this court, the proposition to erect Dewey county was carried.

Should any one of these propositions be determined in favor of the relator, the judgment of the district court must be reversed, and a peremptory writ of mandamus be issued. But if all of them are not well taken, the writ must be denied.

The questions will be taken up in the order in which we have stated them.

The constitutional provision invoked by the relator (sec. 2, art. 10) is in the language following: "No county shall be divided, or have any part stricken therefrom, without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same." This section of the fundamental law is a restriction, or limitation, upon the power to divide a county. Such a division can only be made by the submission of the proposition therefor to the electors of the county interested, and not then, unless the ques-

tion shall have received the sanction of a majority of the legal voters of the county voting thereon. This is so plain that argument could subserve no useful purpose of elucidation. If, therefore, the legislature had not spoken on the subject, it is obvious that the proposition to erect a new county out of the county of Knox has been adopted by the required affirmative vote. But by said section 11, article 1, chapter 18, Compiled Statutes, the law-making body has required that the question of county division must receive a majority of all the votes cast at the election, at which the same was submitted, to authorize the erection of a new county. In *State v. Nelson*, 34 Nebr., 162, it was ruled that the provisions of section 2, article 10, of the constitution do not preclude the legislature from requiring a larger vote than a majority of those voting on the question to effect county division.

It is strenuously argued that the constitution has relegated the subject of county division to those voting thereon, and as the framers of the fundamental law have designated a specific and particular class of electors who shall decide the question, the legislature is thereby rendered powerless to leave the decision of the proposition "to the general vote, to all who vote on any proposition whatever, although they fail to vote for or against county division." Doubtless, it is not within the constitutional power of the legislature to enact a law authorizing the division of a county, when the proposition has received an affirmative vote equal to a majority of those voting for governor or any other office or proposition, since the entire vote for candidates for governor or any other office or proposition voted for at the election at which the question of county division is submitted might be less than a majority of the legal voters of the country voting on the question of the erection of a new county, and county division is not permissible where the question has been sanctioned by a less vote than that prescribed by the constitution. By section 11, article 1, chapter 18, Com-

piled Statutes, county division can be had when a majority of all the votes cast at the election at which the question of the erection of a new county was submitted to the electors shall be in favor of the proposition. As the greater always includes the less, so if the question of county division receives a majority of all the votes cast at the election, the same will likewise obtain a majority of all the votes cast on the proposition. Our conclusion is that said section 11 is not repugnant to section 2, article 10, of the constitution.

The second argument of relator is that said section 11, article 1, chapter 18, Compiled Statutes, must be construed to harmonize with the fundamental law; and that the words "such election," as employed in said section, refer to and mean the election on the proposition of county division and none other. In other words, that the section of statute under consideration only requires the vote of a majority of those electors who vote on the question of county division to carry the same. Whatever may be the views of the writer or the other members of this court as to the proper construction which should be placed upon the words "such election," in the light of the past adjudications in this state, the question must be regarded set at rest, and foreclosed against the relator by *State v. Babcock*, 17 Nebr., 188; *State v. Bechel*, 22 Nebr., 158; *State v. Anderson*, 26 Nebr., 517; *State v. Benton*, 29 Nebr., 460; *Douglas County v. Keller*, 43 Nebr., 635; *Stenberg v. State*, 50 Nebr., 130; *Bryan v. City of Lincoln*, 50 Nebr., 620; *Tecumseh Nat. Bank v. Saunders*, 51 Nebr., 801. Applying the principle of those cases to the statute with which we have been dealing, there is no escaping the conclusion that the words "such election" do not mean merely the vote cast for and against the proposition of county division, but rather the proposition to erect a new county must receive the majority of the legal votes cast at the general election at which the same was submitted, for the filling of an office and on any proposition.

We pass to the consideration of the last contention of relator, that a majority of the votes cast at such election was in favor of the proposition to divide Knox county, and on the question of erecting a new county the greater number of votes was for the affirmative of the proposition, but, as we have already seen, that is not the criterion for determining whether county division carried. To divide the county the proposition must be authorized by a majority of all the votes cast at the election. The county canvassing board found, and so declared and certified, that there were cast in Knox county 2,993 votes at the general election held therein in 1898 when the question of the erection of Dewey county was submitted to the electors, and the county division did not receive a majority of said number. The total number of names of persons registered on the poll-books as voters was 2,993, and the respondent insists that a majority thereof, or 1,497, was necessary to the erection of a new county. We are unable to yield assent to this doctrine. It is a well known fact that at every election blank ballots are cast, ballots are voted which are rejected and not counted for various reasons. See *State v. Roper*, 47 Nebr., 417. Therefore, the names registered on the poll-books do not correctly represent the number of legal votes cast at an election. The names appearing on the poll-books merely indicate that certain persons appeared at the polling places and cast ballots, legal or otherwise, which may or may not have been counted by the judges and clerks of election in the various election precincts. No ballot is counted unless cast for some person or for or against some proposition. Moreover, the county canvassing board had no authority to find and declare the total number of votes cast at the election, and the statement contained in its abstract of votes, "Total vote cast, 2,993," is wholly unofficial, and must be rejected and disregarded, because the board was not required to enter of record the number of votes polled. See *People v. Town of Sausalito*, 39 Pac. Rep. [Cal.], 937.

The abstract of the vote made by the county canvassing board discloses that at the general election held in November, 1898, there were cast in Knox county 2,839 votes for the several candidates for the office of governor which represented the largest vote polled for any office to be filled at, or any question voted on, at said election, and the proposition to divide the county having received more than one-half of the number of votes cast for governor, it is argued by counsel for relator that the question of erecting a new county carried, and the respondent should so certify to the secretary of state. In *State v. Roper*, 47 Nebr., 417, the presumption was indulged that the highest vote cast in the county on any proposition or for any office was the total vote cast at such election, and such vote was taken as the basis of determining whether or not a proposition to relocate the county seat had been carried. The same principle was recognized and applied in *Tecumseh Nat. Bank v. Saunders*, 51 Nebr., 801. See *People v. Wiant*, 48 Ill., 263; *County Seat of Linn County*, 15 Kan., 500; *Enyart v. Trustees*, 25 O. St., 618; *State v. Winkelmeier*, 35 Mo., 103. This presumption doubtless is not a conclusive one, but may be overcome by competent evidence. The abstract of vote made by the county canvassing board discloses that in the several townships of Morton, Hill, Harrison, Peoria and Eastern, in Knox county, there were cast 57 more votes on the proposition to divide the county than were cast in said townships for the office of governor, so that it conclusively appears that the vote on governor in the county was at least 57 less than the total legal votes cast at said election; and these 57 votes must be added to 2,839, the aggregate votes the various candidates for governor received, to ascertain the total vote of the county, and the sum of these two numbers will form the basis for determining whether or not county division carried. It is obvious, therefore, that the proposition to erect a new county received 22 affirmative votes less than a majority of the votes cast at said election and that number less than was essential to adopt the proposition.

Thus far we have considered the case on the merits, which leads to an affirmance of the judgment. But the same result is reached by a shorter course of reasoning. The record before us fails to show that any exception was taken by the relator to the overruling his motion for a new trial filed in the court below. This omission precludes a consideration of the evidence to ascertain whether it is sufficient to sustain the findings of the trial court, or the questions raised by the motion for a new trial or petition in error. See *Lowrie v. France*, 7 Nebr., 192; *Murry v. School District*, 11 Nebr., 436; *Burke v. Pepper*, 29 Nebr., 320. The judgment is

AFFIRMED.

GUSTAVE BIART ET AL. V. W. H. MYERS ET AL.

FILED MARCH 7, 1900. No. 11,154.

1. **Motion for New Trial:** DISMISSAL OF PETITION IN ERROR. The lack of a motion for a new trial will not justify a dismissal of a petition in error.

2. ———: REVIEW. A motion for a new trial is not esssential to a review of a decision of the district court affirming a cause taken to that court by proceedings in error.

3. **Cross-Assignment:** NEW PARTIES. When a defendant in error has filed a cross-assignment of errors without bringing in new parties, he is thereby precluded from urging the dismissal of the petition in error of his adversary on the ground of defective parties.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Motion to dismiss overruled.*

William R. Patrick, for plaintiff in error.

Will H. Thompson, for defendant in error, argued in support of motion to dismiss that no motion for a new trial was filed in the district court, and the only errors

complained of are the errors claimed to have occurred during the trial, and on the rendition of the judgment. No bill of exceptions had ever been settled by the plaintiff in error, so that no question could arise upon a disputed statement of fact. This proceeding must be dismissed. The case comes clearly within the rule laid down in *Leach v. Renwald*, 45 Nebr., 207. It is well settled that to obtain a review of a joint judgment by petition in error all persons, shown by the record to be substantially interested, must be made parties to the proceeding, as plaintiffs or defendants, citing *Wolf v. Murphy*, 21 Nebr., 472; *Hendrickson v. Sullivan*, 28 Nebr., 790; *Andres v. Kridler*, 42 Nebr., 784; *Polk v. Covell*, 43 Nebr., 884; *Kuhl v. Pierce County*, 44 Nebr., 584; *Collins Mfg. Co. v. Seeds Dry-Plate Co.*, 55 Nebr., 576; *Bates-Smith Investment Co. v. Scott*, 56 Nebr., 475.

NORVAL, C. J.

Petitions were presented to the county superintendent of Sarpy county praying the formation of a new school district, and remonstrances were filed with him protesting against such proposed action. On the hearing, the county superintendent formed a new school district, known as district No. 40. A transcript of the proceedings before that officer, and a petition in error, were filed in the district court. The title of the cause in that court, as well as the petition in error, was "Gustave Biart v. W. H. Myers" et al. The parties were likewise so described in the summons in error issued out of that court. Neither in the pleadings nor on the journal were the parties designated with any other or further particularity. Objections to the jurisdiction of the court were filed by the defendants in error, W. H. Myers and Adam Kas, respectively, which were overruled, and the order and proceedings of the county superintendent were affirmed. Error proceeding was prosecuted to this court, the cause being entitled in the petition in error precisely as in the court below, and the parties were not otherwise desig-

nated in the petition in error. Subsequently, Adam Kas filed a cross-petition in error herein, but did not bring in new parties to the proceedings; afterwards he filed a motion to dismiss the petition in error on substantially the grounds that no motion for a new trial was filed in the court below, and that there is a defect of parties plaintiff and defendant. On this motion a submission has been taken.

The failure to file a motion for a new trial constitutes no cause for dismissing a petition in error. See *Leighton v. Stuart*, 8 Nebr., 96. Moverover, such a motion is unnecessary to a review of the judgment of the district court made in an error proceeding. See *Dreyfus v. Moline, Milburn & Stoddard Co.*, 43 Nebr., 233; *Weitz v. Walter A. Wood Reaping & Mowing Machine Co.*, 49 Nebr., 434; *Claflin v. American Nat. Bank*, 46 Nebr., 884.

Adam Kas is precluded from asserting that there is a defect of parties plaintiff or defendant, inasmuch as he has filed a cross-petition in error, without bringing in new parties to the proceeding. Moreover, there is no defect of parties. The judgment of the district court alone is assailed, or is before us for review, and all the parties to such judgment are made either plaintiffs or defendants in error. Whether there was a defect of parties in the district court, is a question which does not concern us at this time. The motion to dismiss is overruled.

MOTION DENIED.

BEE PUBLISHING COMPANY V. WORLD PUBLISHING COMPANY.

FILED MARCH 7, 1900. No. 9,105.

1. **Newspaper Article:** LIBEL PER SE. A newspaper article in which it is falsely stated that a business corporation is maintaining a precarious existence, that it is not able to meet its financial obligations and is tottering, bankrupt and about to pass out of existence, is libelous *per se*.

2. **Measure of Damages.** In this state the measure of recovery in all civil actions is compensation for the injury sustained.

3. **Evidence:** EXPRESS MALICE. In the trial of an action for libel it is improper to receive evidence of express malice for the purpose of influencing the jury in determining the amount which plaintiff ought to recover.

4. **Plea of Justification:** EVIDENCE TO DISPROVE. But if, in such action, a plea of justification has been interposed, evidence of express malice may be received for the purpose of disproving the claim of defendant that in the publication of the article he acted in good faith, from proper motives and for justifiable ends.

5. ———: EVIDENTIAL FACTS: AMENDMENT. A plea justifying a libel is defective if the evidential facts, instead of the ultimate facts, are alleged; but, if the trial court and the litigants treat the plea as sufficient, and proof is introduced on the theory that it is sufficient, its infirmity may be cured by amendment.

6. **Damages:** PROVINCE OF JURY. The law presumes that some damage results from the publication of an article libelous *per se*, and it is the business of the jury, in an action for such injury, to determine the amount of damage.

7. **Evidence:** GIST OF ACTION: VOLUME OF BUSINESS. In the trial of an action for damages resulting from the publication of a newspaper libel, where the gist of the action is injury done to plaintiff's business, it is proper to show the extent and character of the business and its volume both before and after the publication of the libelous article.

8. ———: ———: PROBABLE FUTURE DAMAGES. In such case, the jury should take into account the probable future as well as the actual past, and assess the damages once for all.

9. ———: ———: GENERAL DECLINE. In an action for libel, under the allegation of loss of business, it is competent for the plaintiff to prove a general loss or decline of patronage without naming particular customers or proving that they have ceased to do business with him.

10. ———: ———: SPECIAL DAMAGE. And, in such case, if evidence of special damages is received without objection, it may be considered by the jury.

11. **Defamatory Article:** IMPUTATION UPON SOLVENCY. Where a defamatory article contains an imputation upon the solvency and stability of a large newspaper concern, it is proper, in the trial of an action to recover damages occasioned by the libel, to show by expert proof the general effect of such an article on the business of such a publisher.

12. **Disputed Questions of Fact:** BEST EVIDENCE. In all judicial proceedings, disputed questions of fact must be established by the best evidence attainable.

13. ———: SECONDARY EVIDENCE. Evidence can not be received which, on its face, indicates that it is secondary and that the original source of information is in existence and accessible.

14. **Incompetent Evidence:** CUMULATIVE EVIDENCE NOT REVERSIBLE ERROR. The admission of incompetent evidence is not reversible error, if the fact which it tends to prove is otherwise conclusively established.

15. **Excessive Damages:** ACTION EX DELICTO. Where it appears that a judgment is based on a verdict which is excessive, though not given under the influence of passion or prejudice, it may be permitted to stand, even in actions *ex delicto*, on condition that the excess be remitted.

16. ———: ———: REMITTITUR. Damages *held* to be excessive and plaintiff allowed to file a remittitur.

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

E. W. Simeral and *Eleazer Wakeley*, for plaintiff in error, argued that the proposition that punitive or exemplary damages could not be recovered in this state for libel or slander was not disputed; and this rule needed no discussion, except to show that it was violated in spirit and effect by repeated rulings, complained of herein as prejudicial errors; that the plaintiff, being a corporation, could recover no damages except for actual loss of business, and profits directly traceable to the publication of the article; that whether an individual or a firm could recover beyond that amount, for an article libelous only as assailing his or its business standing and credit need not be here discussed; but it would be easy to show that, even in such case, no other damages were recoverable. A corporation could not be wounded in feelings and sensibilities of which it is inherently destitute. The trite adage that "a corporation has no soul" was strictly pertinent in a question of damages to business and credit. Damages to the feelings or sensibilities of a natural person were no doubt actual damages

which, in a proper case, might be recovered as such. They were not punitive. But physical, mental or psychological damages to a corporation were not conceivable. When no special damages were alleged in the petition none could be properly proved, or relied upon, in any case, except such as would necesarily and ordinarily flow from and be caused by the article in question. The court must be able to say, from the words of the article, and the nature of the plaintiff's business, as set forth in the petition, that the ordinary and usual result of the publication must be to cause damage to such business. But there were authorities that, in case of a corporation, special damages must always be alleged in order to permit proof thereof.

On the subject of malice plaintiff's counsel cited: *Republican Publishing Co. v. Conroy*, 38 Pac. Rep. [Colo.], 423; *Mattice v. Wilcox*, 42 N. E. Rep. [N. Y.], 270; *Casey v. Hulgan*, 21 N. E. Rep. [Ind.], 322; *Klewin v. Bauman*, 10 N. W. Rep. [Wis.], 398; *Templeton v. Graves*, 59 Wis., 95, 17 N. W. Rep., 672; *Delaney v. Kaetel*, 51 N. W. Rep., [Wis.], 559; *Rosewater v. Hoffman*, 24 Nebr., 222; *Boyer v. Barr*, 8 Nebr., 70; *Roose v. Perkins*, 9 Nebr., 315; *Riewe v. McCormick*, 11 Nebr., 263; *Boldt v. Budwig*, 19 Nebr., 739; *Detroit Daily Post Co. v. McArthur*, 16 Mich., 447; *King v. Root*, 4 Wend. [N. Y.], 114; *Root v. King*, 7 Cowin [N. Y.], 613; *Byrket v. Monohon*, 7 Blackf. [Ind.], 83; *Shilling v. Carson*, 27 Md., 175; *Weaver v. Hendrick*, 30 Mo., 502; *True v. Plumley*, 36 Me., 466; *Jellison v. Goodwin*, 43 Me., 287.

As to measure of damages plaintiff's counsel also cited: 1 Sutherland, Damages, 763; *Terwilliger v. Wands*, 17 N. Y., 54; *Bassil v. Elmore*, 65 Barb. [N. Y.], 627; *Keenholts v. Becker*, 3 Den. [N. Y.], 346; *Dicken v. Shepherd*, 22 Md., 399; *Squier v. Gould*, 14 Wend. [N. Y.], 159; *Shaw v. Hoffman*, 21 Mich., 151.

Hall & McCulloch, for defendant in error, cited constitution of Nebraska, art. 1, sec. 5, and argued that the

constitutional defense was evidently the defense set up in this case; and the issues were: First—Was the article true? Second—Was it published for good motives and for justifiable ends? These questions were submitted to the jury. Suppose the jury should have found that the article was true, did not the question of whether or not it was published "with malice" figure in the determination of whether it was published "with good motives and for justifiable ends"? One can not justify himself for libel, if he published it with malice. If it be shown that it was malicious in its publication, a jury could hardly find that it was published "with good motives and for justifiable ends." So that, by the pleadings, the question of malice was directly in issue, and it would have made no difference, if the plaintiff in error had shown the argument true; providing malice was shown to the satisfaction of the jury. Then it would be clear that plaintiff in error had failed upon the other essential allegation of defense, to-wit, that the article "was published with good motives and for justifiable ends."

SULLIVAN, J.

This proceeding in error brings up for review a judgment of the district court of Douglas county in favor of the World Publishing Company and against the Bee Publishing Company. The action was brought to recover damages for an alleged libel published by the defendant concerning the plaintiff, and in relation to its business. Each of the litigants is a corporation engaged in the publication of a newspaper in the city of Omaha. The article complained of was printed in two editions of the *Omaha Daily Bee* and, in substance, asserted that the *World-Herald*, the newspaper published by the defendant, had been maintaining for some time a precarious existence; that it was no longer able to meet its financial obligations; that it was tottering, bankrupt and about to pass out of existence. The story was told with much detail and ornamentation, and was well calculated to

convince the reader that the plaintiff was moribund and about to collapse as a business concern. The defendant, in its answer, admitted the publication of the article as set forth in the petition, and alleged that at the time of such publication it was generally believed that the plaintiff was about to sell, or had sold, its newspaper; that the article in question was published as an article of news, without malice, with good motives and for justifiable ends. It was also alleged that the plaintiff was, in fact, trying to sell its newspaper, and that its assets were less than its liabilities. During the trial the court admitted, over defendant's objections, evidence tending to show that the libelous article was the product of actual malice, and that it was published with a deliberate purpose to impair the plaintiff's credit and destroy its business. These rulings are now assigned for error.

In this state the measure of recovery in all civil actions is compensation for the injury sustained. Exemplary damages are never allowed. See *Boyer v. Barr*, 8 Nebr., 68; *Roose v. Perkins*, 9 Nebr., 304; *Riewe v. McCormick*, 11 Nebr., 261; *Boldt v. Budwig*, 19 Nebr., 739. The evidence of express malice was, therefore, improper, if received for the purpose of influencing the jury in determining the amount which the plaintiff ought to recover. If the publication was false and not privileged, legal malice was indisputably established, and the plaintiff was entitled to full reparation for the wrong done it, without proving that the defamation was inspired by resentment, malevolence or a desire on the part of the defendant to be rid of an offensive business competitor. But it seems clear to us, from a careful examination of the entire record, that the evidence in question was not given to enhance damages, but to disprove the defendant's claim that in libeling the plaintiff it acted in good faith, and from motives altogether proper and justifiable. The plea of justification was defective, no doubt, in alleging evidence of plaintiff's insolvency instead of setting forth the ultimate facts, but it was treated by the court

and the litigants as a sufficient plea; and it was, we think, such an evident and obvious attempt to justify the libel that it might have been amended and its infirmity cured, without terms, during the trial, or even after verdict. It was within the doctrine of *McCleneghan v. Reid*, 34 Nebr., 472, a denial of malice and a substantial justification of the act of which plaintiff complains. That the Bee Publishing Company relied on the truth of the article and the motives for its publication as a complete defense, is shown by the fact that it produced testimony tending to prove that the plaintiff was insolvent and that the defendant acted in good faith and under a sense of duty to the public. If this evidence was not designed to sustain a plea of justification, it is difficult to conceive for what purpose it was offered. The trial court charged the jury that exemplary or punitive damages were not recoverable, and, in effect, advised them that neither malice nor good faith could be taken into account, or given any weight whatever, in the assessment of damages. So it appears that the evidence of express malice was not only properly received, but was, under the instructions of the court, kept within its legitimate sphere of influence.

Another reason assigned for reversing the judgment is that the damages awarded are excessive. In this connection it is insisted that the defamatory article was not libelous *per se*, and that the loss of advertising patronage, not having been specially pleaded, was not recoverable under a general allegation of damages. The article was libelous *per se;* it contained a distinct imputation on the plaintiff's solvency; its natural and inevitable tendency was to produce injury. The law presumes that some damage did result from the publication, and it was the business of the jury to determine the amount. See 1 Jaggard, Torts, 493; *Republican Publishing Co. v. Miner*, 12 Colo., 77; *Hubbard v. Rutledge*, 52 Miss., 7; *Boogher v. Knapp*, 76 Mo., 457; *Mitchell v. Bradstreet Co.*, 116 Mo., 226; *Lock v. Bradstreet Co.*, 22 Fed. Rep., 771; *Newell v.*

How, 31 Minn., 235. In Odgers, Libel & Slander, 293, it is said: "Even if no evidence be offered by the plaintiff as to damages, the jury are in no way bound to give nominal damages only; they may read the libel and give such substantial damages as will compensate the plaintiff for such defamation." See *Lick v. Owen*, 47 Cal., 252; *Tripp v. Thomas*, 3 Barn. & Cres., 427*. In this case there was evidence showing that plaintiff was conducting a very extensive business, requiring an annual outlay of about $180,000; that the *Omaha Bee* had a wide circulation in this and other states, and reached a great many of plaintiff's advertising customers; that in the year following the publication of the libel there was a considerable falling off in plaintiff's advertising patronage. There was also testimony of a general character tending to show the mischievous effect of a charge of insolvency upon the advertising business of a newspaper. This evidence was competent and material. It was proper to be considered by the jury in determining what sum would afford just reparation to the plaintiff for the injury resulting from the defendant's wrongful act. In assessing the damages the jury were authorized to take into account the probable future as well as the actual past; they were required to assess the damages once for all. See Odgers, Libel & Slander, 292; *True v. Plumley*, 36 Me., 466. Under the general allegation of loss of business, it was competent for the plaintiff to prove a general loss or decline of patronage without naming particular customers, or proving that they had ceased to advertise with it. See Odgers, Libel & Slander, 319; *Weiss v. Whittemore*, 28 Mich., 366; *Mitchell v. Bradstreet Co.*, 116 Mo., 226; *Evans v. Harries*, 38 Eng. Law & Eq., 347; *Trenton Mutual Ins. Co. v. Perrine*, 3 Zab. [N. J.], 402; *Broad v. Deuster*, 8 Biss. [U. S.], 265; Newell, Slander & Libel, 868. But even if it were necessary to plead specially the items of loss occasioned by the libel, the jury were justified in considering the evidence introduced by the plaintiff, because no attempt was made to exclude it on the

ground that the allegation of damage was general. See *Bergmann v. Jones*, 94 N. Y., 51. Everything considered we can not say that the damages awarded by the jury are so large as to indicate that the verdict is the result of passion or prejudice, and yet they exceed, we think, the actual loss suffered by the plaintiff in its business. One who deliberately libels another can not justly insist that every pecuniary loss caused by the defamation shall be pointed out with precision. There is no unerring standard for the measurement of damages in this class of cases. Much latitude must of necessity, be given to the practical wisdom and sound discretion of the jury. They should be put in possession of the material facts, and directed to make their award, bearing in mind that the relation of cause and effect must always exist between the conduct complained of and the loss for which damages are given.

We will now consider some objections to evidence introduced by the plaintiff to prove the extent of the injury inflicted upon it. Cadet Taylor and Gilbert M. Hitchcock were called as witnesses and testified in a general way to the conditions upon which the successful prosecution of a business like that of the plaintiff depends. The tendency of the evidence was to show the importance and value to a newspaper of a reputation for stability and permanence, and the disastrous consequence of the want of such a reputation. We are of the opinion that the evidence was competent and its reception proper. The business of a great newspaper is something with which the average juror is not familiar. The considerations which influence advertisers to give or withhold patronage are not known to him; and it is, therefore, permissible for persons of special experience to testify to what extent the success of a publisher in getting and retaining business depends upon his good repute. The defendant has referred us to no decision holding evidence of this character inadmissible, and we have found none in the course of a somewhat extended investigation of the

cases dealing with the subject of expert proof. It is true that both Hitchcock and Taylor testified to some facts which are trite and known of all men, but this was in no respect prejudicial to the defendant; it could not have been injured by the affirmation of facts of universal recognition.

A further contention of defendant is that the court erred in permitting Mr. Hitchcock to testify to the falling off in plaintiff's advertising business during the year following the publication of the libel. It is asserted that this evidence was incompetent, because it was merely the conclusion of the witness based on an examination of the books of the World Publishing Company. It is elementary, of course, that in all judicial proceedings disputed questions of fact must be established by the best means attainable, and that evidence can not be received which indicates on its face that it is secondary and that the original source of information is in existence and accessible. Tested by this rule, it must be conceded that Hitchcock's testimony, to the extent that it was a conclusion from the books of the plaintiff, was inadmissible. It was certainly improper for the witness to state the result gathered by him from an examination of the books themselves, because, even if the entries were numerous and complicated, the production of the books, they being within the jurisdiction of the court and subject to its orders, was a precedent and indispensable condition to the introduction in evidence of a summary or abstract of their contents. Counsel for the defendant was entitled to cross-examine the witness with the books before him, and with the information afforded by them, test the correctness of the conclusions given to the jury. See 1 Greenleaf, Evidence [15th ed.], sec. 82; 1 Jones, Evidence, sec. 200; 1 Rice, Evidence, p. 153; *Boston & W. R. Co. v. Dana*, 1 Gray [Mass.], 83; *Burton v. Driggs*, 20 Wall. [U. S.], 125; *Wolford v. Farnham*, 47 Minn., 95; *Culver v. Marks*, 122 Ind., 554; *Brayton v. Sherman*, 23 N. E. Rep. [N. Y.], 471; *Poor v. Robinson*, 13 Bush [Ky.],

290; *Insurance Co. v. Weide*, 9 Wall. [U. S.], 677; *Anchor Mill Co. v. Walsh*, 108 Mo., 277; *Greenville v. Ormand*, 51 S. Car., 58; *Holmes v. Marden*, 12 Pick. [Mass.], 168. But while it is clear the rulings here complained of were erroneous, they were not, we think, prejudicial to the defendant, and consequently do not afford a sufficient reason for reversing the judgment. Mr. Hitchcock was thoroughly familiar with the business of the World Publishing Company. He knew from day to day the amount of its receipts and expenditures, and when asked to what extent the plaintiff's advertising patronage had declined during the year following the publication of the libel, he testified from an abstract made up from the advertising register, not because it was necessary for substantial accuracy of statement to refer to any memorandum, but in order, it would seem, to be strictly and mathematically correct. That the diminution of business to which the witness testified was approximately known to him, entirely independent of the books, is a conclusion from which we can not escape. He testified: "I know the volume of business transacted by the company, and I know it from constant management of the business and control of it, and also from constant inspection of the books which record the transactions." That the testimony was in fact absolutely true, is not questioned; that actual prejudice resulted from its admission is not claimed. The contention of counsel for defendant, as we understand it, is simply this, that the evidence, being technically inadmissible, it was reversible error to permit it to go to the jury. Our view of the matter is that the credibility and worth of the evidence does not depend alone upon the books of account, or the memoranda used by the witness, but also upon his independent knowledge of the facts to which he testified. The assignments of error based upon the reception of evidence showing the loss of advertising patronage can not be sustained.

The refusal of the court to give certain instructions

requested by the defendant is made the subject of complaint. So far as these requests state correct and pertinent propositions of law, they are embraced in the general charge which is, in most respects, an admirable exposition of the law of libel as applied to the facts of this case.

On the subject of damages the instructions were very explicit. The jury were told that the damages which they were authorized to allow were actual damages, and such only as resulted directly from the libelous article set out in the petition. This statement was sufficient. It could not have been misunderstood. It was all the law required.

For the reason that the damages awarded are in excess of the loss sustained by the plaintiff, the judgment will be reversed unless a remittitur for the sum of $3,000 shall be filed with the clerk of this court within thirty days from this date. If such remittitur be so filed, the judgment for $4,000, with interest on that amount, will be affirmed. It is the settled doctrine of this court, even in actions *ex delicto*, that a judgment based on a verdict which is excessive, but which was not given under the influence of passion or prejudice, will be permitted to stand on condition that the excess be remitted. See *Fremont, E. & M. V. R. Co. v. French*, 48 Nebr., 638; *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Nebr., 159.

JUDGMENT ACCORDINGLY.

HIRAM D. UPTON ET AL. V. GEORGE BETTS ET AL.

FILED MARCH 7, 1900. No. 9,152.

1. **Quia Timet:** EQUITABLE LIEN. In an action *quia timet*, where the only issue was the validity of a deed under which defendant asserted title, a decree in favor of the plaintiff will not pre-

clude the defendant from afterwards asserting an equitable lien for money paid by him in discharging a valid mortgage on the property.

2. **Res Adjudicata.** A matter in issue covered, either generally or specifically, by the decree of the court can not be again litigated without a modification or vacation of that decree.

3. **Junior Incumbrancer:** EQUITABLE LIEN: BONA FIDES. A junior incumbrancer who claims priority over an elder equitable lien must allege and prove that he acted in good faith in the transaction, and that he paid out the full amount secured by his lien in ignorance of the prior equity.

4. **Findings:** PLEADINGS. The findings of the court must respond to the issues raised by the pleadings in the case.

5. **Evidence.** Evidence examined, and found to support the findings and decree of the court.

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

F. I. Foss, W. R. Matson and *C. E. Holland,* for plaintiffs in error:

A mortgage recorded prior to an entry of judgment which was a lien upon the property took precedence of the judgment lien. See 1 Jones, Mortgages, sec. 461; *Jackson v. Dubois,* 4 Johns. [N. Y.], 216; *Dunwell v. Bidwell,* 8 Minn., 18; *Goodenough v. McCoid,* 44 Ia., 659; *Lambertville Nat. Bank v. Boss,* 13 Atl. Rep. [N. J.], 18.*

As between a mortgage and a judgment rendered in a county different from that in which the land was, priority was determined by priority of registration in the county where the land is situated. See *Firebaugh v. Ward,* 51 Tex., 409; *Gray v. Patton,* 13 Bush [Ky.], 625.

Under the statute, which provided that a mortgage recorded within a certain time after its date, should take effect, as between the parties, from its date, a judgment recovered subsequently to the date of a mortgage, and before the recording of it, bound only the equity of redemption, and was subject to the mortgage, without re-

*This case does not appear in the New Jersey reports.—REPORTER.

gard to the question of actual notice, if the mortgage was subsequently recorded within the time prescribed by law. See *Knell v. Green Street Building Ass'n*, 34 Md., 67.

The limit of inquiry necessary in any case was that required by the use of reasonable diligence. See *Passumpsic Savings Bank v. National Bank of St. Johnsbury*, 53 Vt., 82; *Vredenburgh v. Burnet*, 31 N. J. Eq., 229; *Babcock v. Lisk*, 57 Ill., 327; *Heaton v. Prather*, 84 Ill., 330.

As a general rule a final decree could not be amended after the term in which it is ended. See 5 Am. & Eng. Ency. Law, 380, note 2; *Pope v. Hooper*, 6 Nebr., 178; *Bramlet v. Pickett*, 12 Am. Dec., 350, 2 A. K. Marsh. [Ky.], 10.

A mandate was not necessary to the finality of a judgment. Powell, Appellate Proceedings, pages 284, 287, showed the purpose of a mandate. See, also, Powell, page 345, as to the use of a mandate.

The universal rule was acknowledged to be that where any question of fact, however slight, was involved, parties are entitled to have the jury pass upon such questions. See *Johnson v. Missouri P. R. Co.*, 18 Nebr., 690.

James W. Dawes and *Joseph R. Webster*, for the defendant in error, Sims, argued that the radical question was, Had this court still jurisdiction of the cause after the decree of December 14, 1888, to modify it, and send the cause back for trial on another issue? If it then had jurisdiction, then the decree of December 14, 1888, was not in fact final. This court had full and complete jurisdiction of the cause of *Betts v. Sims*, to modify the decree, and remand the cause for trial on the new issues formed. The mortgages were taken *lis pendens*, and were barred by result of that controversy. There are in this state no statutory or constitutional provisions defining when jurisdiction of this court, once acquired, ceases. Every authority cited by plaintiffs in error, on the power of courts to modify their judgments after the term at which they are rendered (save two), related to modification of judgments made, attempted or sought in courts not of

last resort where a somewhat different rule prevailed. In 156 U. S., 267, the court held it had power till expiration of 1893 (July, 1894) term to modify its decree of April 3, 1893 (October term of 1892), but could not do so in 1895, more than two years after its rendition. On page 25 counsel quoted from brief of counsel in *Longworth v. Sturgis*, 6 O. St., 147, by some inadvertence citing it as, and probably supposing it to be, the language of the court. This was not adopted as a part of its opinion. The court, in that case, refused to modify its judgment, or yield to a bill of review, because mandate had been sent down and filed in the lower court, new parties brought in, new issues made, and the cause was in due course of adjudication below.

SULLIVAN, J.

This action was brought by Hiram D. Upton to foreclose a mortgage on real estate in Saline county. Ernest C. Holland answered, setting up a junior mortgage on the premises described in the petition. F. L. Sims, who is the fee owner of the property, filed an answer claiming title through a sale under a decree foreclosing an equitable lien in favor of himself and antedating the mortgage of both Upton and Holland. To this answer the mortgagees replied. The reply of Holland was a general denial, while that of Upton was a general denial, coupled with the statement that he had taken his mortgage on the faith of a decree rendered by this court in an action between George and Eliza Betts and Sims involving the ownership of the land here in controversy. The trial court found the issues in favor of Sims, and rendered a decree quieting his title. Upton and Holland filed a joint motion for a new trial, and they have also joined in the petition in error. The substance of their contention is that while the lien upon which Sims grounds his title was anterior to the mortgages, it was a secret lien and, therefore, not entitled to priority.

It appears from the record that George Betts was at

one time the owner of the property; that he occupied it as a homestead; that Charles Bidleman had a valid mortgage thereon; that Sims purchased and paid for the land and was given possession of it; that he then paid off the Bidleman mortgage and caused it to be released of record; that afterwards Betts and wife sued Sims to quiet their title to the land, on the theory that it was a family homestead, and that, Mrs. Betts not having joined with her husband in the deed through which Sims claimed title, the deed was void; that the action was tried in the district court, and that the trial resulted in a finding and judgment in favor of Sims; that the cause was appealed to this court, where, on December 14, 1888, a decree was rendered in favor of George and Eliza Betts, quieting their title and awarding them possession and costs; that after the adjournment of the term at which the decree was rendered, and after the expiration of the time limited by the rule for filing a motion for a rehearing, Sims asked and obtained in this court leave to file an amended answer setting up the facts in regard to the payment by him of the Bidleman mortgage; that after such answer was filed, the cause was remanded to the district court, where a trial was had, and a decree rendered awarding Sims a lien on the property, on the ground that he had succeeded to the rights of Bidleman in relation to the debt which he had discharged; that Sims' present title is derived from a sale of the property made in execution of that decree. It further appears that the mortgages involved in the present suit were given by George and Eliza Betts on March 13, 1889.

There is in the briefs of counsel much discussion touching the power of this court to alter the decree rendered by it on December 14, 1888, but we think the question is not of vital importance. For present purposes we shall assume that the view of counsel for Upton and Holland is correct, and that a court of last resort has no rightful authority, after the adjournment of the term at which a judgment was pronounced, to grant a rehearing except

in response to a motion seasonably filed. Conceding, then, that the decree in favor of Betts and against Sims was a finality on March 13, 1889, what fact did it conclusively establish? What was determined with respect to the property upon which persons dealing with it might safely rely? The action was brought to obtain an adjudication of the question of ownership, and that was the only point considered or decided. No issue was raised as to the existence or validity of any lien on the land in favor of Sims; and no such question was set at rest by the decree. The petition, which is set out in *Betts v. Sims*, 25 Nebr., 166, merely charged that Betts was the owner of the property, and that a certain quitclaim deed through which Sims claimed title was void. It was not alleged that any other adverse right or interest was being asserted. That nothing but the validity of the quitclaim deed was adjudicated is further shown by the fact that this court, after final judgment, and without any modification thereof, permitted Sims to file an amended answer, which eventually became the basis of the decree establishing his right of subrogation. Had this matter been covered, either generally or specifically, by the decree in favor of Betts, it would not have been permissible to again litigate it without a vacation or modification of that decree.

The plaintiffs in error may have loaned money on the faith of the judgment quieting Betts' title, but they were certainly not induced by it to believe that Sims did not have a lien on the property. The mortgages involved in this litigation are junior incumbrances, and they are, therefore, not entitled to priority over Sims' equitable lien, unless Upton and Holland were ignorant of the existence of that lien at the time their rights were acquired. This they have not shown; they have neither pleaded nor proved it. One who asks a court to give priority to a junior lien on the ground that it was obtained in ignorance of an elder latent equity must allege and prove that he acted in the transaction in absolute good faith. In 2

Pomeroy, Equity Jurisprudence, section 785, it is said: "The allegations of the plea, or of the answer, so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a *bona fide* purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not." In *Arlington State Bank v. Paulsen*, 57 Nebr., 717, it was held: "That one is a subsequent innocent purchaser of real estate is an affirmative defense, which the claimant, to avail himself of, must plead; and upon him is the burden of proof to establish it." See *Bowman v. Griffith*, 35 Nebr., 361; *Garmire v. Willy*, 36 Nebr., 340; *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Nebr., 705; *Baldwin v. Burt*, 43 Nebr., 245; *American Exchange Nat. Bank v. Fockler*, 49 Nebr., 713.

Since Holland's reply was a general denial, it is very clear that the court could not have rendered judgment in his favor on the theory that he was a *bona fide* mortgagee. And it is equally evident that Upton's allegation, that he took his mortgage on the faith of the decree rendered by this court in favor of Betts, is not an averment that he was without knowledge of Sims' equitable lien. There was no finding of the trial court that Upton and Holland were good-faith incumbrancers; but if there had been, it would not respond to any issue presented by the pleadings. Besides the failure to plead want of notice, there was also a complete failure to prove that fact. There was no evidence whatever bearing upon the question. Holland, who was acting for Upton as well as for himself, testified that he relied on the decree in favor of Betts, and had no knowledge that any steps were being taken to modify it. He did not, however, testify that he was ignorant of the right of Sims to be subrogated to the

Bidleman mortgage. Indeed, it would seem quite probable that he was aware of that right, for it was disclosed at the trial of *Betts v. Sims, supra,* and appeared in the findings made by the district judge in that case. It also appeared in the opinion of this court filed on December 14, 1888. The conclusion of the district court is right, and is

AFFIRMED.

CHARLES B. DENNEY ET AL. V. PETER S. STOUT.

FILED MARCH 7, 1900. No. 9,156.

1. **Verdict:** SUFFICIENT PROOF. A verdict supported by sufficient competent proof will not be disturbed.

2. **Action on Contract:** GENERAL DENIAL: TRIAL: EXCLUSION OF EVIDENCE. In the trial of an action on a contract, where the answer is a general denial, it is not error to exclude evidence which has no tendency to disprove the averments of the petition.

3. **Pleading:** AFFIRMATIVE DEFENSE. Any affirmative defense to the enforcement of a contract should be pleaded in the answer.

4. **Instructions:** OMISSION OF IMPORTANT ELEMENT. It is not error to refuse an instruction which omits an important element.

5. **Evidence:** UNCORROBORATED WITNESS. The jury may disregard the entire evidence of an uncorroborated witness, where his testimony on a material point is willfully and corruptly false.

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

Charles W. Haller, for Charles B. Denney, plaintiff in error, cited: *Billings v. McCoy Bros.,* 5 Nebr., 187; *Dell v. Oppenheimer,* 9 Nebr., 454; *Gandy v. Pool,* 14 Nebr., 98; *Sandwich Mfg. Co. v. Shiley,* 15 Nebr., 109; *First Nat. Bank v. Carson,* 30 Nebr., 104.

Thomas & Nolan, for O'Neill, plaintiff in error.

A. N. Ferguson, for defendant in error, cited *Prall v. Peters,* 32 Nebr., 832; *St. Felix v. Green,* 34 Nebr., 800; *Smith v. Wigton,* 35 Nebr., 460.

SULLIVAN, J.

This action was commenced in the county court of Douglas county and was removed thence to the district court by appeal. The petition stated a cause of action for money expended by the plaintiff, Peter S. Stout, at the request of Denney and O'Neill, and for their use and benefit. The answer was a general denial. A jury found the issues in favor of the plaintiff, and judgment was rendered on the verdict. There is in the brief of counsel for the complaining party no extended discussion of the errors assigned, but it would seem that the alleged insufficiency of the evidence to sustain the verdict is the main ground relied on for a reversal of the judgment. We have read the record and are entirely satisfied with the conclusion reached by the jury. The verdict is certainly supported by ample proof.

It is claimed that the court erred in refusing to receive in evidence Exhibits 1 and 2 offered by the defendants. The ruling was not erroneous. The documents were properly excluded. They had no tendency to disprove any fact alleged in the petition. In both of the trial courts the disputed facts were (1) the alleged contract for the expenditure of the money by the plaintiff for the use of the defendants, and (2) the amount expended in pursuance of such contract. If the contract was made as alleged, the plaintiff was, of course, entitled to recover whatever sum he paid out in accordance with its terms. The rejected evidence might have a tendency to show that there was a modification of the original contract between the parties, but it was not relevant to any issue made by the pleadings. What is said upon this subject is equally applicable to some other rulings made during the progress of the trial. Counsel for Denney seems to have lost sight of the fact that, if the plaintiff made the contract pleaded, he had an absolute legal right to perform its obligations and enforce it against the defendants. If the contract had been modified or re-

scinded, that was an affirmative defense, and should have been stated in the answer. See *Prall v. Peters*, 32 Nebr., 832; *St. Felix v. Green*, 34 Nebr., 800; *Smith v. Wigton*, 35 Nebr., 460.

Error is assigned on the refusal of the court to give the following instruction requested by the defendants: "If you find that any witness testified falsely as to any material point, you may disregard all he testified to unless corroborated by other competent proof." This instruction omitted an important element, and was, therefore, properly refused. The rule is that the jury are authorized to disregard the entire evidence of an uncorroborated witness where his testimony upon a material point is willfully and corruptly false.*

The judgment of the district court is right and is

AFFIRMED.

FANNIE BERNHEIMER, APPELLEE, V. FRANCIS G. HAMER ET AL., APPELLANTS.

FILED MARCH 7, 1900. No. 9,163.

1. **Judicial Sale:** CONFIRMATION: OBJECTIONS. Objections to the confirmation of sale of real estate must be specifically assigned, and called to the attention of the trial court, in order to entitle them to be considered in this court.

2. ———: APPRAISAL: OBJECTIONS. Objections to an appraisal of property to be sold at judicial sale should, except where fraud is alleged, be filed prior to the date fixed for the sale.

3. ———: ERROR IN APPRAISAL: OUTLAWED LIEN. An error in appraising real estate for judicial sale, whereby an outlawed lien was deducted, is without prejudice, where the property sold for more than two-thirds its gross valuation.

APPEAL from the district court of Buffalo county. Tried below before GREENE, J. *Affirmed.*

*See *Stoppert v. Nierle*, 45 Nebr., 105.—REPORTER.

Francis G. Hamer, for appellant:

It was the duty of the court to examine the return of the sheriff, and to have ascertained if any irregularity appeared therein; and, if any such irregularity appeared, to set aside the sale upon his own motion. See *Helmer v. Rehm*, 14 Nebr., 220.

The sheriff can not delegate the exercise of judicial functions to his deputy. See *State v. Noble*, 118 Ind., 350; *Van Slyke v. Insurance Co.*, 39 Wis., 390; *State v. Jefferson*, 66 N. Car., 309.

Dryden & Main, contra.

SULLIVAN, J.

This is an appeal from an order of the district court of Buffalo county confirming a sale of real estate made pursuant to a decree of foreclosure. Appellant contends that there are four sufficient reasons why the sale should be set aside. The first, second and third of these reasons were not brought to the notice of the district court, and, consequently, can not be considered here. Such is the rule established by *Johnson v. Bemis*, 7 Nebr., 224; *Ecklund v. Willis*, 44 Nebr., 129, and *Creighton University v. Mulvihill*, 49 Nebr., 577. The fourth ground of objection to the sale is that the appraisers deducted from the gross valuation of the property an outlawed lien amounting to $84.81. This objection is without merit, because (1) it does not affirmatively appear that the right to enforce the lien by action was barred; (2) the appropriate remedy was a motion to vacate the appraisement (*Jarrett v. Hoover*, 54 Nebr., 65), and (3) the land having been sold for two-thirds of the gross valuation, the alleged error in the appraisal was not prejudicial. See *La Selle v. Nicholls*, 56 Nebr., 458. The order of confirmation is

AFFIRMED.

ASHLAND LAND & LIVE-STOCK COMPANY V. ALFRED MAY.

FILED MARCH 7, 1900. No. 10,158.

1. **Evidence:** VERDICT. Evidence examined, and found to support the verdict.

2. **Misconduct of Counsel:** NEW TRIAL. Where there is reason to believe that the jury may have been influenced in any degree in favor of the prevailing party by the misconduct of his counsel in arguing the cause, the verdict should be set aside and a new trial awarded.

3. **Irregular Methods.** A litigant should not be permitted to hold any advantage obtained by the employment of lawless or irregular methods during the trial, or in connection therewith.

4. **Misconduct not Prejudicial.** Where it is evident that the misconduct of the successful party has not been prejudicial, a judgment in his favor will not be reversed for that reason alone.

ERROR to the district court of Saunders county. Tried below before BATES, J. *Affirmed.*

Simpson & Sornborger, for the plaintiff in error, argued that they did not understand the rule to be that, because the verdict might be sustained by sufficient evidence, counsel might resort to the method pursued in this case for the purpose of insuring success. See *Cleveland Paper Co. v. Banks*, 15 Nebr., 20; *Ashland Land & Live-Stock Co. v. May*, 51 Nebr., 474. They understand the rule on this subject to be that, if the matter stated to the jury was not such as might be proven on the trial, it was misconduct. See *Stratton v. Nye*, 45 Nebr., 619; Thompson, Trials, sec. 263; *Scripps v. Reilly*, 35 Mich., 371.

O. C. Tarpenning, contra.

SULLIVAN, J.

This proceeding in error brings up for review a judgment of the district court in favor of Alfred May and

against the Ashland Land & Live-Stock Company. The action was brought for services alleged to have been rendered under a contract of hiring. The defendant is the owner of a stock ranch in Saunders county, where the plaintiff was employed in some capacity for about fourteen months. The plaintiff claims he was acting as manager and veterinarian, while the defendant insists that he was merely doing chores and other light work for his board. The jury decided in favor of May, and the first reason assigned for the reversal of the judgment is that the verdict is not supported by sufficient evidence. It is expressly conceded by counsel for the company that the jury were justified in finding that the contract alleged in the petition was in fact made, but they deny that the plaintiff proved performance. We think there is no lack of proof upon this point. The defendant repeatedly admitted that May was in its employ and doing good work. On one occasion it referred to him in a business advertisement as its manager, and in the same connection made some laudatory allusion to his skill as a practitioner of veterinary medicine and surgery. There was also produced at the trial some letters written by the company which tended strongly to support the plaintiff's claim. At one time the defendant, as an evidence of its satisfaction with May's work, and as an especial mark of confidence and token of esteem, sent him "two gallons of the best," with cautionary instructions as to its use. Everything considered, there is, we think, no very cogent reason for supposing that the jury erred in their conclusion; and, without any serious misgivings on our part, their finding is approved.

The only other assignment of error discussed in the briefs of counsel is that relating to the alleged misconduct of Mr. Tarpenning, attorney for the plaintiff. He remarked to the jury in his opening statement that there had been other trials of this cause, and that "the defendant had to appeal every time." In his closing argument he called attention to some evidence that had been

excluded, and said it was true. He also denounced with considerable vehemence the conduct of opposing counsel in making too frequent objections to the introduction of evidence. Each of these statements was objected to, and each was distinctly disapproved by the court. It is true that the judicial reproof was not as pronounced and decisive as it ought to have been, but it was doubtless sufficient to indicate to the jury that the objectionable remarks were condemned and should pass unheeded. We have little patience with counsel who deliberately seek to achieve success by lawless methods; and we do not hesitate, in any case, to deprive them of advantages thus obtained. In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering.

When this case was here before (*Ashland Land & Live-Stock Co. v. May*, 51 Nebr., 474) a judgment in favor of the plaintiff was set aside because of the pernicious tactics of his counsel; and we would certainly reverse the judgment now under review, if there were reason to suppose that the jury were at all influenced in giving their verdict by the statements in question. We are of the opinion that they were not so influenced, and being satisfied now, as in the former proceeding, that the verdict rests upon sufficient evidence, the judgment will be

AFFIRMED.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V. JOHN F. CORNELL ET AL., APPELLEES.

FILED MARCH 7, 1900. No. 10,417.

1. **Executive Offices:** CONSTITUTIONAL LAW. The act of 1887 (Session Laws, ch. 60), creating the board of transportation and defining its powers, is not in conflict with section 26, article 5, of the constitution, which forbids the legislature to create any executive state office.

2. ———: ———. Nor is it in conflict with section 2, article 5, of the constitution, which declares that no executive state officer shall be eligible to any other state office.

3. **Board of Transportation:** POWERS. The state board of transportation has power to inquire into the intra-state business of express, telephone and telegraph companies and to regulate their rates therefor.

4. **Maximum Rate Law:** DEFINITION OF DUTIES. The act of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), does not materially modify the provisions of the law enacted in 1887 (Session Laws, ch. 60), defining the duties and powers of the state board of transportation.

5. ———: VALID ACT: PRESUMPTION. The enactment of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), appears upon its face to be a constitutional and valid act; and there is no presumption that its immediate execution would deprive freight carriers of their property without due process of law, or deny them the equal protection of the laws.

6. ———: JUDICIAL COGNIZANCE: ASSUMPTION WITHOUT PROOF: CONFISCATORY LEGISLATION. This court does not take judicial cognizance of the net earnings of railroad companies, and can not assume, without proof, that the "Maximum Rate Law" (Session Laws, 1893, ch. 24) is now, or was at the time of its enactment, confiscatory legislation.

7. **Judgment:** STRANGERS TO RECORD. A judgment is binding only between the parties to the action in which it was rendered. It is of no force between other litigants.

8. **Disapproval.** The seventh point in the syllabus of *Pacific Express Co. v. Cornell*, 59 Nebr., 364, 81 N. W. Rep., 377 is disapproved.*

9. **Board of Transportation:** STATUTE: JURISDICTION. The jurisdiction of the board of transportation under the act of 1897 (Session Laws, ch. 56) is not limited to the regulation of specific charges for messages sent from one point to another within the state. The regulation of telephone rentals is also within the powers of the board.

10. **Statutes:** CONSTITUTIONAL LAW. The act of 1897 (Session Laws, ch. 56), empowering the board of transportation to regulate the

*The seventh point of the syllabus above cited is as follows: "The law of 1893, known as the 'Maximum Rate Law,' or the portion thereof which contained the schedule of rates, was declared unconstitutional. under the then existent conditions, by the supreme court of the United States. This carried with it section 6 of the act, which could have no operation except in connection with rates as fixed in the schedule. Such law is now as if non-existent, and does not interfere with the enforcement of the law of 1897, to which we have referred, by the board and in the method provided in the law of 1887, to which we have hereinbefore alluded."—REPORTER.

charges of express, telephone and telegraph companies, is an original and independent statute and is not violative of section 11, article 3, of the constitution respecting amendatory legislation.

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

Adolphus R. Talbot and *W. W. Morsman*, for appellant.

W. W. Morsman, for appellant, argued orally that the act of 1887, creating the board of transportation and defining its powers, is in conflict with section 26 of article 5 of the constitution, which prohibits the legislature from creating any other executive state office than those defined in the constitution, and is also in conflict with section 2 of article 5, which provides that none of the officers of the executive department shall be eligible to any other state office.

Counsel cited, at length, *In re Railroad Commissioners*, 15 Nebr., 679; and argued that this opinion was, of course, entitled to consideration, but it did not have the force of a decision by this court. It was not a judicial decision. There was no case before the court. It was not argued by counsel representing conflicting interests. It was the opinion of disinterested judges, to be sure, but unaided by counsel or litigants interested in the result. Nothing but conflict of interest, the diligence and zeal of counsel, supplemented by the best judgment of the court, could produce results that are entitled to be accepted as authority.

"The secretaries are empowered, in all matters of examination or investigation, to perform the duties prescribed by the board themselves, with the proviso that all final decisions shall be made by the board themselves. See section 22. This was the creation of a new executive office.

"When the people adopted the constitution, they created, by section 1, article 5, the constitutional office of attorney general, with such governmental powers or functions as might be appropriately assigned to that

office. This was the obvious legal effect of the provision, implied from the title given to the office. The scope and character of the functions allotted to that office and to be performed by the attorney general were as certainly defined and limited by the title which was given to the office, as if these functions and powers had been expressed in detail. The constitution did not create the officer, or incumbent of the office, but provided for his election by the people. The same is true of the offices of secretary of state, auditor of public accounts, state treasurer and commissioner of public lands and buildings. An office, in the sense of the constitution, is that portion of the sovereignty of the state—those governmental powers, which, being segregated from the remainder, are allotted for execution or exercise by some person or persons to be chosen to the office. There is a clear distinction between the office and the officer.

"At the time of the passing of the act of 1897 (Compiled Statutes, 1897, ch. 72, art. 8, sec. 23) whatever power the board of transportation previously had, under the act of 1887, to regulate rates, had been repealed by the act of 1893, known as the 'Maximum Rate Law'; and, therefore, chapter 56 of the Laws of 1897 was ineffectual to confer upon the board the power to regulate the rates to be charged by the appellant." Counsel cited *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313, 23 Nebr., 117, and referred to it as a clear case of judicial legislation which seemed to have been accepted by the legislature in an amendatory act passed in 1897.

The act of 1897, chapter 56, by its express terms, limits the power to regulate charges for messages sent.

The act of 1897 (chapter 56) was an amendatory act, and did not contain the section or sections amended, and did repeal such section or sections, and was, therefore, unconstitutional and void. Counsel here cited *People v. McCallum*, 1 Nebr., 195; *Smails v. White*, 4 Nebr., 353; *Sovereign v. State*, 7 Nebr., 409; *State v. Corner*, 22 Nebr., 265; *In re House Roll 284*, 31 Nebr., 505; *Stricklett v.*

State, 31 Nebr., 674; *Trumble v. Trumble*, 37 Nebr., 340; *State v. County Commissioners of Douglas County*, 47 Nebr., 428; *Morgan v. State*, 48 Nebr., 798; *State v. Moore*, 48 Nebr., 872; *Lancaster County v. Hoagland*, 8 Nebr., 37; *City of South Omaha v. Taxpayers' League*, 42 Nebr., 678; *German-American Fire Ins. Co. v. City of Minden*, 51 Nebr., 870; *Board of Education v. Moses*, 51 Nebr., 288; *State v. Moore*, 48 Nebr., 870; *State, ex rel Graham, v. Tibbets*, 52 Nebr., 228. This line of decisions, covering the period from the very organization of this court down to the present time, had not been broken by a single contrary decision, nor weakened by a single dissent.

The record clearly showed the inadequacy of any remedy at law. The attorney general contended here, as he did in the *nisi prius* court, that any order which might be made by the board of transportation fixing and establishing rates for the appellant could not be enforced by the board without resort to some judicial tribunal for mandatory process, in which proceeding the appellant could make his defense; therefore the remedy at law was inadequate. But this was a mistake. It was not sufficient that there be a remedy at law. It must be as adequate, practicable and efficient to the ends of justice as the remedy in equity.

Counsel cited *Boyce v. Grundy*, 3 Pet., 210; *Sullivan v. Portland*, 94 U. S., 806; *Wylie v. Coxe*, 15 How. [U. S.], 415; *Tyler v. Savage*, 143 U. S., 79; *Richardson Drug Co. v. Meyer*, 54 Nebr., 319; *Miller v. Drane*, 75 N. W. Rep. [Wis.], 413; *Kilbourn v. Sunderland*, 130 U. S., 505.

It is a settled question of law that, where public officers are proceeding illegally and under claim of right or color of office, a person injured may have an injunction. Counsel cited *Board of Liquidation v. McComb*, 92 U. S., 531; *Davis v. Grey*, 16 Wall. [U. S.], 203; *Osborn v. Bank*, 9 Wheat. [U. S.], 738; *Pennoyer v. McConnaughy*, 140 U. S., 1; *Johnson v. Hahn*, 4 Nebr., 139; *Morris v. Merrell*, 44 Nebr., 428; *Mohawk & H. R. R. Co. v. Artcher*, 6 Paige

Ch. [N. Y.], 83; *Belknap v. Belknap*, 2 Johns. Ch. [N. Y.], 472; *Livingston v. Livingston*, 6 Johns. Ch. [N. Y.], 497; *Hamilton v. Cummings*, 1 Johns. Ch. [N. Y.], 516; *Hughes v. Trustees*, F. Vesey Sr. [Eng.], 188; *City of Omaha v. Megeath*, 46 Nebr., 511.

Constantine J. Smyth, contra.

The attorney general filed the same brief as was filed in the *Pacific Express Co. v. Cornell* case, reported in 59 Nebr., 364. He argued that that part of section 26 of article 5 of the constitution which provides that no other executive office shall be continued or created did not prohibit the legislature from creating a board of transportation, and authorizing the governor to appoint the members thereof from outside of the executive state officers named in section 1 of the same article. "If the legislature has the power to create a board of transportation, and to authorize the executive to appoint the *personnel* of such board out of persons not executive state officers within the meaning of section 1, article 5, of the constitution, then not only the first part of the first point stated by the appellant but the second part as well must fall. See *In re Railroad Commissioners*, 15 Nebr., 679. The reasons upon which the opinion in that case stands, summarized, are as follows: The judges first assumed that the powers to be conferred on the new commissioners would be the same as those conferred on the Iowa commission. Hence they would receive salaries out of the state treasury; and, in many respects, their duties would be coextensive with the territorial limits of the state. From these premises they reasoned that the commissioners would be state officers. Since they would be state officers, their power must be referred to either one or the other of the three departments into which the state government has been divided by the constitution, to-wit, the legislative, the executive and the judicial. Inquiry follows as to which of the depart-

ments they would belong. It is concluded that they would be executive state officers. The position is untrue, because it proves too much. The office of policeman and the office of constable are executive state offices. Since the adoption of the constitution the legislature has provided for the creation of many new policemen and new constables. If it be urged that neither the policeman nor the constable draws his salary out of the state treasury, how about the sheriff? He surely is an executive state officer. Considerable of his compensation comes out of the state treasury, to-wit, for "conveying prisoners to the penitentiary." See Compiled Statutes, ch. 86, sec. 36. When, under the provisions of section 518 of the Criminal Code, he conveyed prisoners to the penitentiary, he had jurisdiction in any part of the state in which the performance of his duty brought him, as when he served criminal process outside of his own county. The superintendent of the school for the deaf and dumb, the superintendent of the Lincoln insane asylum, the superintendent of the Kearney industrial school, the commandant of the soldiers' home and the chancellor of the state university were all state officers. They were not legislative; they were not judicial; therefore they must be executive officers—according to the opinion of the judges. Each one, as regularly as the law permitted him, drew his salary out of the state treasury, and each one, so far as the work of his institution was concerned, exercised jurisdiction coextensive with the territorial limits of the state. What difference was there in principle between the duties which would be imposed upon a board of railroad commissioners and those imposed upon the warden of the penitentiary, the chancellor of the university or the superintendent of any one of the many state institutions? The fact was these last were administrative offices merely. So were the board of secretaries. The secretaries, the attorney general said, were, as he viewed them, merely the arms of the executive department of government.

The attorney general cited *State v. Weston*, 4 Nebr., 234; *State v. Smith*, 35 Nebr., 25; *Moore v. State*, 53 Nebr., 831.

The creation of a board of transportation out of state officers is not the creation of an office distinct from the several offices of the officers composing the board. See *State, ex rel. Attorney General, v. Judges*, 21 O., 1.

The law providing for the secretaries of the board of transportation was not unconstitutional. To say so would be to say that the law creating deputies to state officers or permitting employment of clerks in any of the state offices is unconstitutional. The validity of the law was before this court on three different occasions, and on each occasion was sustained. See *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313, 23 Nebr., 117.

At the time of the passage of the act of 1897, whatever power the board of transportation previously had under the act of 1887, to regulate rates, had not been repealed by the act of 1893, known as the "Maximum Freight Rate Law," and, therefore, the act of 1897 was not ineffectual to confer upon the board the power to regulate the rates to be charged by the appellant. See *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313, 23 Nebr., 117; Compiled Statutes, 1897, ch. 72, art. 8, sec. 23 and construction of appellant's counsel thereon.

The act of 1897, by its express terms, does not limit the power to regulate charges of telephone companies for messages sent. The act of 1897 is not an amendatory act, and hence the argument by appellant's counsel, that the act for that reason is unconstitutional, must fail. See *Campbell v. Board of Pharmacy*, 45 N. J. Law Rep., 245; *De Camp v. Hibernia R. Co.*, 47 N. J. Law Rep., 43; *German-American Fire Ins. Co. v. City of Minden*, 51 Nebr., 870; *People, ex rel. Commissioners, v. Banks*, 67 N. Y., 575. In *Smails v. White* and *Sovereign v. State*, cited by opposing counsel, the court put its decision on the ground that the new act was in conflict with parts of the old. Therefore, those cases supported the position

of the attorney general. The attorney general drew a distinction between *Board of Education v. Moses,* 51 Nebr., 288, and the case at bar.

The act of 1897 is complete in itself. See *Van Horn v. State,* 46 Nebr., 79; *State v. Whittemore,* 12 Nebr., 252; *State v. Ream,* 16 Nebr., 681; *Stricklett v. State,* 31 Nebr., 674; *Smails v. White,* 4 Nebr., 353; *Sovereign v. State,* 7 Nebr., 409.

The record clearly showed that the appellant had an adequate remedy at law. The attorney general could well understand that where a public officer, without any authority of law, or, what is the same thing, under a void law, was proceeding to place a cloud upon a title, he could be enjoined. One would not be required to wait until the harm was done, and then engage in a long and circuitious proceeding at law to cure the injury. That, however, was not this case. Here, before the harm was done, application must be made by the officers to a court at law, in which defendant would have an opportunity of making all his defense. Not an adjudged case had the counsel cited which was similar to the case before the court for decision.

SULLIVAN, J.

This action was commenced by the Nebraska Telephone Company in the district court of Lancaster county to enjoin the members of the board of transportation and their secretaries from taking cognizance of a complaint presented to them by John O. Yeiser, and from assuming to exercise jurisdiction under the provisions of chapter 56 of the Session Laws of 1897. A more extended statement of the facts out of which the controversy has arisen will be found in the former opinion affirming the judgment of the trial court. See *Nebraska Telephone Co. v. Cornell,* 58 Nebr., 823, 80 N. W. Rep., 43. On motion of appellant a rehearing was allowed, and the cause having been reargued is again submitted. We have read with great interest the very able and im-

pressive arguments presented by counsel, for both parties, and have endeavored to give the case the careful and thorough consideration which the importance of the questions involved entitles it to receive. After much reflection the conclusion reached is that, while the reasons given for the former decision require revision, the judgment of affirmance is right and should be adhered to.

On the first submission it was held (the writer dissenting) that the plaintiff's petition did not disclose a right to equitable relief, assuming the legislation relative to the board of transportation to be valid. This holding was wrong, and we afterwards so decided in *Pacific Express Co. v. Cornell*, 59 Nebr., 364, 81 N. W. Rep., 377.

This question being out of the way, we will give attention to the arguments touching the authority of the defendants to inquire into the business of the plaintiff; and to reduce its charges in case the same are found to be excessive or unjust.

On behalf of the company it is contended that the act of 1887 (Session Laws, ch. 60), creating the board of transportation and defining its powers, is in conflict with section 26 of article 5 of the constitution, which in terms forbids the creation by the legislature of any executive state office. It is also claimed that the act clashes with section 2 of article 5 of the constitution, which declares that none of the state officers of the executive department shall be eligible to any other state office. These questions are not now presented to this court for the first time. As early as 1883 they were considered by the learned judges who at that time constituted the court. In an advisory opinion then given, at the request of the house of representatives, it was declared by those judges that legislation of the character now under consideration would not trench upon the supreme law. See *In re Railroad Commissioners*, 15 Nebr., 679. We are aware that this case is not a decision in the technical sense of

the term. But it represents, nevertheless, the best judgment of the members of the court upon a matter likely to come before them at some time for adjudication. It has been acquiesced in and accepted by every department of the government, and by the people, as a guide of conduct and a rule of action. To discredit it now would be to open Pandora's box, and turn loose a brood of evils, without the means at hand to cope successfully with them. This court on several occasions has taken jurisdiction of causes and decided controversies involving large interests on the assumption that the act of 1887 was a valid and enforceable law. See *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313, 23 Nebr., 117; *State v. Missouri P. R. Co.*, 29 Nebr., 550; *Chicago, B. & Q. R. Co. v. State*, 50 Nebr., 399.

In the recent case of *Pacific Express Co. v. Cornell, supra*, the question was directly presented for decision, and it was there held, in an opinion by HARRISON, C. J., that the board of transportation was a lawfully constituted body invested with power to inquire into the business of express, telegraph and telephone companies, and to regulate their rates. That decision was made in the light of the arguments now before us, and, upon the point which we have been considering, must be accepted as final.

Another contention of the appellant is that the powers conferred on the board of transportation by the act of 1887 were entirely wiped out by the act of 1893 (Session Laws, ch. 24), known as the "Maximum Rate Law"; and that, therefore, the act of 1897, giving the board jurisdiction over express, telegraph and telephone companies, is incapable of enforcement. The act of 1887, as construed by this court, invested the board of transportation with authority to establish rates for the carriage of freight by railroad companies from one point to another within the state.

By the act of 1893 the legislature fixed maximum rates for the transportation by rail of commodities within the

state. The effect of this act was to permit the railroads to charge the prescribed maximum rates, unless the board of transportation should exercise the power conferred upon it by section 6, which, so far as material to the present inquiry, is as follows: "That the board of transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said board of transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established, whenever it shall appear to a majority of said board just and reasonable to revise said classification."

The power of the board to regulate freight charges was not, we think, materially changed by the act of 1893. That act authorized a reduction of rates whenever it should seem to the board reasonable and just. In other words, it conferred upon the board authority, within the limits of the law, to fix reasonable rates. The carriers may, of course, reduce their rates below the statutory schedule; and the board of transportation may undoubtedly order a further reduction, if, upon investigation, such rates are found to be excessive. The power granted to the board by each of the acts was power to fix reasonable rates. The act of 1893 condemned all rates in excess of the maximum limit therein prescribed, as extortionate and unjust; and thus narrowed the field of inquiry open to the board. But the power given by the act of 1887 to reduce excessive rates and make them reasonable remained as before. If, therefore, there is an irreconcilable conflict between the two statutes so far as they relate to the regulation of freight rates, the repeal effected by the later act would still leave the board with undiminished power.

In this connection we have occasion to refer again to the case of *Pacific Express Co. v. Cornell, supra.* It was there in effect held that the act of 1893, the "Maximum

Rate Law," never became operative and is not now in force. The act was adopted in accordance with established procedure, and, presumably, was from the beginning a constitutional and valid law. This court has never decided that it was invalid or unenforceable; and there is certainly nothing in the record now before us upon which to ground such inference. We know as a matter of history that the circuit court of the United States decided in the case of *Smyth v. Ames* that the enforcement of the law of 1893 would have been, under circumstances then existing, a confiscation of property of the companies which were parties to that action. We also know of the affirmance of that decision by the federal supreme court; and understand that it is at present a binding adjudication between the parties to the suit. See *Smyth v. Ames*, 169 U. S., 466, 171 U. S., 361. It is not, however, of any force as to other railroad corporations. It may be that the law at the time of its enactment was enforceable against some of the companies, but not against all. Those whose lines are wholly within the eastern part of the state, where the population is comparatively dense and business generally prosperous, may have had no just reason to complain of the maximum charges established by the act of 1893. But, however that may be, it is perfectly clear that we are not warranted in holding, in this case, that the law did not become immediately operative. We could not reach that conclusion without having first determined that the legislation was confiscatory as to all railroads doing business in the state. There is, on the face of the act, nothing whatever to indicate that its execution would deprive freight carriers of their property without due process of law, or deny them the equal protection of the laws; and we are not authorized to take judicial notice of the facts, which it is claimed would establish such deprivation and denial. Neither can we, in pronouncing upon the validity of the statute, be influenced in any way by the judgment in *Smyth v. Ames*. We do not presume

to question the correctness of that judgment. But we can not take it for granted that the evidence will be the same in every other case, in which the constitutionality of this legislation may be challenged. But if it were true that the law did not become effective in 1893, it would not at all follow that it is still forceless and inert. It ought rather to be presumed that it has been vitalized by prosperity and that, under improved business conditions, its once dormant energies have been quickened into action. The statement contained in the seventh point of the syllabus to the case of *Pacific Express Co. v. Cornell, supra,* is obviously unsound and is disapproved.

The next contention of appellant is that the act of 1897, by its express terms, limits the power of the board of transportation to the regulation of charges for "messages sent." The section of the statute bearing upon this point is in these words:

"Sec. 2. That the powers of the board of transportation to regulate charges by corporations, companies and persons herein referred to, shall apply only to charges by express, for transportation from one point to another in this state, and messages sent by telegraph and telephone from one point to another in this state."

This provision was intended, we think, to limit the jurisdiction of the board to intrastate business, and to exclude the possible inference that regulation of interstate commerce was within the contemplation of the lawmaking body. It is said by counsel for the company that the defendants are asserting the right to regulate rentals and not charges for "messages sent." In view of the manner in which telephone companies conduct their business, it is not perceived how it would be practicable to regulate charges for messages sent without at the same time regulating rentals. The business of a telephone company is to transmit messages from one place to another. That is the purpose for which it is brought into existence; it is the only business it is authorized to do; it is the only business it professes to do. The

only service required of it by its customers is the transmission of messages sent to them and by them. All the instrumentalities employed by the company have for their ultimate object the carrying of messages. The real thing, and the only thing, for which the customers pay is the transmission of messages, whatever may be the forms in which the charges are made. In our opinion the legislature did not intend to give the board of transportation jurisdiction over telephone companies for the purpose merely of regulating specific charges for messages sent.

It is finally contended that the act of 1897 is amendatory legislation and as such is violative of section 11, article 3, of the constitution, which provides: "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 contention can not be sustained. The law is, in substance, an act to regulate the rates of express, telephone and telegraph companies; and it might, with propriety, have been enacted under that title. For the accomplishment of the object in view it was in the first section provided: "That from and after the passage of this act, all companies or persons owning, controlling or operating, or that may hereafter own, control or operate, a line or lines of express, telephone or telegraph, whose line or lines is or are, in whole or in part, in this state, shall be under the control of the board of transportation of this state, who shall have the same power to regulate the prices to be charged by any company or person or persons owning, controlling or operating any line or lines of express, telephone and telegraph, for any services performed by such company, person or persons as they may have over railroad companies and other public carriers; and all the powers given to said board of transportation over railroads in this state by law are hereby declared to be of force against corporations, companies or a person or persons owning, controlling or operating a line or lines of ex-

press, telephone and telegraph, doing business in this state, whose line or lines is or are, wholly or in part, in this state, so far as the provisions of said act can be made applicable to any corporation, company, person or persons owning, controlling or operating a line or lines of express, telephone and telegraph." The second, and only other section, has been already noticed. Clearly the act does not profess to do that which is inhibited by the constitution. It does not assume to amend the law of 1887 or any other law; it purports to be, and it is, an original and independent statute. The title of the act of 1887 is: "An act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads' of the Revised Statutes and all acts and parts of acts in conflict herewith." This legislation had for its object the regulation of railroad rates. As a means to that end, a board of transportation was created, and its jurisdiction defined. The act of 1897 relates exclusively to express, telephone and telegraph companies, and touches in no way the subject of railroad regulation. Indeed, it is quite evident that, if the act of 1897 had been given the form of an amendment to the act of 1887, it could not be regarded as amendatory; for it would be neither embraced within the title of the earlier statute nor germane to its subject. Since it could not be regarded as amendatory legislation, if it had assumed that character, how can it be said to be amendatory, while professing to be an original and independent measure? It is legislation like that conferring jurisdiction on county courts in other than probate matters (Compiled Statutes, 1899, ch. 20, sec. 2), and like that creating the office of county attorney, and providing for the prosecution of criminal cases by information instead of by indictment. See Code of Criminal Procedure, ch. 54. It is valid legislation, because it does not modify or change in any respect the pre-existing law on the subject of railroad regulation, and, therefore, does not offend

against the clause of the constitution quoted. If it were decided to be invalid, the principle of the decision would condemn a very considerable part of our statutory law. The question was considered and decided in *Pacific Express Co. v. Cornell, supra,* and with the conclusion there reached we are entirely satisfied. *Campbell v. Board of Pharmacy,* 45 N. J. Law, 241; *State v. Hibernia U. R. Co.,* 47 N. J. Law, 43; *People v. Banks,* 67 N. Y., 568, and *Curtin v. Barton,* 139 N. Y., 505, are instructive precedents on this branch of the case. The judgment of the district court is

AFFIRMED.

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

STATE OF NEBRASKA, EX REL. FRANK T. EMERSON, RELATOR, V. CHARLES T. DICKINSON, RESPONDENT.

FILED MARCH 7, 1900. No. 10,965.

1. **Correct Conclusion:** REASONS IMMATERIAL. It is immaterial whether the court gives a good or a bad reason for its conclusion. If the court has reached the correct decision, its judgment will not be disturbed.

2. **Award:** ISSUES. The relief awarded by a court must respond to the issues and be within the case made by the pleadings.

3. **Finding:** PERSONAL JUDGMENT: MANDAMUS. A finding in an equity cause which does not respond to the issues, and which is, at plaintiff's instance, treated as, and declared to be, advisory only, will not warrant the court in rendering a personal judgment against the defendants; and in such case mandamus will not lie to compel the court to render a personal judgment in favor of the plaintiff on such finding.

ORIGINAL application for mandamus. *Writ denied.*

Joel W. West, for relator, argued that the relator was entitled to the writ, citing: Moses, Mandamus, pp. 41, 51; High, Extraordinary Legal Remedies, par. 235, 236. As to the question of appearance conferring jurisdiction: *Porter v. Chicago & N. W. R. Co.,* 1 Nebr., 14; *Cropsey v.*

Wiggenhorn, 3 Nebr., 108; *Crowell v. Galloway*, 3 Nebr., 215; *Hilton v. Bachman*, 24 Nebr., 505; *Bucklin v. Stickler*, 32 Nebr., 602; *Hurlburt v. Palmer*, 39 Nebr., 158; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Nebr., 29.

Counsel for respondent say that, if the court was in error in that regard, the error might be corrected by error proceedings. However, an analysis of the situation disclosed that the error lay back of the refusal to do the act which it was sought by the proceeding to command, and in such cases, and particularly where the refusal was based upon a supposed want of jurisdiction, it had been repeatedly held that mandamus was the appropriate remedy. See *People v. Swift*, 59 Mich., 529.

Hall & McCulloch, contra, argued that, if the findings and judgment were error, error proceedings would correct, but mandamus proceedings would not reverse, citing *State v. Nemaha County*, 10 Nebr., 32; *State v. Churchill*, 37 Nebr., 702; *State v. Laflin*, 40 Nebr., 441; *State v. Holmes*, 38 Nebr., 355; *State v. Merrell*, 43 Nebr., 575.

SULLIVAN, J.

This is an application for a mandamus to compel the respondent, one of the judges of the fourth judicial district, to render judgment favorable to the relator on special findings made in the case of Emerson v. Stimmel et al. pending in the district court of Douglas county.

The facts which form the basis of our decision are as follows: Frank T. Emerson and Phil Stimmel were the sole members of a mercantile partnership which was found to be insolvent in January, 1894. The Omaha National Bank and Montgomery, Charlton & Hall had recovered judgments against Mr. Stimmel and had caused executions to be levied on the partnership property. To prevent a sale under these executions and to secure the application of firm assets to the payment of firm debts,

Emerson commenced an action against his partner, the judgment creditors of the latter, and the sheriff of Douglas county. The prayer of the petition was for an accounting, for the appointment of a receiver and for an injunction to prevent a sale of the property taken on the executions. After issues had been joined, the plaintiff asked leave to file a supplemental petition showing that the bank and Montgomery, Charlton & Hall had converted the partnership property taken under their executions, and demanding judgment against them for its value. This application was denied, and, on the theory that the judgment creditors were entitled to a jury trial on the question of conversion, the action as to them was dismissed. Afterwards a referee was appointed to audit claims against the insolvent partnership, to state an account between the partners and make a report as to the assets of the firm. The referee found that the property taken on execution as aforesaid was partnership property, that it had been converted by the judgment creditors to their own use, and that the causes of action arising out of such conversion were firm assets. Thereupon the court, at the instance of the plaintiff, appointed a receiver and directed him to proceed at once by action, or otherwise, to collect all of the partnership assets. Acting in obedience to this order, the receiver sued separately the Omaha National Bank and Montgomery, Charlton & Hall to recover the value of the partnership property alleged to have been converted by them. After these suits were instituted, the defendants therein, by leave of court, intervened in the equity case, and asked that the receiver be discharged, that certain orders claimed to have been collusively made be set aside, and for other relief. Emerson answered the pleadings of the interveners and prayed as follows:

"Wherefore, they pray that the relief asked for by the interveners, be denied; that their application for a temporary injunction be denied. And they further pray that the report of the referee on file in this cause as far as it

passes upon the claims of creditors of said partnership, be established and confirmed, and that the amounts found due the several claimants, as therein set forth, be established, and that said several claimants have judgment for said several respective amounts, and that the report of said referee finding as to the assets and the liability of the interveners, the Omaha National Bank and Montgomery, Charlton & Hall be held to be advisory only and as affording good and sufficient grounds for the appointment of the receiver herein with instructions to sue said parties at law for the recovery of said assets. That the appointment of the receiver heretofore made herein, be established and confirmed, as having been providently and properly made, and that the receiver be required and directed to proceed with the law actions now pending against the interveners on the law side of this court."

On May 26, 1899, the court, on motion of the interveners, permitted them "to withdraw and dismiss their said petition of intervention and answer and cross-petition of intervention, without prejudice." The cause then proceeded to trial, and the court, having the report of the referee before it, made the following finding: "The court further finds that there should be recovered in this suit, from the defendant, the Omaha National Bank, the said sum of $85,886.20, and from the defendants, Montgomery, Charlton & Hall, the sum of $5,714.00, for the use and benefit of the several claimants of the partnership, consisting of Phil Stimmel and Frank T. Emerson, and further finds that whereas, Frank A. Agnew, has been duly appointed as receiver herein; that it will best conserve orderly procedure and the ends of equity that the said intervening creditors who have proved their claims as set out in this decree, should have and recover herein through the said Frank A. Agnew, receiver, and in his name, judgment against the defendant, the Omaha National Bank, for the sum of $85,886.20, and against the defendants, Montgomery, Charlton & Hall, for the sum of $5,714.00, together with the costs of this action. But

in that behalf, the court further finds, that by reason of the order of the court, entered May 26th, 1899, by which the said defendants, the Omaha National Bank and Montgomery, Charlton & Hall, had leave to withdraw and dismiss their petition of intervention filed May 4th, 1897, and their answer and cross-petition of intervention, filed October 7th, 1897, that thereby the court lost jurisdiction over the said defendants, the Omaha National Bank and Montgomery, Charlton & Hall, and thereby lost jurisdiction to enter a default and a personal judgment against the said defendants, the Omaha National Bank and Montgomery, Charlton & Hall, upon the foregoing findings; and that but for want of such jurisdiction, defaults and personal judgments should and ought to be entered in favor of the said Frank A. Agnew, receiver and against the said defendants and each of them according to the above and foregoing findings; and the motion of the plaintiff, in open court for default against said defendants and for judgment upon and in accordance with said and above and foregoing findings, and against the defendants, the Omaha National Bank and Montgomery, Charlton & Hall is therefore hereby overruled, to which the plaintiff excepts, and each of the several intervening creditors separately except and the receiver, Frank A. Agnew, excepts." The decree contains, among other things, a direction to the receiver to diligently prosecute the law actions which he had commenced and which were then pending.

The contention of the relator is that judgment should have been rendered in the equity case against the Omaha National Bank and Montgomery, Charlton & Hall, based on the finding above quoted; and we are asked in this case to set aside the decision of the district court on the question of jurisdiction and enter a peremptory command for a decree in favor of the receiver. Whether the court gave a good or a bad reason for its action is not material. If a correct conclusion was reached, the decision must be approved regardless of the reason that induced it. Con-

ceding that the dismissal filed by the interveners did not divest the court of jurisdiction over their persons, we are of opinion, nevertheless, that a judgment against them grounded on a conversion of partnership assets would have been unwarranted and could not be sustained. Such a judgment would be entirely outside of any issue tendered by the petition or any other pleading filed by Emerson in the case. It would be an adjudication upon a matter not involved in the suit. It is a rule everywhere recognized by courts administering our system of jurisprudence that the relief awarded by a court must respond to the issues—must be within the case made by the pleadings. See *Kitchen Bros. Hotel Co. v. Hammond*, 30 Nebr., 618; *Whitney v. Levon*, 34 Nebr., 443; *Lincoln Nat. Bank v. Virgin*, 36 Nebr., 735; *Rockford Watch Co. v. Manifold*, 36 Nebr., 801; *Ross v. Summer*, 57 Nebr., 588. It is not enough that some portion of the record discloses a right to the relief granted; the right must be shown in the appropriate way. "No judgment," remarked Danforth, J., in *Truesdell v. Sarles*, 104 N. Y., 167, "can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence." Emerson tendered no issue as to the conversion of partnership assets. He attempted to do so, but his effort in that direction was unsuccessful. The court denied his application for leave to file a supplemental petition, and thus excluded from the case the question which counsel now insists has been tried and resolved in relator's favor. The findings that the bank and Montgomery, Charlton & Hall were liable for conversion of partnership assets was treated as advisory only; and of this the relator can not justly complain, for it was in accordance with the prayer of a pleading which he had filed in the case, and which he had not withdrawn. The facts stated in the finding above set out were not found on the trial of an issue between the relator and the execution creditors. There was no such issue to try in the equity

cases. The court had previously ordered that the question of conversion be tried and determined in other suits. That order had not been rescinded. It was still in force, and law actions had been commenced and were pending to carry it into effect. The court very clearly did not intend to make a finding that would have any binding force as to the bank and Montgomery, Charlton & Hall; and had judgment been rendered against them on that finding, it would, under the circumstances, be the obvious duty of this court, in a direct proceeding, to set it aside. Admitting relator's contention in regard to personal jurisdiction, the writ should be, and it is, denied.

WRIT DENIED.

H. W. ROGERS & BROTHER v. JOHN T. MARRIOTT.

FILED MARCH 7, 1900. No. 9,140.

1. **Wagering Contract:** PUBLIC POLICY: BONA FIDES. In a transaction, involving the alleged purchase of wheat upon the Chicago board of trade, which is challenged as a wagering contract and void as being contrary to public policy, the true test is whether there was in the minds of the parties to the transaction an intention in good faith to purchase the property, and to secure a *bona fide* transfer and actual delivery thereof to the purchaser.

2. **Valid Contract:** POSSESSION OF SELLER: FUTURE DELIVERY. A valid contract for the future delivery of wheat, even though not in the possession of the seller, may be entered into, and such contract would be upon the same plane as any other legal obligation for the sale and delivery of any species of personal property.

3. ———: GOOD FAITH OF ONE PARTY: GENUINE TRANSFER. Where such a contract is entered into by one of the parties thereto in good faith, the same would be valid and binding, even though the other party to the contract entered into it with no intention to effect a genuine transfer of the property, and merely as a gambling transaction and speculative venture on the fluctuation in the price of the commodity nominally dealt in.

4. **Controversy between Principal and Agent:** GAMBLING PURCHASES. In a controversy between a principal and his agents, acting as

commission merchants or brokers, in a transaction involving an alleged purchase of grain for future delivery, the question is whether the intention was that the principal should become the actual buyer of grain through the agency of the commission merchants, or whether they expressly or impliedly agreed to act as the principal's agent in gambling purchases of grain, which the principal had no intention of receiving.

5. **Bad Faith of Principal.** If the transaction was a gambling one on the principal's part, and known to be such by those acting for him, and the services and advances which constitute the cause of action were made and rendered in carrying it into effect, the agent can not recover therefor.

6. **Agreement in Testimony:** BUT ONE CONCLUSION. Where the evidence in the case is neither conflicting nor contradictory, and it is not of such a nature as to warrant different conclusions by reasonable men, and but one rational conclusion can be drawn therefrom, it becomes proper for a trial judge to treat the case as having been resolved into questions of law, and to suitably instruct the jury acccordingly.

7. **Evidence Examined.** Evidence examined, and *held* that the only conclusion to be reached from the plaintiff's evidence is that the contract was based on a wagering transaction, and that there was, in fact, no intention on the part of the parties to engage in a *bona fide* purchase to be followed by an actual delivery of the commodity in which they nominally dealt, and that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the markets, and is void as being contrary to public policy.

ERROR from the district court of Dixon county. Tried below before EVANS, J. *Affirmed.*

O. E. Martin, for plaintiff in error:

Was the evidence sufficient to make a *prima facie* case in favor of the plaintiffs on the issues joined? The board of trade of Chicago was a voluntary corporation, organized under state charter, its members being business men interested in handling grain and provisions. The members handled ninety-nine per cent of the grain that came to the Chicago market. Among the purposes and objects of the board of trade were the following: To establish values for commercial articles therein dealt in, and to find and distribute commercial information and to secure

for its members benefits by co-operation in their pursuit of the grain business. See deposition, p. 22. There prevails among the members of the board of trade a universal custom with regard to the putting up of margins in the hands of commission merchants by non-members of the board, who buy or sell property through members of the board. The custom is well known and absolute. Everybody is expected to put up a margin, which consists of a certain amount of money to protect a contract to the extent of the money deposited as such margin against a rise or fall in the market. See deposition, 19. Persons who dealt in a market were presumed to know of and deal with reference to the customs of the market. See *Bailey v. Bensley*, 87 Ill., 556, and authorities cited on p. 559; *Cothran v. Ellis*, 107 Ill., 413.

Contracts made in good faith for the future delivery of grain or other commodity, at some time in the future, were not prohibited either by the common law or the statute. See *Wolcott v. Heath*, 78 Ill., 433; *Pixley v. Boynton*, 79 Ill., 351; *Logan v. Musick*, 81 Ill., 415. In the last case cited the examination showed, as the correspondence showed in this case, that actual grain was purchased and it showed it no more conclusively than was the fact shown in the case at bar. To the same effect was *Irwin v. Williar*, 110 U. S., 499, in which numerous cases were cited from the leading states of our Union. They were all to the same effect, that contracts for the purchase or sale of grain or other commodities to be delivered in the future, if *bona fide*, were valid and would be enforced by the courts.

When the defendant failed to put up margins in accordance with the custom of the board of trade, as repeatedly promised by him, the plaintiffs had the right, under the rules of the board of trade, to sell the grain purchased for the defendant, at the market price, and hold the defendant for the loss. See *Moeller v. McLagan*, 60 Ill., 317.

John B. Barnes, M. D. Tyler and *Alfred E. Barnes, contra:*

Throughout the whole history of the pretended transactions no money was ever demanded for anything except as margins. There was no pretense of demanding it for anything else. No grain was transferred. No warehouse receipt for any grain was ever given or received by any one. In fact the whole transaction was conclusively shown to be a speculation on the rise and fall of the price of wheat on the board of trade. This was, therefore, a gambling contract and void as against public policy. See *Sprague v. Warren*, 26 Nebr., 326; *Watte v. Wickersham*, 27 Nebr., 457; *First Nat. Bank v. Oskaloosa Packing Co.*, 23 N. W. Rep. [Ia.], 255; *Gregory v. Wattowa*, 58 Ia., 711; *Murray v. Ocheltree*, 59 Ia., 435; *Pixley v. Boynton*, 79 Ill., 351; *Logan v. Musick*, 81 Ill., 415; *Corbett v. Underwood*, 83 Ill., 324; *Bigelow v. Benedict*, 70 N. Y., 202.

The plaintiff's own evidence brought this case clearly within the rule established in the above cases, and the judgment must be affirmed. The cases cited by counsel for the plaintiff were not in point. An examination of them showed that there was in all of them an actual sale of grain, actually existing and stored in warehouses, for which warehouse receipts were given and accepted.

HOLCOMB, J.

As ground for recovery the plaintiffs in their petition state, in substance, that the defendant is indebted to them in the sum of $1,446.25 on account of the purchase at the request of the defendant of 20,000 bushels of wheat on the market in Chicago, Illinois, and a subsequent sale thereof made on defendant's account at a less price per bushel. The amount sued for was the difference in the buying and selling price less $222.50, which defendant had to his credit with plaintiff, the whole or a part thereof growing out of prior transactions in the wheat pit on the Chicago board of trade.

The defendant, answering, in substance, alleged that the plaintiffs were commission merchants in Chicago and dealt and traded in what are known as options on 'change, by buying and selling in market on 'change for future delivery, when, in fact, no delivery was ever made or intended or demanded, and no grain was bought or sold or intended to be; that the whole transaction was a venture and speculation on margins depending for profits or loss on fluctuations of the market, and a purely fictitious and gambling transaction, without consideration; that the account sued upon is claimed for loss in so trading in options, was without consideration, wholly void, as plaintiffs well knew, and in violation of law and contrary to public policy. From the foregoing a clear conception is gained of the issues involved and upon which the case went to trial.

Upon the submission of plaintiffs' evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant upon the ground, among others, "that the testimony of the plaintiffs introduced in this case fails to make out a case or support a judgment in their favor, but on the contrary shows beyond all question that the transaction upon which the suit is brought and upon which such testimony is based was a dealing in margins on the board of trade in the city of Chicago, and is a gambling contract and absolutely void, and is against public policy." The motion was sustained, and the jury peremptorily instructed to return a verdict in favor of the defendant, which was done, and a judgment in his favor rendered on the verdict. From this judgment plaintiffs prosecute error proceedings in this court.

While some other questions are presented by the record, as we view the case, it is proper, and necessary only, to notice the ruling of the trial judge on defendant's motion to peremptorily instruct the jury to return a verdict in his favor, and we shall therefore confine our consideration of the case to the one question mentioned. It is for us to determine only whether, under the evidence, the

peremptory instruction given was justified, or, in other words, whether the evidence introduced by plaintiffs would sustain a verdict if rendered in their favor.

The only evidence submitted was in the form of depositions, and consisted of the testimony of one of the plaintiffs, including the telegraphic and written correspondence which passed between the parties to the action and relating to the transactions out of which the suit grew, and the testimony of one other witness, a member of the board of trade, who testified to certain customs thereon prevailing and the meaning of certain words used on the board of trade, such as "options," a "put" or a "call."

In the deposition of the plaintiff, after identifying a series of letters and telegrams passing between the parties and testifying in relation to them, the witness was asked to state how he arrived at the amount due, to which he replied:

"As before stated, at the time we made the purchase of the 10,000 bushels of wheat, Mr. Marriott [the defendant] had to his credit on our books the sum of $218.89. On the first of March we find that he was entitled to a credit of $3.61 for an error made in an account of sale, which we had sent him prior to this time—that, with the $218.89, gave him a credit on our books of $222.50. The money that we obtained on the sale of his 20,000 bushels of wheat amounted to the sum of $1,643.75 less than we paid for the wheat, which we charged to his account. We also charged to his account $25—being for commissions upon this transaction. We then deducted the credit from the debit, which shows a balance as per account herewith, of $1,446.25 due us on the 18th of March, 1892."

Other questions to, and answers by, this witness were as follows:

"Q. State whether or not these purchases of four 5,000 bushel lots of wheat were actual purchases of grain?

"A. They were.

"Q. And for Marriott's account, were they?

"A. Yes.

"Q. Is there any custom on the board of trade with regard to keeping margins in the hands of commission merchants by persons who are not members of the board and who make purchases or sales through members of the board?

"A. It is customary to require a margin of money on transactions made by board to protect commission merchants from loss by the decline or advance in the market.

"Q. The defendant says in his answer that your firm on the 26th day of February and the 17th day of March, 1892, dealt and traded in what are known as options, on 'change in Chicago, in grain by selling and buying in the market in Chicago for future delivery, in the firm name of H. W. Rogers & Bro., when, in fact, no delivery was ever made or intended or demanded and no grain was bought or sold or intended to be—I will ask you whether or not this paragraph of the answer which I have just read is true, with reference to the transactions about which you testified yesterday?

"A. It is not.

"Q. Does your firm deal in options?

"A. It does not—it is not permitted on the board of trade.

"Q. What is an option?

"A. An option is a privilege whereby the purchaser for a consideration paid is entitled within a specified time to call upon the seller or not as he elects for grain, stocks or whatever the trade is for at an agreed price, deliverable to him at once or at some future date, usually at some future date.

"Q. State whether or not the transactions such as you have just described are permitted on the board of trade.

"A. That sort of a trade is gambling under the laws of the state of Illinois and is forbidden by the board of trade, nor has it been permitted on the board of trade since the law was enacted over twenty years ago,—if, indeed, it was ever recognized.

"Q. Did the transactions that you had with Marriott

partake of the nature of such transactions as you have just described?

"A. No, sir, not in the least.

"Q. Is it true, as stated in his answer, that no delivery was ever made or intended or demanded and no grain was bought or sold or intended to be, in either of these transactions which you testified about yesterday?

"A. My answer to that is, it is not true, but utterly false, except that the wheat was not actually delivered, but it would have been delivered to us and paid for, if Mr. Marriott had kept a margin with us against loss. It was sold before maturity of the contracts and was settled under the rules and regulations of the board of trade.

"Q. The answer of defendant further states that the whole transaction was a venture and speculation on margins depending for a profit or loss on fluctuations of the market, and was a fictitious and gambling transaction—state whether or not these purchases of 20,000 bushels of wheat were fictitious and gambling transactions?

"A. Not in the least.

"Q. Neither fictitious nor gambling?

"A. No, sir.

"Q. State whether or not there was any option about these purchases of 20,000 bushels of wheat, except as to the time of delivery.

"A. That was all the option there was about that, and that was a limited option.

"Q. What was the option?

"A. The option was that the party might deliver the wheat any day between the first and last days of May, 1892.

"Q. He could select his date?

"A. He could select his date and the buyer would be obliged to take the grain.

"Q. Is it true that your firm did not intend to take and receive the 20,000 bushels of grain which you bought, as you stated yesterday?

"A. It is not.

"Q. What was your intention at the time you made these purchases?

"A. Our intention was to take and pay for the grain when it would be delivered.

"Q. Were all these real purchases?

"A. They were real and *bona fide* purchases of wheat.

"Q. And by reason of these purchases your firm has been compelled to pay out this amount of money on Mr. Marriott's account, to-wit, $1,643.75?

"A. Yes, sir."

We have quoted at length from the testimony of plaintiff as to his version of the transaction under consideration. With respect to it, we may say that it is regarded by us as being for the most part conclusions of the witness rather than testimony of positive acts or of things done and said which more certainly establish the true nature and character of the transaction, and that such testimony must be taken in connection with, and weighed in the light of, the antecedent transactions, which must after all determine the truth or falsity of the answer of the defendant.

A large number of telegrams and letters passed between the parties with reference to the nominal purchases of wheat, which, with the sale thereof, furnish the basis for plaintiffs' action. It is only necessary to consider a few of these, from which a satisfactory deduction can be arrived at as to the nature of the relations existing between the plaintiffs and defendant. It is proper to say, first, that, from all the written evidence in the case, it is made to appear that, prior to the transactions at present under consideration, the plaintiffs had in form purchased, and sold at an advance over the purchase price, a lot of wheat for account of the defendant, the gain or profit of such transaction being placed to the defendant's credit in the account herein sued on.

We copy the following report of the plaintiff as to the purchases of the wheat referred to:

CHICAGO, Feb. 9, 1892.

"*J. T. Marriott, Esq., Wakefield, Neb.:* We herewith confirm the following trades made for your account and risk today, upon condition that we shall have the right to close these purchases or sales at our discretion, whenever the usual margin, or such margin as has been agreed upon, is not kept good:

Quantity.	Property.	Price.	Time of delivery.
Bought 5000	No. 2 Wheat	89⅜	May

"H. W. ROGERS & BRO."

On February 12 plaintiff received a telegram in cipher from defendant, which witness interpreted as follows:

"If market rallies to 92, sell out my long No. 2 spring wheat. If market breaks to about 88, buy for my account five thousand, then sell out my long wheat about 90; and then if market breaks to about 88, buy for my account ten thousand May wheat."

"On the 15th of February, '92," says the witness, "I sold his five thousand bushels of long wheat at 91⅞."

"Q. What is the meaning of the word 'long' in board of trade circles?

"A. It means property bought."

The report of the sale was made by wire and also by letter. It appears that the defendant made $100 on the foregoing transaction.

February 20, 1892, defendant wired plaintiff as follows: "Buy at about 93½, ten thousand May—2 spring wheat; then keep on buying ten thousand for one cent decline or advance."

Under this order, ten thousand bushels of wheat for May delivery were purchased, and the defendant was asked by letter to make further remittance for margins. Says the plaintiff: "You will readily see that the amount of money which you have to your credit, $218.89, is a very small margin even for 10,000 bushels, and as the market

is very active nowadays, it would be altogether inadequate as margin on your further orders."

On February 26 another cipher dispatch from defendant was received by plaintiffs, reading, when interpreted, as follows:

"Buy at about 92—10,000 May No. 2 wheat. Then sell out my long No. 2 wheat about 93½ cents."

Says the plaintiff: "In pursuance of that telegraphic order we purchased five thousand bushels of No. 2 spring wheat to be delivered in May, 1892, at 92⅛ cents per bushel and five thousand more at 92 cents per bushel for the same delivery, and both for the account of John T. Marriott."

The plaintiffs, in reporting the above purchases to the defendant, say: "We purchased for your account 5000 May at 92 and 5000 at 92⅛ and wired you asking you to remit us $500. Up to the present writing we have received no reply. The market closed fairly steady but not strong, and while we sincerely hope we may be able to get the price you mention, the prospects are a little faint at present."

It is not amiss to note here that both parties were contemplating selling the "trades," as these transactions are termed, as soon as the condition of the market would permit of a profit being realized, and that there is not in any of the communications the remotest suggestion or inference of an actual delivery at any time or of any intention of an actual transfer of wheat to the defendant.

After the purchase of the 20,000 bushels of wheat for May delivery, as hereinbefore narrated, much correspondence passed between the parties as to the state of the market, its decline, and the cause therefor, interspersed with much urgent solicitation and expostulation on the part of the plaintiffs for remittances from defendant for "margins," and with equal earnestness and surpassing ingenuity on the part of the defendant delaying, upon one pretext or another, a compliance with such demands, until finally the climax was reached, and the defendant's

"trades" closed out at a decline in the market price equal to the amount sued for, plus the sum of the defendant's credit on the books of the plaintiff. It will avail nothing to pursue this correspondence with minuteness.

On February 20, the plaintiff writes: "At tonight's market 90¼ your margin is all exhausted and $331.00 besides. We are not in a position to margin your trades for you hence we call. * * * The bears appear to have control of the mkt. at present and will undoubtedly force prices lower next week as everything appears to favor them at present."

On February 29 the plaintiff writes the defendant, in part, as follows: "We are in receipt of your favor of 26th which came late Saturday night, and while we think the market may react, possibly enough to let you out, we have not got as much confidence as you appear to have, and we wish you would advise us at once of the remittance or shipment to protect us on this deal."

On March 7 plaintiffs write: "The wheat market has declined again today and your trades are about $800.00 behind tonight. Now we can not carry this property much farther and may have to sell it the first thing in the morning."

In none of the communications between the parties to the suit does it appear that there was any intention of making an actual transfer of wheat, the commodity alleged to have been bought. There is an entire absence of any fact or circumstance tending to show that the defendant was desirous of having delivered to him, or to any one for him, any wheat during the month of May, or at any other time. Not a word is said as to an intended delivery of wheat at any time, place or to any person. The word "wheat" and "May delivery" are evidently used only for the purpose of identifying the commodity and the price of that commodity at a fixed time upon which the speculative venture is based. No wheat is in sight. No wheat is referred to, except in general terms as above mentioned. No warehouse receipts, or any evidence of

a similar nature, are anywhere existent, or alluded to, disclosing an intention to buy or sell the property itself rather than to speculate in its market value. Nothing is asked for by the plaintiffs from the defendant except margins to protect them against loss by reason of a falling market. They appear to be in nowise concerned as to the intention or ability of the defendant to receive or pay for the commodity at the time it is deliverable. It is entirely within the bounds of a proper discussion of the case to say that it is firmly established by the evidence, and that it was well known to the plaintiffs that the defendant was scarcely able financially to comply with their demands for margins on a slight decline in the market; and it appears that he could not do even that. To entertain the belief that he was able to pay, at the current price, for 20,000 bushels of wheat, is simply preposterous. It logically follows, and the conviction is overwhelming, that no actual delivery of wheat was ever intended or contemplated by either party. It is a matter of common knowledge that many million bushels of wheat are annually in form bought and sold upon the Chicago board of trade which are not in existence, never change hands and are never intended to. That such trades are mere speculations in the fluctuations of the market price of the commodity referred to, is a self-evident truth. Perhaps not one per cent of the purchases and sales of wheat upon 'change represent *bona fide* transactions and actual delivery of the property itself. The writer, however, professes no accurate or definite knowledge of the ratio of "paper trades" to the transactions involving actual and genuine sale and delivery of such commodity. Clearly, the transactions representing *bona fide* sales, with the intention of actual delivery of the thing purchased, are but a small part of the sum total, and the most natural and probable inference would be that any one of the many transactions constantly occurring would fall within the category of speculative ventures, and are in fact wagering contracts.

Nothing appears in the evidence as to the rules of the board of trade for the settlement of these contracts for the purchase and sale of the different commodities thereon dealt in as between the members thereof; nor do we deem such evidence essential for a proper disposition of this case. We have to do here more with the relations between the plaintiffs and the defendant with respect to the transactions and attendant circumstances connected with this suit.

We apprehend the true test, in a controversy similar to the one under consideration, is whether there was in the minds of the parties to the transaction—that is, the plaintiffs and the defendant—an intention, in good faith to purchase the property, in form bought, and to secure a *bona fide* transfer and actual delivery thereof to the purchaser. It is not to be doubted that a valid contract for the future delivery of wheat, even though not in the possession of the seller, may be entered into, and such contract would be upon the same plane and as valid and binding as any other legal obligation for the sale and delivery of any species of personal property. Nor do we question the soundness of the proposition that, where such a contract is entered into by one of the parties thereto in good faith, the same would be valid and binding, even though the other party to the contract entered into it with no intention to effect a genuine transfer of property, but merely as a gambling transaction and speculative venture on the fluctuation of the price of the commodity nominally dealt in. See *Pixley v. Boynton*, 79 Ill., 351; *Wolcott v. Heath*, 78 Ill., 433.

We are not to overlook the fact that the present litigation is between the plaintiffs, acting as brokers, and the defendant, who, so far as the alleged purchase of the grain mentioned is concerned, was their undisclosed principal; and while the rules, general to all contracts between principals for purchase and sale of personal property challenged as wagering contracts, obtain here, yet there exist some distinguishing features where the con-

troversy is between an agent and his principal regarding the same transaction.

There is nothing disclosed by the evidence as to the party or parties from whom the nominal purchase of wheat was made, nor does it appear that any third party, in any way, enters into the transaction. Nor are we able to shut our eyes to the obvious conclusion that the purchases were made upon 'change on the Chicago board of trade upon the general offerings to sell and buy at the market quotations prevailing on the day the purchases are supposed to have been made, and entirely without reference to the commodity itself, or to the actual delivery of the property purchased.

As affecting the liability of the principal to his agent in a transaction of the kind under consideration, the following statement of law to a jury by a presiding judge in Pennsylvania, which was afterwards approved by the supreme court of that state and reported in the case of *Fareira v. Gabell*, 89 Pa., 91, seems well in point, and we can do no better than quote in full that part of the charge referring to the subject: "A like question arises for the consideration of the jury in this case—that is to say, whether the intention was that the defendant should become an actual buyer and vendor of stocks through the agency of the plaintiff, or whether the plaintiff expressly or impliedly agreed to act as the defendant's agent in gambling sales and purchases of stocks, which the defendant had not the means to deliver, and which it was no part of his intention to receive. If the jury find that the transaction was a gambling one on Gabell's part [the principal], and known to be such by Fareira [the broker], and that the services and advances which constitute the cause of action were made and rendered in carrying it into effect, their verdict should be for the defendant; and it does not necessarily vary the legal aspect of the case, that some, or the greater number of the persons with whom Fareira dealt, on Gabell's account, were actual buyers and sellers, and did not intend to gamble; al-

though, if such be the fact, it may be taken into view by the jury in determining the true nature of the contract as between Gabell and Fareira. * * * I am clearly of opinion that one who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss; and I can see no difference between such a case and that of an agent who renders services and expends money in conducting any other gambling operation."

Bluntly stated, the only rational conclusion to be reached from the evidence in this case is, that in the transactions hereinbefore set forth it was not the intention of the defendant, in fact and truth, to purchase for actual transfer and delivery the wheat nominally bought on his account, but to engage in a wagering venture for speculative purposes on the rise and fall of the market, and the plaintiffs were of necessity, from the circumstances of the case, in privity with him and had facts before them to be abundantly advised of his gambling intentions, and any contract, express or implied, growing out of such transactions is void as against public policy and public morals.

Lord Mansfield, in the case of *Holman v. Johnson*, 1 Cowp., 343, commenting on the subject, tersely says: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*—[from fraud a right of action does not arise]. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* [from a bad cause], or the transgression of a positive law of this

country, there the court says he has no right to be assisted."

In *Rudolf v. Winters*, 7 Nebr., 128, Chief Justice GANTT, speaking of similar matters, says: "It is very clear that such a gambling contract is *contra bonos mores* and against public policy; and the doctrine is well settled, that whenever a contract is founded on an illegal transaction, or grows out of an illegal act, or is so connected with it as to be inseparable from it, the law will not sanction it. * * * It may be said that it has become an axiom in the law, that when a claim is bottomed on an immoral and illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain."

In *Sprague v. Warren*, 26 Nebr., 335, Justice MAXWELL, in writing the opinion for the majority of the court, says: "Real contracts for the delivery of property at a future time will be sustained, because parties then deal with actual property. Where, however, there was no intention to deliver the property, but simply to pay the difference between the contract price and the price on the day agreed upon, the contract will not be enforced, as in fact it is a mere wager. It is the duty of courts and juries, therefore, to scrutinize these time contracts very closely, and see whether they were really intended by the parties as contracts for the purchase and delivery of the property."

"Neither," says Judge MAXWELL, "will it do to attach too much importance to the form of the instrument, for it is always possible for the parties to conceal the true nature of the transaction by complying with the outward forms of the law. It is the duty of the courts, therefore, where the validity of the contract is challenged, to receive evidence outside of the words of the contract, and examine the facts and circumstances which attended the making of it, in order to ascertain, if possible, whether it was intended as a *bona fide* transaction for the purchase and delivery of the property, or merely colorable." Fur-

ther in the same case it is said: "The case has all the ear-marks of a gambling transaction, and it devolves upon the defendants in error to show that the purchase of the grain was *bona fide*, and for actual delivery." See, also, *Watte v. Wickersham*, 27 Nebr., 457.

In this case, the testimony was neither conflicting nor contradictory, except, perhaps, in so far as the parol testimony of the plaintiff may be inconsistent with the letters and telegrams passing between the parties and which constitute the contract between them and determine the nature thereof. It is largely a matter of construction of the evidence, its legal effect to be deduced and given force and effect. If from it but one rational conclusion can be drawn, if it is not of such a nature to warrant different conclusions by reasonable men, then it becomes entirely proper for the trial judge to treat the case as having been resolved into questions of law, and to suitably instruct the jury accordingly. See *Dehning v. Detroit Bridge & Iron Works*, 46 Nebr., 556; *Woolsey v. Chicago, B. & Q. R. Co.*, 39 Nebr., 798; *Omaha St. R. Co. v. Craig*, 39 Nebr., 601.

We are irresistibly drawn to to the conclusion, from plaintiff's own evidence, that the contract was based on a wagering transaction; that there was, in fact, no intention on the part of the parties to this suit to engage in a *bona fide* purchase to be followed by an actual delivery of the commodity in which they nominally dealt, and that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the markets, and the same is therefore void and non-enforceable in the courts of justice, as being contrary to public policy. The ruling of the lower court complained of is right, and is, therefore

AFFIRMED.

J. B. ALFREE MANUFACTURING COMPANY V. HENRY R. GRAPE.

FILED MARCH 7, 1900. No. 9,148.

1. **Breach of Contract:** PETITION. Petition examined, and *held* to state a cause of action for damages for breach of contract for non-performance and failure to comply with its terms, and *held* that it does not contain essential averments necessary in order to construe it as a petition for a rescission of the contract and recovery of the consideration paid.

2. **Instructions.** Instructions set out in the opinion give action a double aspect, one for damages for breach of contract, and the other for a rescission thereof and the recovery of the purchase price. *Held*, That an action will not lie to recover damages because the machinery was not as good as represented, and, at the same time, recover the price of it by rescinding the contract. The two remedies are inconsistent and repugnant and can not be joined or blended.

3. **Pleading:** RESCISSION OF CONTRACT. A pleading for rescission of a contract for a breach in its conditions must allege the ground upon which a right to rescind is based—an offer to rescind without unnecessary delay by a tender of the property received, with a request for a return of the consideration. The offer to return the property must be continuous, and kept good by a proper averment to that effect.

4. **Rescission of Contract:** IN TOTO: STATU QUO. A contract can not be rescinded in part and a part remain executed. If rescinded at all, it must be *in toto*, and the parties thereto placed in *statu quo* so far as the circumstances will permit.

5. **Instructions.** Instructions which bring into the case questions foreign to the issues as raised by the pleadings, and which are calculated to mislead the jury, are prejudicial error, calling for a reversal of the judgment.

ERROR from the district court of Dixon county. Tried below before EVANS, J. *Reversed.*

William E. Gantt, for plaintiff in error.

J. J. McCarthy, *John V. Morgan*, *S. G. Hutchinson* and *John C. Watson*, *contra*, argued that the exceptions by the plaintiff in error to the instructions given by the

court at the request of the defendant in error were so indefinite that they could not be considered by this court. The exception of the defendant below to plaintiff's instructions was as follows: "Instructions requested by the plaintiff and given by the judge, to all of which the defendant duly excepts." See transcript, 16. This exception was made at the commencement of the instructions, as shown by the transcript. It had long been a settled rule of this court that a general exception to the charge to the jury was unavailing, unless the entire charge was erroneous. See *Redman v. Voss*, 46 Nebr., 512; *City of Omaha v. McGavock*, 47 Nebr., 313. Exceptions should be taken separately to instructions, and not *en masse*. See *Blue Valley Lumber Co. v. Smith*, 48 Nebr., 293.

HOLCOMB, J.

In the district court the plaintiff, defendant in error, in his petition alleged substantially that on August 3, 1891, he was desirous of erecting a cereal mill, and entered into a contract in writing with the defendant, plaintiff in error, whereby defendant agreed to furnish, set up and put into successful operation in plaintiff's mill-building the machinery necessary to the successful operation of the said cereal mill, all machinery and material to be first-class, etc., for the sum of $4,500, payable one-half on shipment of machinery, and the balance after six days' successful operation, provided the mill did not fail to perform the following guarantee: "We guarantee this cereal mill to have a capacity of 50 bus. per hour, and to manufacture all grades of corn goods, flake goods and buckwheat flour, equal in quality to any samples you may produce from same grade of grain." That afterwards, at the special instance and request of the defendant, and upon the express promise to pay the sum of six per cent as interest thereon, the plaintiff advanced to and paid the defendant upon the said contract price, relying on the said contract and the several promises of the defendant, the sum of $3,500 in cash; and

while the defendant was putting in the machinery called for by the contract, the plaintiff paid and advanced to the said defendant, at his special instance and request, the further sum of $425 in labor, material, etc.; that the defendant did not comply with the said contract; that the machinery purchased was and is entirely worthless for the purposes specified, and will not perform the work desired and agreed upon; that the plaintiff has repeatedly demanded of the defendant that it comply with its agreement and make the machinery conform to said contract, but the defendant refuses to comply with the terms of said agreement, and refuses and neglects to conform to the same, to the damage of the plaintiff in the sum of $4,000, for which judgment is prayed, with interest at seven per cent from August 31, 1891, and costs of action.

The answer, after generally denying the allegations of the petition, pleads full performance of the terms of the contract, and by way of cross-petition states that there is due it, under the terms of the contract, a balance of $823, for which, with interest, judgment is asked.

The reply consists of a general denial.

After the issues were formed, a trial was had to the court and a jury, the jury returning a verdict for the plaintiff in the sum of $5,118.

The plaintiff filed a remittitur for the sum of $118, and judgment was rendered on the verdict for the sum of $5,000 and costs of suit.

The errors assigned as grounds for reversal are very numerous, being some sixty-eight in number, none of which are presented with clearness and precision, and all seemingly are regarded as equally important, special or extended consideration being given to none. An examination of the voluminous record convinces us that it is all-sufficient to notice but two of the assignments of error, and these relate to the instructions of the court, and to which exceptions were properly taken and preserved in this court.

The sixth instruction given by the court on its own motion is as follows:

"The jury will first inquire if the defendant company has complied with the terms of its contract with the plaintiff, that is, has there been a breach of the contract? and if you find for the plaintiff on this point you are instructed, as a matter of law, that the true rule of damages in this case is the difference between the value of the machinery furnished and what it would cost to replace the same with such as was demanded by the contract and in accordance with the terms thereof, unless you find that the plaintiff has by reason of the breach of said contract on the defendant's part rescinded said contract."

Following is the tenth instruction:

"The jury are instructed that there is no time mentioned in the contract in which the defendant was to comply with its terms and fulfill the guaranties in said contract contained, and you are instructed that under the law the defendant would be allowed a reasonable time in which to erect such mill and make such changes in the machinery and appliances and the proper placing of the same as the defendant might deem necessary to make said mill and machinery comply with the conditions of said contract, and the question as to what is a reasonable time in this case is a question of fact for you to determine from all the evidence, you being the sole judges thereof; and if you further find that the defendant has failed or refused within a reasonable time to comply with the terms of the contract in question, and without the fault of the plaintiff, then the plaintiff would be entitled to the difference between the value of the machinery furnished and what it would cost to replace the same with such as was demanded by the contract and in accordance with the terms thereof; or the plaintiff may in case you find the defendant has not complied with the terms of said contract, and that such failure is not the fault of the plaintiff, rescind the con-

tract, and if you find he has rescinded such contract, in such case the plaintiff will be entitled to recover the money advanced by him to the defendant, or on its order, or for which they have accepted the benefit, with interest at six per cent from the time of such advancement to April 27th, 1896."

It will be observed that in each of the instructions quoted the court submitted to the jury the question as to a rescission of the contract sued on by the plaintiff, and authorized the return of a verdict for the full amount of money advanced by the plaintiff on the contract price with interest to April 27, 1896, at six per cent. The jury evidently adopted the theory that the plaintiff was justified in rescinding, and had in fact rescinded, the contract, and was, therefore, entitled to recover the amount paid thereon with interest, and returned a verdict accordingly.

As we construe the petition, it was an action for damages for breach of contract for non-performance and failure to comply with its terms. Nothing is said therein as to a rescission of the contract, and different averments, essential in order to construe it as a petition for a rescission of the contract and recovery of the consideration paid, are omitted.

In the two instructions quoted the action is given a double aspect, one for damages for breach of contract, and the other for a rescission of the contract and the recovery of the purchase price paid for the machinery mentioned in the contract.

We do not understand how the plaintiff can recover damages because the machinery was not as good as represented, and at the same time recover for the price of it, because he had chosen to rescind the contract. If he sues for a breach of warranty or non-performance, he affirms the contract, and seeks indemnity by way of damages; if he rescinds the contract, he disaffirms it, and asks the return of the original consideration. The two remedies are inconsistent, and can not be blended, as appears was done in the instructions quoted.

In 2 Bates, Pleading, p. 707, it is said: "A count for a rescission of contract for fraud, and a count for damages for the fraud or recovery of the consideration can not be joined, they are repugnant, one affirms and the other disaffirms the contract," citing *Heastings v. McGee*, 66 Pa. St., 384, 387.

In our view, a good pleading for a rescission of a contract for non-performance or a breach in its conditions must allege the grounds upon which a right to rescind is based—an offer to rescind without unnecessary delay by a tender of the property received, with a request for a return of the consideration. The offer to return the property must be continuous and be kept good by a proper averment to that effect. See Maxwell, Code Pleading, p. 292.

A contract can not be rescinded in part, and a part remain executed. If rescinded at all, it must be *in toto*, and the parties thereto placed *in statu quo* so far as the circumstances will permit.

The instructions quoted brought into the case questions foreign to the issues as raised by the pleadings, and were calculated to, and doubtless did, mislead the jury into the consideration of the case as being one for a rescission of the contract for non-performance of, and failure to comply with, its terms, and recovery of the purchase price advanced thereon. In this we think there was error, to the prejudice of the defendant, calling for a reversal of the judgment. It is well settled that an instruction to a jury not warranted by the pleadings and the evidence, or misstating the issues, will require the reversal of a judgment, if it has a tendency to mislead the jury. See *Steele v. Russell*, 5 Nebr., 211; *Smith v. Evans*, 13 Nebr., 314; *Esterly v. Van Slyke*, 21 Nebr., 611; *Roberts v. Drehmer*, 41 Nebr., 306; *McCready v. Phillips*, 44 Nebr., 790; *Scott v. Kirschbaum*, 47 Nebr., 331.

For the reasons stated, the judgment of the lower court is reversed, and the case remanded for a new trial.

REVERSED AND REMANDED.

W. C. BULLARD & CO., APPELLANTS, V. SALLIE F. DE GROFF ET AL., APPELLEES.

FILED MARCH 7, 1900. No. 9,194.

1. **Agent:** SIGNING PRINCIPAL'S NAME: SCOPE OF AUTHORITY. An agent in charge of a retail lumber business, with the power and authority ordinarily incident to the conduct of such business, exceeds the scope of his agency in signing his principal's name to an obligation for the faithful performance by a third party of a contract for the construction of a building, or an obligation of like character.

2. ———: UNAUTHORIZED ACT: NOT WAIVER OF LIEN. The unauthorized acts of an agent in signing his principal's name to such instrument can not, of themselves, be construed as a waiver by the agent of his principal's right to a lien for material furnished to the contractor with whom the agent executed such bond, or be given vitality for the purpose of depriving plaintiffs of a right to a lien which they otherwise possessed.

3. ———: SIGNING FIRM NAME: NOT WAIVER OF MECHANIC'S LIEN. The fact that an agent, acting without authority, signs the firm name of his principal to such bond, believing that if the principal obligor secured the contract, his firm would furnish the building material, and signed the bond for the purpose of helping the contractor obtain the contract, would not be sufficient to constitute a waiver of his principal's right to a mechanic's lien; the giving of the bond and the sale of the material being two entirely separate and distinct acts, made at a different time, each independent of the other.

4. **Efficacious Ratification of Unauthorized Act.** In order that a ratification of the unauthorized acts of an agent may be made efficacious, it must be made by a party who has power to act in the first instance, and made with knowledge of the material facts in connection therewith.

APPEAL from the district court of Red Willow county. Tried below before NORRIS, J. *Reversed and remanded.*

Warren Switzler, for appellants, cited *Hotchin v. Kent*, 8 Mich., 526; *Trudo v. Anderson*, 10 Mich., 367; *Western Nat. Bank v. Armstrong*, 152 U. S., 346; *O'Shea v. Rice*, 49 Nebr., 897.

There was no waiver of the right to file liens. Counsel drew distinctions between the case of *Owen v. Udall*, 39 Nebr., 14, and the one at bar, as follows: In that case

the Chicago Lumber Company was a copartnership; and, as such, might not only be bound for the reasons stated, but for the additional reasons that (1) a partner of the firm signed the bond; (2) a partner has more power than any agent or employé; (3) the knowledge of the copartner is the knowledge of the firm; (4) the firm selling on the strength of a bond given by the copartner in the firm name could not afterwards repudiate their obligation to the disadvantage of one relying upon it. In this case, the knowledge of Warren was not the knowledge of his principals. Counsel cited further: *White Lake Lumber Co. v. Stone*, 19 Nebr., 402; Phillips, Mechanics' Liens [3d ed.], sec. 273; *Overseers v. Bank*, 2 Gratt. [Va.], 547; *Whitley v. Foy*, 6 Jones Eq. [N. Car.], 34.

Webster S. Morlan, for appellees, cited: *Trustees v. Ins. Co.*, 73 N. W. Rep., 767, 98 Wis., 257; *Ins. Co. v. Crighton*, 50 Nebr., 314; *Iron Co. v. Murray*, 38 O. St., 323; *West v. Klotz*, 37 O. St., 420; *Executors v. Church*, 173 Pa., 242, 33 Atl. Rep., 1043; *Handley v. Ward*, 70 Mo. App., 146; *Hughes v. Ins. Co.*, 40 Nebr., 627.

Counsel argued that ratification of the act of an agent is to be presumed from the absence of the dissent of the principal; that persons receiving the benefit of a transaction entered into by an agent are estopped to deny his authority; and that a principal must adopt the acts of his agent as a whole, and will not be permitted to retain that part which is beneficial, and reject that which is not, citing: *Himes v. Herr*, 3 Pa. Super. Ct., 124, 39 W. N. Cas., 568; *First Nat. Bank v. Ridpath*, 47 Nebr., 96; *Johnston v. Milwaukee & W. I. Co.*, 49 Nebr., 68; *Huttig Sash & Door Co. v. Gitchell*, 69 Mo. App., 115; *Slobodisky v. Phenix F. Ins. Co.*, 72 N. W. Rep. [Nebr.], 484; *Webster v. Wray*, 17 Nebr., 579; *Lorton v. Russell*, 27 Nebr., 372; *Levy v. Bank*, 27 Nebr., 557; *Johnson v. Carrere*, 45 La. Ann., 847, 13 So. Rep., 195; *Little P. C. M. Co. v. Little C. C. M. Co.*, 11 Colo., 223, 7 Am. St. Rep., 226; *Piercy v. Hedrick*, 2 W. Va., 458; *Leavitt v. Sizer*, 35 Nebr., 80; *Rogers v. Emp-*

kie Hardware Co., 24 Nebr., 653; *McKeighan v. Hopkins*, 19 Nebr., 33; *Joslin v. Miller*, 14 Nebr., 91.

HOLCOMB, J.

It appears from the record that the plaintiffs, appellants, are members of a copartnership engaged in the retail lumber and building material business at McCook, Nebraska, the business being in charge, and under the supervision, of one U. J. Warren, as agent. The defendants, appellees, being desirous of erecting a dwelling-house, entered into negotiations with one U. A. Killebrew, a contractor, who undertook to construct such building, furnishing all necessary labor and material. Killebrew entered into a written contract with the owners for that purpose, and, in connection therewith, executed a bond in the sum of $1,000, conditioned for the faithful performance of such contract, which bond was signed by the said Killebrew, as principal, and the plaintiffs, by their agent, as surety thereon. The contractor failed to complete the building, and failed to pay for much of the material that was furnished to be used therein. The plaintiffs furnished the building material and, not being paid therefor, claimed a lien on the premises on which the building was erected and undertook to foreclose the same in the present action. The owners of the premises, appellees, in their answer pleaded that the plaintiffs, for the purpose of selling the material and of inducing them to award the contract to the contractor securing the same, with the said contractor executed the bond and that, because of the damage sustained by a breach of the contract, the plaintiffs were not entitled to enforce their lien against the premises on which it was claimed. The plaintiffs replied that the agent was without authority to sign the firm name to the bond, and that their name on the bond was without their knowledge or consent and without authority, and was not valid and binding upon them. The case proceeded to a hearing upon the issues thus joined.

In the court below, among other things, it was found, in substance, first, that the contract would not have been awarded to U. C. Killebrew, the contractor, had not U. J. Warren signed the principal's name to the bond, unless the contractor had furnished some other bond deemed good and sufficient; second, that the owners relied upon the bond in allowing the material furnished to be used in the building, and ordering from plaintiffs other material after the contractor had abandoned his contract; third, that the agent, at the time of signing the bond, believed that, if the contract was awarded to Killebrew, the plaintiffs would furnish the material for the building, and signed the bond for the purpose of helping Killebrew obtain the contract, believing that plaintiffs would furnish the building material. The court found generally that the agent had no authority to sign the firm name of the plaintiffs to the bond, and the signing of the bond was never ratified by the plaintiffs; that the agent had authority to waive the filing of mechanics' liens, and by signing plaintiffs' name to said bond, and by his conduct and representations in the premises, waived the right to file such lien to the amount of such bond. There was found to be due the plaintiffs from the contractor, $1,056.71, and, deducting therefrom the amount named as penalty in the bond, $1,000, the plaintiffs were given a lien on the premises for $56.71, and from this finding and decree plaintiffs appeal.

A correct disposition of the case hinges upon the validity, force and effect to be given the contractor's bond, and the inference proper to be drawn from the circumstances surrounding its execution. Counsel for appellees contends that "whether or not Warren had authority to sign appellants' business name to the bond, is immaterial, for two reasons: first, he secured the privilege of furnishing the building material by signing the bond, and furnished the material after the bond was signed by virtue of the representations contained in the bond; second, the appellants, by their manager and

agent, represented to appellees that they had sold the material to Killebrew on his credit, and would not rely upon a mechanic's lien, or in any other manner hold appellees liable for the material so furnished, and appellees, relying upon these representations, allowed Killebrew to put the material into their building." In our opinion, these two propositions may be considered together. As we view the record, the only representations which may be relied upon to operate against the plaintiffs, either as an estoppel against recovery, or the waiver of a right to claim a mechanic's lien for the material furnished for the building of the appellants, are contained in, and based upon, the execution of the bond referred to, or the inferences reasonably deducible from the circumstances surrounding its execution. There is nothing to warrant the assumption of an express waiver of a lien, or an agreement to look only to the contractor for compensation for material furnished for said building. As we interpret the record, the consideration for the building contract and the bond given in connection therewith, was the amount to be paid the contractor for the labor and material required to construct the building according to the terms of the contract. No third party, as material-man or otherwise, had any part or parcel in said contract. The question as to who should furnish the building material in no way entered into the contract, and was a matter entirely between the contractor and any one from whom he might choose to purchase the necessary material. The appellees, after having secured the execution of the contract, and obtained the bond for its faithful performance, were not concerned about who should furnish the material for the building, and looked only to the contractor and his bond for a compliance with the terms of the contract. As was said by the trial judge, they would not have awarded the contract to Killebrew unless he had furnished some other bond deemed good and sufficient, had not the agent signed the name of W. C. Bullard & Co., plaintiffs, to

said bond. It is probable, as was said by the court below, that the agent, in signing the firm name to the bond, believed that if Killebrew, the principal obligor, secured the contract, his firm would furnish the building material, and signed the bond for the purpose of helping Killebrew obtain the contract; yet there is nothing to justify the conclusion that any agreement, valid or otherwise, existed between the parties to the effect that the plaintiffs, in consideration of the signing of the bond, should have the privilege of furnishing the material, or that it was, in any way, determined who should furnish the material at the time of the execution of the contract and bond. Such unauthorized acts would not be sufficient to constitute a waiver of his principals' right to a mechanic's lien. It is quite clear that, after the agreement and bond were entered into, the contractor was at liberty to purchase his material from whomsoever he might choose. We are disposed to the view that the validity and effect of the bond should be determined in the same manner as it would be were this a suit upon the bond by the owner and obligee, because of the contractor's failure to comply with the terms of the contract, entirely without reference to the person furnishing the building material. We regard the giving of the bond, and the sale of the material as two entirely separate and distinct acts, made at different times, and each independent of the other. If the conclusion, to the effect that the execution of the bond by the plaintiffs, through their agent, was predicated upon an agreement of any nature, whereby the plaintiffs should have the advantage of selling the material for the building, is properly deducible from the circumstances of the transaction, then we fully agree with defendants' counsel, that the plaintiffs could not be heard to disaffirm the acts of their agent to their disadvantage, while retaining the benefit of those that were. We do not, however, think that this rule, sound and salutary as it is, can be invoked in this case. An agent in charge of a

retail lumber business, with the power and authority ordinarily incident to the conduct of such business, exceeds the scope of his agency in signing his principal's name to an obligation for the faithful performance by a third party of a contract for the construction of a building, or an obligation of a like character. We are, therefore, in entire accord with the finding of the trial judge, to the effect that the agent had no authority to sign the name of the plaintiffs to the bond, and, unless his acts in that respect were ratified in some manner by his principals, the bond, as to them, is a nullity. We search the record in vain for some act expressly or impliedly ratifying the agent's unauthorized acts. Unless a waiver of the right to file a lien can be deduced from the evidence, the plaintiffs' right to have their lien enforced is unquestioned.

No word or act is called to our attention which can be construed as a waiver, unless it be in connection with the execution of the bond. It would seem that, if the act was beyond the scope of the agent's power and unauthorized, it would be a contradiction of terms and illogical to hold that the unauthorized and wrongful act of the agent became effective for the purpose of preventing plaintiffs from asserting their right to a lien, which they were possessed of, save for the unwarranted acts of the agent. This would be accomplishing by circumlocution that which frankness and consistency would require should be directly reached. The act of the agent in signing his principals' name to the bond is admittedly beyond the scope of his authority, and therefore unauthorized, and this being true, such unauthorized acts, unless ratified, can not be given vitality for the purpose of depriving plaintiffs of a right to a lien which they otherwise possessed. The agent was not authorized to enter into obligations in the name of his principals for the faithful performance by others of their contracts for the erection of buildings. He was not authorized to make representations by going on

bonds or otherwise in behalf of his principals, as to the responsibility or reliability of others; and if he did so, this is a wrong attaching to him individually, and for which his principals can not be held to account. If the acts were illegal, they can not be made legally effective by construing them as a waiver of, or an agreement to waive, his principals' right to a lien given them by law. No suggestion of any waiver on the part of the agent by any other act or thing said or done by him has been brought to our notice. At the time the bond was signed, the person who should furnish the material was unknown. The agent was not in a position either to act or speak with reference to a lien for material furnished, nor does it appear that he did so. There is no suggestion of any act done or word said by the agent touching the subject of a waiver, except as inferences may be drawn from the circumstances surrounding the execution of the bond.

No waiver having been shown, the remaining question is whether the plaintiffs, by any act of theirs, in any way ratified the agent's unauthorized acts in signing their name to the bond. We hold this must be answered in the negative. None is attempted to be shown; nor is any knowledge thereof imputed to the principals, except as knowledge by the agents may be binding upon them. In *Trudo v. Anderson*, 10 Mich., 307, it is said: "And an agent can not ratify an act done by himself or his servant beyond the scope of the agency, so as to bind the principal; otherwise an agent might enlarge his own powers to any extent without his principal's consent." In *Western Nat. Bank v. Armstrong*, 152 U. S. Sup. Ct. Rep., 346, Justice Shiras, writing the opinion, says: "It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place; * * * and that it must be made with knowledge of the material facts." In *O'Shea v. Rice*, 49 Nebr., 893, Judge POST, then a member of this court, says: "It is elementary law that knowledge by the prin-

cipal of material facts is an essential element of an effective ratification of the unauthorized acts of his agent."

The numerous authorities cited by the learned counsel for defendants are scarcely in point. Most, if not all, of the legal propositions invoked are sound, but, in our opinion, are not applicable to the controlling factors in this case.

The judgment of the lower court is reversed, and the case remanded with instructions to enter a decree establishing a lien in favor of plaintiffs for the amount found due on the account for which a lien is claimed. Judgment accordingly.

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5. Whether a defendant is authorized to withdraw a plea of "not guilty" after the issue raised by it has been unalterably adjudicated, in the orderly course of procedure, *quære. Idem.*

Bailment. See TROVER, 14.
See, also, *Baker v. Priebe*..... 597

Ballot. See CONSTITUTIONAL LAW, 1. ELECTION.

Ballot—*concluded.*

Indorsement.

1. The statutory provision requiring the names of two judges to be indorsed upon a ballot is mandatory. *Mauck v. Brown* 382

Marking.

2. The placing of a cross in the circle or square opposite the name of a candidate is not an essential of a valid ballot. *Idem.*

3. The provisions, that no elector shall place a mark upon his ballot by which it may afterward be identified and that he shall not make any mark upon the ballot except as directed in the law, are mandatory. *Idem.*

Bank Check.

A bank will not be obligated to pay a check in a sum greater than the amount to the credit of the drawer in his account with the bank; nor does the check operate a transfer *pro tanto. Henderson & Co. v. United States Nat. Bank*..... 280

Bank Credit. See PAYMENT.

Bank Deposit. See BANK CHECK.

Bastardy. See RECOGNIZANCE.

Bill of Exceptions. See MOTION, 5. REVIEW, 26.

1. The validity of a bill of exceptions does not depend upon the time within which a motion for a new trial is filed. *Nebraska Nat. Bank v. Pennock*..... 61

Motion for New Trial.

2. A bill of exceptions may be allowed, although no motion for a new trial should be made in the cause. *Idem.*

Authentication.

3. Where the certificate of the trial court attached to the record states "that the foregoing is a true and perfect transcript of the record in the above entitled cause, except the bill of exceptions, which original bill is hereto attached," it is a sufficient authentication of such bill. *Herman v. Kneipp* 208

Election Ballots.

4. Ballots which have been used in evidence, in an election contest, can be made part of a bill of exceptions though not physically attached to such bill at the time of the settlement. *Mauck v. Brown*..... 382

District Court Rules.

5. The rules of practice of the district court may be incorporated into the bill of exceptions without being formally introduced in evidence. *State v. Scott*..... 499

Res Non in Evidentia.

6. A bill of exceptions may properly include a record of

Bill of Exceptions—*concluded.*

events transpiring in the presence of the court but not formerly introduced in evidence. *Idem.*

7. Objections not in the record may be reduced to writing and incorporated in the bill of exceptions. *Idem.*

Correction.

8. A bill of exceptions filed with this court and not withdrawn by leave thereof, can not be corrected in a suit of mandamus against the trial judge. *State v. Ramsey*..... 518

Omissions.

9. Where, upon an inspection of a bill of exceptions, palpable omissions appear, the reviewing court will not pass upon the sufficiency of the evidence. *Davidson v. Gretna State Bank* 63
Scott v. Society of Russian Israelites..... 571
See *Anderson v. Beeman*, 52 Nebr., 387.

Board of Equalization.

In counties under township organization the supervisors, sitting as a board of equalization, possess no greater authority to redress individual grievances than that possessed by the town board. *Lincoln Land Co. v. Phelps County* 249

Board of Transportation. See JURISDICTION, 5.

Statute. Jurisdiction.

The jurisdiction of the board of transportation, under the act of 1897 (Session Laws, ch. 56), is not limited to the regulation of specific charges for messages sent from one point to another within the state. The regulation of telephone rentals is also within the powers of the board. *Nebraska Telephone Co. v. Cornell*..... 737

Bona Fides. See INCUMBRANCE.

Bond. See DELIVERY, 3. REPLEVIN, 6.

1. Appeal ——, action on. See JUDGMENT, 9. UNDERTAKING.

Alteration.

2. A material alteration in a bond, after its approval, by a stranger to the instrument, without the consent of parties, will not release the obligor. *Schlageck v. Widhalm*... 541

3. Alterations in an appeal bond must be brought to the attention of the approving officer, before approval, to invalidate the bond. *Idem.*

Injunction. Trustee.

4. A trustee of an express trust, who was restrained with respect to matters concerning the trust estate, may maintain an action on the bond given in the injunction suit in which he is named as the obligee. *Gyger v. Courtney*..... 555

Bond—*continued.*

Surety. Sureties.

5. A bond, voluntarily given, is not rendered void because of the fact that it was signed by one surety when the order was that it be executed by "sureties." *Idem.*

Delivery. Presumption.

6. In the absence of evidence to the contrary, the delivery of a bond is presumed to be unconditional. *Idem.*

7. A bond is presumed to be effective for the purpose for which it was delivered. *Idem.*

Stay.

8. An officer, charged with the approval of stay bonds, who does not comply with the statutory requirements, is guilty of a breach of official duty. *Heater v. Pearce*..... 583

9. Sureties on a stay bond can not plead their legal disqualification. *Idem.*

Official.

10. In an action upon an official bond against an officer for wrongfully approving a stay bond, the judgment creditor is entitled, at least, to nominal damages and costs. *Idem.*

Common Law.

11. A bond good at common law, which fails in a strict compliance with the provisions of sec. 4, art. 1, ch. 89, Comp. Stats., confers no jurisdiction upon the county board to act in the premises. *Casey v. County of Burt*..... 624
See STATUTES, 8.

Official Acceptance.

12. The governor has no authority, as an agent of the state, to accept the official bonds of state or district officers, and by such acceptance make them binding obligations. *Paxton v. State*..... 460

Approval.

13. The duty of the governor with respect to the bonds of state and district officers is merely to approve them. *Idem.*

Filing.

14. The official bonds of state and district officers, except that of secretary of state, do not become binding obligations until they have been filed in the office of the secretary of state. *Idem.*

Statutory Contemplation.

15. Sec. 15, ch. 10, Comp. Stats., 1899, contemplates that an official bond, after its approval by the proper officer, shall be returned to the person presenting it, and by him filed in the proper office for record. *Idem.*

Approval. Contract.

16. The approval of an official bond by the governor, does not work its acceptance or make it a valid contract. *Idem.*

Bond—*concluded.*

Delivery.

17. The principal upon an official bond has an implied agency to deliver the bond as the contract of his sureties. *Idem.*

Possession by Principal. Approval and Delivery.

18. Possession of an official bond by the principal on a day subsequent to that fixed by the statute for its delivery, carries with it, *prima facie*, the right to have it approved and delivered. *Idem.*

Sureties. Revocation. Delivery.

19. Sureties on an official bond have the right, at any time before the obligation is delivered, to revoke their principal's authority to bind them; but, until such revocation, the right of the principal to deliver the instrument is presumed to continue. *Idem.*

Sureties. Acceptance.

20. Until the sureties upon an official bond have signified an intention to recede, the obligee may bind them by an acceptance of their offer. *Idem.*

Agreement of Sureties. Delivery by Principal.

21. Several days after the time fixed by statute for filing an official bond the sureties thereon signed an instrument reciting, "that any and all additional names that he [their principal] may procure on said bond shall in no manner affect our liability on said bond, and each of us are held liable the same as if said names had not been added." *Held*, That such instrument affords the inference that, at the time it was signed, the sureties knew the bond had not become effective by having been approved and filed for record; and when the principal presented the bond for approval, accompanied by such instrument, he had apparent authority from the sureties to have the obligation approved and delivered. *Idem.*

Bond of State Treasurer.

22. No officer of the state is authorized to demand additional sureties of the state treasurer after his official bond has been duly approved, and filed for record. *Idem.*

Tardiness of Officer. Vacancy. Waiver.

23. The failure of a state or district officer to have his official bond duly and timely approved and filed creates a vacancy in the office. But the state may waive its right to oust the incumbent; and, if the state does waive its right, the sureties on such official bond are estopped from denying its validity. *Idem.*

24. Where an official is charged with the approval of a stay bond, and fails or neglects to perform his duty, he thereby renders himself liable, upon his official bond, to the judgment creditor for such damages as he may have sustained. *Heater v. Pearce*..... 583

Brief.

1. **Failure to file ———.** See CONSTITUTIONAL LAW, 15. REVIEW, 4.

2. A brief filed after a cause has been submitted will not be considered upon points not previously called to the attention of the court. *State v. Omaha Nat. Bank*..... 483

Bringing Money Into Court. See TENDER.

Burden of Proof. See EVIDENCE, 28, 29. FRAUDULENT CONVEYANCE, 2. LOST INSTRUMENT. PLEADING, 13, 14, 23.

Action on Promissory Note.

In an action for a promissory note, where incipient illegality is established, the burden is upon the indorsee to establish an innocent purchase. *Thompson v. West*..... 677

Certificate.

1. ——— of officer, impeachment thereof. See ACKNOWLEDGMENT.

2. At a judicial sale, under a statute requiring an officer to certify to the "character" of liens, it is sufficient if their general character be stated in such certificate. *Orcutt v. Polsley* 575

Certificate of Deposit.

A certificate of deposit against a solvent bank, invests the transferee with dominion over the deposit; and the transfer is tantamount to a manual delivery. *Paxton v. State*.... 460

Cestui Que Trust. See TROVER, 6.

Chattel Mortgage. See VOLUNTARY ASSIGNMENT.

1. A chattel mortgage given by a debtor to several creditors, who by the terms of the instrument are to prorate in the proceeds of the mortgaged property, is the legal equivalent of a separate mortgage to each of such creditors. *Skinner v. First Nat. Bank of Pawnee City*..... 17

2. The fact that a mortgagor remained in possession, is only presumptive evidence of fraud. *Heidiman-Benoist Saddlery Co. v. Schott* 20

3. The question of fraud depends on the intention of the parties, and is a question of fact for the jury. *Idem.*

4. Description of property. See EVIDENCE, 15.

5. Although the description in a chattel mortgage may be insufficient to impart notice to innocent third parties, such fact will not avail a purchaser from the mortgagor who was appraised of the lien on the property before he parted with the consideration. *Drexel v. Murphy*..... 210

6. Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private

Chattel Mortgage—*concluded.*

sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien. *Idem.*

Insurance.

7. The giving of a mortgage on insured chattels, in violation of a condition of the policy against incumbrances, renders such policy void. *Home Fire Ins. Co. v. Johansen*..... 349

8. A mortgagee of chattels who files the instruments before the rights or liens of third parties intervene is entitled to the property as against them. *National Bank of Commerce v. Bryden*..... 75

City of First Class.

Defective Sidewalks.

1. A city, in the absence of actual notice, is not, ordinarily, liable for failing to discover the existence of a defect in a scuttle-hole which had been properly constructed, and was apparently safe and secure. *City of Lincoln v. Pirner*.. 634

2. The test of liability of a city of the first class for injury, on account of a defective sidewalk, is whether the municipal authorities did everything which, under the circumstances, ordinary care and prudence required them to do. *Idem.*

3. When an injury was occasioned by a defective sidewalk, an omission of duty is not to be inferred from a failure of the agents and servants of the city to search for defects in the sidewalk where there was no reason to suppose defects existed. *Idem.*

City of Second Class. See MUNICIPAL CORPORATION. TAXATION, 5.

Clerk of Court. See TENDER, 2, 3.

Common Carrier. See STATUTES, 10.

Under the constitution of this state, a common carrier of freight can not lawfully stipulate for the release from liability for loss or damage occasioned by its own negligence, and such a stipulation is illegal and void. *Pennsylvania Co. v. Kennard Glass & Paint Co*..... 435

Compensation. See DAMAGES, 4, 6.

Complaint. See FORCIBLE ENTRY AND DETAINER.

Confiscatory Legislation. See MAXIMUM RATE LAW, 2.

Conflicting Evidence. See REVIEW, 1.

Consent.

——— of parties. See JURISDICTION, 1.

Consideration. See STATUTE OF FRAUDS, 3.

A premium note executed by the insured is a sufficient consideration for the policy. *Farmers & Merchants Ins. Co. v. Wiard*..... 451

Constitutional Law. See LIEN, 2. STATE AND STATE OFFICERS, 11.

Election. Ballots.

1. The requirement of the Australian ballot law, that the names of two judges of election shall be written on the back of each ballot used, and the provision that a ballot not indorsed as aforesaid shall not be counted are mandatory, and are not inimical to the constitution. *Orr v. Bailey* 128

Exemption.

2. Sec. 58, art. 2, ch. 93*a*, Comp. Stats., 1897, which assumes to exempt irrigation companies from the operation of the general law requiring railroad corporations, canal companies, etc., to erect and maintain bridges and crossings on the highways where their roads, canals or ditches cross such highways, is special legislation, and, being in violation of the constitution, is void. *State v. Farmers & Merchants Irrigation Co.* 1

Part of An Act.

3. Secton 58, aforesaid, is not so intimately connected with the remainder of the act as to be incapable of separation from it. *Idem.*

4. When a separable part of a statute is adjudged to be null, the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure. *Idem.*

Executive Officers.

5. Under the provisions of the present constitution, the state officers of the executive department, as named therein, are charged with all duties executive in their nature which are by law required of them. NORVAL, J., dissenting. *Pacific Express Co. v. Cornell* 364

Board of Transportation.

6. The law creating the board of transportation, by which certain designated executive state officers are charged with certain duties in regard to railroads, does not cast such duties upon the individuals, as distinguished from the offices or officers, but it places upon such officers the burden of further acts executive in their nature. *Idem.*

Executive Officers.

7. There is nothing in the constitution which prohibits the requirement of performance, by any of the executive state officers, of additional duties executive in their nature, and this requirement may be made of them either singly or collectively. NORVAL, J., dissenting. *Idem.*

Presumption in Favor of Law.

8. The judiciary may not declare an act of the legislature unconstitutional, unless it is clear that it contravenes some provision of the fundamental law. *State v. Poynter* .. 417

Constitutional Law—*continued.*

Taxation.

9. By sec. 1, art. 9, of the constitution, the public revenues are required to be raised by the levying of a tax by valuation, "so that every person or corporation shall pay a tax in proportion to the value of his, her or its property and franchises." *Idem.*

10. The rule of uniformity prescribed by sec. 1, art. 9, of the constitution, inhibits the legislature from discrimination between taxpayers in any manner whatever. *Idem.*

11. Under sec. 4, art. 9, of the constitution, the legislature is powerless to pass a law releasing or discharging any individual or corporation or property from the payment of any portion of the taxes to be levied for state or municipal purposes. *Idem.*

12. Secs. 36, 37, ch. 47, Session Laws, 1899, in so far as they attempt to exempt the property of insurance companies from taxation, or to release or commute the taxes of such companies, are inimical to sections 1 and 4 of article 9 of the constitution, and void. *Idem.*

Inducement.

13. When the invalid part of an act influenced or induced the passage of the residue, the entire act will be declared void. *Idem.*

14. The unconstitutional provisions of secs. 36, 37, ch. 47, Session Laws of 1899, induced the passage of the remainder of said chapter, and invalidate the entire act. *Idem.*

Brief.

15. A party desiring the court to pass upon the constitutionality of a statute, should point out in his brief the section of the constitution which he claims the law infringes. *Farmers & Merchants Ins. Co. v. Wiard* 451

Change in Title.

16. A material change in the title of a bill after it has passed both houses of the legislature, and before it is presented to the governor, renders the act unconstitutional. *Weis v. Ashley* 494

Fees.

17. The constitution art. 5, sec. 24, provides that certain fees must be paid in advance into the state treasury. *State v. Home Ins. Co* 524

Amendment.

18. The provision of sec. 11, art. 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," is intended to prevent surreptitious legislation. It forbids amendatory legislation foreign to the original act and not covered by its title. *Webster v. City of Hastings* 563

Constitutional Law—*concluded.*

United States.

19. Sec 3, art. 1, ch. 72, Comp. Stats., is not inimical to sec. 1 of the fourteenth amendment of the constitution of the United States. *Chicago, R. I. & P. R. Co. v. Zernecke*..... 689
Chicago, R. I. & P. R. Co. v. Eaton..... 698

Division of County.

20. Sec. 2, art. 10, of the constitution prohibits the division of a county where the proposition has not received a majority of the legal votes cast thereon. *State v. Clark*..... 702

21. The provisions of sec. 2, art. 10, of the constitution do not preclude the legislature from passing a law requiring that the question of county division shall receive a majority of all votes cast at the election at which the same was submitted to the electors, to effect the erection of a new county out of one then existing. *Idem.*

22. Sec. 11, art. 1, ch. 18, Comp. Stats., is not inimical to sec. 2, art. 10, of the state constitution. *Idem.*

Maximum Rate Law.

23. The enactment of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), appears upon its face to be a constitutional and valid act; and there is no presumption that its immediate execution would deprive freight carriers of their property without due process of law, or deny them the equal protection of the laws. *Nebraska Telephone Co. v. Cornell*..... 737

24. The act of 1897 (Session Laws, ch. 56), empowering the board of transportation to regulate the charges of express, telephone and telegraph companies, is an original and independent statute and is not violative of sec. 11, art. 3, of the constitution. *Idem.*

Constructive Service. See SUMMONS, 4

Contempt.

1. A party is guilty of contempt who willfully disregards, or refuses to comply with, an order of court directing him to restore the subject-matter of litigation. *Jenkins v. State* 68

2. Where the court has jurisdiction, an order, though erroneous, is not void, and must be obeyed. *Idem.*

3. One who willfully disobeys and defies a valid restraining order, is guilty of contempt of court. *Hydock v. State*.... 296

4. Proceedings in contempt are in their nature criminal, and the rules of strict construction applicable to criminal prosecutions obtain therein. *Idem.*

Contest. See ELECTION, 2.

Continuance.

Where the court, during the process of a trial, allows the defendant to amend his answer so as to present a new defense, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause upon such terms as the court may deem just. *Dunn v. Bozarth*..... 244

Contract. See BOND, 16. CORPORATION, 6. EVIDENCE, 44. INJUNCTION, 1. MARRIED WOMAN. RATIFICATION. STATUTE OF FRAUDS.

1. Adherence to views expressed in *Fiske v. School District*, 58 Nebr., 163. *Fiske v. School District of City of Lincoln*..... 51
2. Essence of ———. See REPLEVIN, 6.
3. Breach of ———. See INTEREST, 1.

Construction.

4. Courts will usually adopt the interpretation placed on a contract by the parties themselves. *Lawton v. Fonner*.... 214
5. A contract should be construed, if possible, so as to give effect to all of its provisions. *Idem.*
6. Validity of ———. See LOBBYIST.

Equity Court. Province.

7. It is not the province of a court of equity to make contracts, but to construe and enforce them. *Building & Loan Ass'n v. Walker*..... 456

Nebraska.

8. A contract made in Nebraska is a Nebraska contract, and will be governed by the laws of this state, notwithstanding it contains a stipulation that it is understood to be made with reference to and under the laws of another state. *Building & Loan Ass'n v. Bilan*..... 458

Rescission.

9. A contract can not be rescinded in part, and a part remain executed. *Alfree Mfg. Co. v. Grape*..... 777

Contribution.

Action for accounting and contribution will lie in favor of the stockholder of a state bank, who has advanced his own funds to pay the debts of the bank, in pursuance of an agreement with other stockholders that each shall contribute in proportion to the number of shares held by him. *Davidson v. Gretna State Bank*..... 63

Contributory Negligence. See NEGLIGENCE, 2, 3.

Personal Injury.

Where, in an action for personal injury, evidence clearly establishes contributory negligence, it is proper to direct a verdict. *Nebraska Telephone Co. v. Jones*..... 510

Conversion. See TROVER.

Conveyance. See CHATTEL MORTGAGE. DEED. ESTOPPEL, 1. EXECUTOR. FRAUDULENT CONVEYANCE. MORTGAGE.

Where credit was not obtained on the faith of property

Conveyance—*concluded.*

conveyed by an insolvent husband to his wife, there is, in an action by a creditor, no basis for an estoppel against assertion of ownership of such property. *Dunn v. Bozarth*.. 244

Corporation.

1. The rule that the ratification of an unauthorized act of an agent estops disavowal, applies to a corporation. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*..... 7

2. Rights of stockholder in ———, under agreement for advances made. See CONTRIBUTION.

3. An unincorporated bank, exclusively owned by one person, is not a corporation *de facto*, though the business be conducted by a president and cashier. *Longfellow v. Barnard*.. 455

4. Religious ———. See ULTRA VIRES, 1.

Trustees.

5. A majority of a board of trustees can not bind a corporation without notice to the other members of the board. *Thompson v. West*..... 677

6. A corporation can not ratify a contract which it had not the power to make. *Idem.*

Corporation de Facto. See CORPORATION, 3.

Correction.

The right to correct an erroneous judgment arising from the service of defective process, rests, in the first instance, with the court out of which the process issued. *Ley v. Pilger* 561

Costs. See JUDGMENT, 6, 13, 14.

County Commissioners. See TAXATION, 1.

County Court. See ELECTION, 2.

County Division. See ELECTION.

In determining the question of whether the county division has been adopted, the total vote cast in the county, at the election at which the same was submitted, will be presumed to be the highest vote cast for any office or on any proposition. But this presumption, if not conclusive, may be overcome by proper evidence. *State v. Clark*..... 702

Coupon.

The assignment of a coupon secured by a mortgage is *pro tanto* an assignment of the mortgage. *Whitney v. Lowe*..... 87

Creditor. See CHATTEL MORTGAGE, 1. DEBTOR, 1. ESTOPPEL, 1. JUDGMENT, 1.

Except in cases of fraudulent conveyances, a creditor can reach nothing more than the right, title and interest of his debtor in the property seized. *Arlington State Bank v. Paulsen*..... 94

Creditor's Bill.

1. Under answer to a creditor's bill (predicated upon a judgment, execution and return *nulla bona*) which rests upon ownership of a small tract of unexempt land of uncertain value in another county, testimony *held* insufficient. *Thompson v. La Rue* 614

2. A defendant in an action upon a creditor's bill, is precluded from defeating it by urging that others are liable on the instrument upon which the basic judgment was founded. *Idem.*

Criminal Law. See AUTREFOIS ACQUIT, 1. See also various crimes.

Procedure.

1. After the trial of a criminal action has commenced, it is error for the court to permit the name of a witness for the state to be indorsed on the information. *Sweenie v. State* 269

Adultery.

2. No presumption of law, either conclusive or rebuttable, arises from the fact of an unmarried man and a married woman having had sexual intercourse on one occasion while dwelling together in the acknowledged relation of master and servant. *Idem.*

3. Presumption. See EVIDENCE, 62.

4. By sec. 208 of the Crim. Code, it is unlawful for persons not joined together in wedlock to live in a state of adultery, either secretly or openly, whether they profess to live in the marital state or not. *Idem.*

Costs.

5. Judgment for costs in criminal cases and assignment thereof. See JUDGMENT, 13, 14

Cross-Assignment. See REVIEW, 50.

Cross-Examination. See EVIDENCE, 31, 46.

Damages. See BOND, 10. EVIDENCE, 53, 54. FRAUD. INSTRUCTIONS, 2. JURY, 6. NEGLIGENCE, 3. REPLEVIN, 7, 10. TIME.

1. The general measure of damages in an action of conversion, is the market value of the property converted with legal interest, and this is applicable to a policy of life insurance. If it has no market value or trade value, then its present value to its owner, at the time of the conversion, may be shown, and this will furnish a rule of damages. *Woodworth v. Hascall* 124

2. Excessive. See REPLEVIN, 7.

3. ——— for breach of contract. See INTEREST, 1.

4. In an action for conversion, the fair market value of the property at the time and place where appropriated, with

Damages—*concluded.*

interest, is the measure of compensation. *Bennett v. McDonald* 234

Nominal.

5. The failure to award nominal damages is not reversible error where it does not affect a substantial right or entitle the plaintiff to costs. *Heater v. Pearce*..... 583

6. In this state the measure of recovery in all civil actions, is compensation for the injury sustained. *Bee Publishing Co. v. World Publishing Co*..... 713

7. The law presumes that some damage results from the publication of an article libelous *per se*. *Idem.*

Special. Libel.

8. In an action for damages for a libelous publication where, under an allegation of loss of business, evidence of a general decline, after the publication, has been received, and evidence of special damages also has been received without objection, it is proper for the jury to consider the latter evidence. *Idem.*

Remittitur.

9. Damages *held* to be excessive, and plaintiff allowed to file a remittitur. *Idem.*

Dead Body.

Reward.

1. Where several persons are searching for a dead body for which a reward has been offered, and one, acting independently and on his own account, finds the body, he will be entitled to the whole reward. *Elkhorn Valley Lodge v. Hudson* 672

2. The question of whether he did act independently of the others is one of fact. *Idem.*

Death. See MUNICIPAL CORPORATION, 1. POND.

Debt.

1. Payment of a ——— by stockholder. See ACCOUNTING. ADVANCES. CONTRIBUTION. CORPORATION. STOCKHOLDER.

2. A member of an unincorporated religious society not founded for the purpose of gain or pecuniary profit, is not individually liable for its debts unless he authorized the incurring of the obligation, or subsequently ratified the same. *First Nat. Bank of Plattsmouth v. Rector*..... 77

Debtor.

1. A suit by a judgment creditor, under sec. 532 of the Code, to recover assets of his debtor not reachable by execution, can be maintained only where the debtor had himself an actionable demand at the time the suit was instituted. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*.. 7

2. An insolvent may prefer creditors. *Bennett v. McDonald*... 234

Decree. See JUDGMENT, 16, 17. RES ADJUDICATA, 2.

Deed. See DELIVERY, 1. PROPERTY, 2.

Default.

1. Alleged errors of law committed in the trial of a cause, or an objection that the evidence is not sufficient to support a finding and judgment, will not be reviewed either in error or on appeal to this court, when the judgment was by default. *American Bank of Beatrice v. Hand*..... 273
2. In an action against two or more persons, some of whom are in default, the court should, on the trial, render judgment against such as are in default, regardless of the finding on the issues between the plaintiff and contesting defendants. *German-American Bank v. Stickle*..... 321

Defect of Parties. See INVENTORY. REVIEW, 50. WAIVER, 4.

All parties to a joint judgment, or those who may be affected by the modification or reversal thereof, must be made parties in this court upon proceeding in error; and a failure to do so is a ground for dismissal, if the objection is seasonably made. *Richardson v. Thompson*..... 299

Degrees of Crime. See NEW TRIAL, 3.

Delivery. See BOND, 6, 17, 18, 19, 21.

1. A deed placed in the hands of the grantor's agent to be held until the consideration is paid, is not a delivery to the vendee. *Soward v. Moss*..... 71
2. Formal ——— not necessary. See SALE, 4.
3. An official bond is without validity until it has been delivered. *Paxton v. State*..... 460
4. An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled. *Idem.*

Demurrer. See EVIDENCE, 21. PLEADING, 3, 5, 28.

Deposit. See TENDER, 1.

Deposit in Custodia Curiae. See INTEREST, 4. TENDER, 1.

Deputies.

The secretaries of the board of transportation are mere deputies acting for their principals in matters which precede or lead to a final order or decision, which must be by the principals. *Pacific Express Co. v. Cornell*..... 364

Description of Property. See VERDICT, 2, 5

Directors.

——— may be qualified to vote upon a proposition to sell corporate property; though disqualified to vote upon an application of the proceeds. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*..... 7

Discretion. See AMENDMENT, 1. EVIDENCE, 32, 48.

Dismissal. See DEFECT OF PARTIES. TRANSCRIPT.

A motion on behalf of the defendant below, to dismiss a proceeding to reverse a judgment, will not be sustained on the ground that the debt has been satisfied and released after the judgment or decree was entered. *Boldt v. First Nat. Bank of West Point* 283

District Judge. See BILL OF EXCEPTIONS, 8.

Divorce. See ALIMONY.

Extreme cruelty. *Zimmerman v. Zimmerman* 80

Dormant Judgment. See JUDGMENT, 10. STATUTE OF LIMITATIONS, 2, 3.

Drainage of Swamp Lands. See STATUTES, 8.

Election. See BALLOT. COUNTY DIVISION.

1. ——— of remedies. See SALE, 3. TROVER, 8.

Contest. Judgment.

2. The jurisdiction in certain election contests, is placed in the county court as term cases. Judgment may be pronounced at any time during the term. The four-day rule of justice courts does not apply. *Orr v. Bailey* 128

3. Under sec. 11, art. 1, ch. 18, Comp. Stats., to effect the division of a county, the proposition therefor must receive a majority of the legal votes cast at the general election at which the same was submitted, whether cast for the filling of an office or on any proposition. *State v. Clark* 702

4. ——— of defenses. See WAIVER, 3.

Endorsement. See INDORSEMENT.

Enrolled Bills. See EVIDENCE, 41. STATUTES, 2.

Equitable Lien. See INCUMBRANCE. QUIA TIMET.

Equity.

——— will not lend its aid to one, who, in violation of an agreement that certain property shall be distributed among all parties thereto, seeks to appropriate such property to his own use. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

Error. See DEFECT OF PARTIES. REVIEW, 5 and elsewhere.

1. General assignment. *Bennett v. McDonald* 234
2. Joint assignment. *American Bank of Beatrice v. Hand* 273
   Moseman v. State 629
3. Parties to proceedings. *Richardson v. Thompson* 299
4. Special assignment. *Palmer v. First Bank of Ulysses* 412
5. Specific assignment. *Bennett v. McDonald* 234
   Baer v. State 655

Estoppel. See CONVEYANCE. CORPORATION, 1. EXECUTOR. PLEADING, 31.

Executor.

1. An executor who attempts to transfer the entire estate in land to a third person, who executes a mortgage thereon, and uses the proceeds for the benefit of the estate, is, as a devisee, estopped from denying that the title passed by the conveyance, or that the mortgage is valid. And in such case the estoppel is binding upon the creditors of such devisee. *Arlington State Bank v. Paulsen*..... 94

By Act of Party.

2. A party is not estopped by his acts or omissions which were in no manner or degree an element of or inducement to the acts of the one who seeks to invoke the estoppel. *Oak Creek Valley Bank v. Helmer*..... 176

In Pais.

3. An estoppel *in pais* is not available to a stranger to the transaction. *Oliver v. Lansing*..... 219

4. As to wife and husband's creditors, see CONVEYANCE.

Auditor. Insurance Company.

5. An insurance company which has obtained the services of the auditor in the issuance of certificates *et cætera*, and has reaped the benefit thereof, is estopped to deny its debt to the state for fees due therefor. *State v. Home Ins. Co.*. 524

Evidence. See CRIMINAL LAW, 2, 3. INSTRUCTIONS, 2, 3, 4, 6, 9. PLEADING, 12, 15, 36. REVIEW, 30. VARIANCE. WITNESS.

1. ——— of ratification. See INSTRUCTIONS, 2, 4. PRINCIPAL AND AGENT, 6.

2. The duplicate receipt of the receiver of a United States land office is evidence of title upon which the holder can maintain a possessory action for the premises therein described. *Moore v. Parker*..... 29

Certified Copy of Official Letter.

3. A certified copy of a letter written by a public officer stating in a general way what the records of his office disclose is not competent evidence of the facts stated. *Idem.*

Vacation of Judgment. Perjury.

4. As to vacation of judgment upon false testimony of principal witness, not a party, see *Meyers v. Smith*..... 30

New Trial. Cumulative Evidence.

5. Judgment will not be set aside in an independent action in equity, on account of newly-discovered evidence which is merely cumulative to evidence adduced at the trial. *Idem.*

Harmless Error.

6. The admission of incompetent and immaterial evidence, resulting in no prejudice to the rights of the party complaining, will not work the reversal of a judgment. *Van Housen v. Broehl*..... 48

See, also, REVIEW, 4, 15.

Evidence—*continued.*

7. In the absence of fraud, an officer's certificate of acknowledgment is conclusive in favor of those who in good faith rely on it. *Council Bluffs Savings Bank v. Smith*..... 90

Form of Objection.

8. An objection to the introduction in evidence of a written instrument to which are appended the names of several persons, on the ground that it is "incompetent, immaterial and irrelevant," is too general to be considered; and such objection does not raise the question of the genuineness of the signatures to the instrument offered. *Krull v. State*... 97

9. ——— of enactment. See STATUTES, 2.

Statute.

10. Written papers pinned to original bills in the secretary of state's office, having on the face, in blue pencil marks, the word "adopted" or the word "carried," are not competent evidence to impeach the journals of the house and senate or original bills duly authenticated. *State v. Abbott*..... 106

11. Conflicting ———. See REVIEW, 1.

Merger.

12. The evidence in this case did not conclusively establish a merger, but was sufficient to sustain a finding of non-merger. *Oak Creek Valley Bank v. Helmer*..... 176

Absent Witness.

13. The showing of the absence of a witness from the jurisdiction of the court is an insufficient foundation for the admission of his testimony given on a former trial. *Wittenberg v. Mollyneaux*..... 203

14. ——— of demand, in a replevin action. See REPLEVIN, 8.

Parol.

15. Where the description of property in a chattel mortgage is clear, and free from all ambiguity, parol proof is inadmissible to show the extent and meaning of language employed. *Drexel v. Murphy*..... 210

Proof of Registration.

16. The filing of a chattel mortgage is not proven by the introduction in evidence of a copy of the instrument, even though the fact of filing may have been indorsed thereon. *Idem.*

17. Evidence examined, and *held* not to sustain the findings of the trial court. *Oliver v. Lansing*..... 219

Negligence.

18. Where there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question of negligence is for the court. *Brady v. Chicago, St. P., M. & O. R. Co*..... 233

Form of Objection.

19. An objection to testimony on the ground that it is "incom-

Evidence—*continued.*

petent, irrelevant and immaterial" is sufficiently definite and specific. *Bennett v. McDonald* 234

Hearsay.

20. A witness should not be permitted to give hearsay testimony. *Idem.*

Reception After Demurrer to Evidence.

21. The reception of evidence tendered by the defendant, after a decision against him on a demurrer to plaintiff's evidence, is not error. *Dunn v. Bozarth* 244

Husband and Wife.

22. In the enforcement of a wife's claim against her husband, she does not stand on the same plane with other creditors as to *quantum* of proof. She must show (1) that the debt was genuine; (2) that her purpose was honest; (3) that she acted in good faith in obtaining the payment. *Idem.*

Master and Servant.

23. ——— of liability of master to infant servant for personal injuries. See MASTER AND SERVANT, 7.

24. In a suit by the purchaser of a note from the first indorsee, such indorsee may testify upon rebuttal as to the *bona fides* of the purchase and ownership of the paper. *Knight v. Finney* 274

Sufficiency.

25. Evidence *held* sufficient to sustain the verdict. *Idem.*

26. Evidence examined, and *held* to sustain a finding and judgment in favor of plaintiff for a certain amount. *Beebe v. Latimer* 305

Motive.

27. Evidence is admissible which tends to show that a person had a motive for doing an act. *German-American Bank of Milwaukee v. Stickle* 321

28. The burden of proof as to new matter pleaded by way of confession and avoidance of the allegations of an adversary's pleadings is on the party setting forth such new matter. *Home Fire Ins. Co. v. Johansen* 349

Insurance. Incumbrance. Onus Probandi.

29. Where an insurance policy contains a clause against incumbrances, and a mortgage is given upon the property insured, in violation of the condition of the policy, and the lien is afterward discharged, the burden of proving such discharge is on the insured. *Idem.*

Foreign Statutes.

30. In the absence of proof, the laws of a sister state will be presumed to be the same as our own. *Pennsylvania Co. v. Kennard Glass & Paint Co* 435

Evidence—*continued.*

Cross-Examination.

31. The cross-examination of a witness should be confined to the matter covered by his examination in chief. *Idem.*

Order of Proof.

32. The order in which testimony shall be introduced is discretionary with the trial court. *Idem.*

Written Statement of Accounting Officers.

33. A document prepared by an accounting officer during his term of office, showing the receipts and disbursements of, and the balance chargeable against, a financial officer, is competent evidence against the sureties on the official bond of the latter officer, if it was used by him in accounting to his successor and turning over the office, at the time and in the manner contemplated by the law and the contract of the sureties. *Paxton v. State*..... 460

Expert.

34. A person who has held an office for some considerable time, is, presumably, competent to give an opinion as to the meaning of entries in the books of the office evidencing business transactions therein. *Idem.*

Official Record. Sureties.

35. The official records of a state treasurer are competent evidence against his sureties. *Idem.*

Trover.

36. In an action for specific conversion of public funds against a state treasurer and his sureties, it is not error to exclude evidence that the officer paid his own funds into the treasury, unless the conversion occurred prior to the payment. But, in an action for a general balance, such evidence would be admissible under a general denial. *Idem.*

Res Gestæ.

37. The declaration of an officer or agent of a public corporation, in regard to official business, is admissible as part of the *res gestæ*. *Idem.*

Pleading in Another Action.

38. Pleadings in another case may be received in evidence as declarations against interest. But when not verified, they are received only on actual or presumptive proof that the pleader directed or subsequently sanctioned the admission. The weight of such evidence is a question for the jury. *Idem.*

Judicial Knowledge.

39. Facts of which the court will take judicial notice, need not be given in evidence. *State v. Scott*..... 499

Locus in Quo.

40. The view of the *locus in quo* by the jury is evidence. *Chicago, R. I. & P. R. Co. v. Farwell*..... 544

Evidence—*continued.*

Statute.

41. The due authentication and enrollment of a statute affords only *prima facie* evidence of its passage. *Webster v. City of Hastings.* 563
42. The legislative journals, kept in obedience to the command of the constitution, are the best evidence of what affirmatively appears in them regarding the enactment of a law. *Idem.*
43. Witnesses should state facts, and not mere conclusions. *Orcutt v. Polsley* 575

Ambiguous Contract.

44. Contradictory evidence as to the construction of an ambiguous contract, should be submitted to the jury. *McCord-Brady Co. v. Moneyhan* 593

Harmless Error.

45. The admission of evidence which could not have influenced the jury in the conclusion reached, is, at most, error without prejudice. *Walsh v. Peterson* 645

Cross-Examination.

46. Where a witness has related a portion of a conversation or transaction on his direct examination, he may be cross-examined as to the whole. *Idem.*

Expert.

47. Triers of fact are not generally bound by opinion evidence of value, even when it is not met by opposing proof. *Lincoln Land Co. v. Phelps County* 249
48. The order in which evidence will be received, rests in the discretion of the court. *Baer v. State* 655

Rape.

49. Where the prosecutrix in a rape case testified to the commission of the offense by the prisoner; and it appeared that she made immediate complaint of the outrage and exhibited marks of violence; and where, immediately before the outrage, the defendant declared his purpose of gratifying his passion; and there were proofs showing that he probably visited the scene of the outrage on the night of its commission, the evidence is sufficient to sustain a conviction against the testimony of the prisoner, unsupported by other direct testimony. *Idem.*
50. Where a person is indicted for rape, as distinguished from incestuous rape, it is not necessary that any witness shall testify in terms that the prosecutrix and the prisoner are not brother and sister. *Idem.*

Presumption.

51. In an action for injuries suffered by derailment of a train, the presumption is against the company. *Chicago, R. I. & P. R. Co. v. Zernecke* 689
Chicago, R. I. & P. R. Co. v. Eaton 698

Evidence—*continued.*

Malice.

52. In the trial of an action for libel, evidence of express malice is incompetent to determine the amount of recovery. *Bee Publishing Co. v. World Publishing Co*..... 713

Libel. Damages.

53 In the trial of an action for damages to business from a libelous publication, evidence of the volume of such business, before and after the publication, is competent. *Idem.*

Probable Future Damages.

54. In the trial of an action for damages for a libelous publication, it is proper for the jury to take into account the probable future damages. *Idem.*
See, also, *Birchard v. Booth*, 4 Wis., 85, [67].

Libel. Decline of Business.

55. In a civil action for libel, under an allegation of loss of business, it is competent for the plaintiff to prove a general loss or decline of patronage. *Idem.*

Expert Testimony.

56. Where a defamatory article contains an imputation upon the solvency and stability of a large newspaper concern, it is proper, in the trial of an action to recover damages occasioned by the libel, to show by expert proof the general effect of such an article on the business of such publisher. *Idem.*

Disputed Questions of Fact.

57. Disputed questions of fact must be established by the best evidence obtainable. *Idem.*

Secondary.

58. Evidence can not be received which, on its face, indicates that it is secondary and that the original source of information is in existence and accessible. *Idem.*

Cumulative.

59. The reception of cumulative secondary evidence, is error without prejudice, if the fact sought to be proved is otherwise conclusively established. *Idem.*

Exclusion. General Denial.

60. In the trial of an action on a contract, where the answer is a general denial, it is not error to exclude evidence which has no tendency to disprove the averments of the petition. *Denney v. Stout*..... 731

61. The jury may disregard the entire evidence of an uncorroborated witness, where his testimony on a material point is willfully and corruptly false. *Idem.*

Adultery.

62. A jury might be authorized, in a proper case, to presume

Evidence—*concluded.*
the existence of an adulterous relationship from sporadic acts of sexual commerce. *Sweenie v. State*..... 269

Execution. See INJUNCTION, 2.

Executive Officers. See STATE AND STATE OFFICERS, 11.

Executor. See ESTOPPEL, 1.
Executors who have made conveyances in violation of the terms of the will under which they are administering an estate, are not estopped in their representative capacity from denying that the conveyances are invalid, and that they do not transfer the title or interest of the devisees. *Arlington State Bank v. Paulsen*..... 94

Exemption. See HOMESTEAD.
1. Individual partners can not claim as exempt, any portion of the partnership property until after partnership debts have been liquidated. *Miller v. Waite*..... 319
2. Where a debtor takes the necessary steps after the levying of an execution upon his lands to have his homestead interests therein determined, it is the duty of the creditor to make application as provided by law for the appraisal of the premises, and his failure to do so will be sufficient ground for vacating the sale of the homestead. *Chamberlain Banking House v. Zutavern*..... 623

Expert Testimony. See EVIDENCE, 34, 47, 56. INSTRUCTIONS, 4.

Feme Covert. See MARRIED WOMAN.

Final Judgment. See GARNISHMENT, 7. JUDGMENT, 17.

Findings. See VERDICT.
The findings of the court must respond to the issues raised by the pleadings in the case. *Upton v. Betts*..... 724

Fixtures.
1. Ordinarily the requisites of a fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold. *Oliver v. Lansing*..... 219
2. Removal of ———. See REMEDY.

Forcible Entry and Detainer.
A complaint in an action of forcible entry and detainer, which accurately describes the premises and distinctly charges an unlawful and forcible detention thereof by the defendant, is sufficient. *Moore v. Parker*..... 29

Foreclosure. See APPRAISEMENT. STATUTE OF LIMITATIONS, 7.

Foreign Building and Loan Associations. See USURY, 2.

Fraud. See FRAUDULENT CONVEYANCE. SALE, 3, 8.

Fraud, to constitute a cause of action, counter-claim or defense, must have been fruitful of injury or damage to the party who seeks to avail himself of the plea. *Carrington v. Omaha Life Ass'n*..... 116

Fraudulent Conveyance. See CREDITOR. HUSBAND AND WIFE. PLEADING, 15.

1. A question of fraud or intent accompanying conveyance of title is one of fact. *Boldt v. First Nat. Bank of West Point*.. 283
2. That a conveyance of title between relatives is without consideration, does not make it fraudulent, *ipso facto;* but only casts the burden of proof of the good faith of the transaction upon the party endeavoring to sustain it. *Idem.*
3. *Omaha Coal, Coke & Lime Co. v. Suess*, sustained. *Oak Creek Valley Bank v. Helmer*..... 176

Gambling. See WAGERING CONTRACT.

Garnishment.

1. The garnishee is the only person who can successfully plead that the fund garnisheed, is *in custodia legis. Sturtevant v. Bohn*..... 82
2. Money *in custodia legis* is not subject to the process of garnishment. *Idem.*
3. The garnishee may waive the defense that money in his hands is not liable to garnishment. *Idem.*
4. A plaintiff in a suit of garnishment, by service of the writ, becomes entitled to the rights of his debtor against the garnishee; and no after-understanding or agreement between the two latter parties, can essentially change the rights which have so attached. *Chamberlain Banking House v. Reliance Ins. Co. of Philadelphia*..... 195
5. Where a party has recovered judgment against his debtor; and the latter is summoned as such debtor, in garnishment; and his answers are unsatisfactory; and suit is instituted against him, all suits being instituted in the county court; and the garnishee makes a payment into court which is credited by the judge upon the original judgment; and the assignee of such judgment files a claim to the payment, and serves notice upon the attorney of plaintiff in garnishment who appears and does not object to the jurisdiction; and there is an adjudication in favor of applicant, the last proceeding is without jurisdiction. *Idem. Chamberlain Banking House v. Hartford Fire Ins. Co*..... 201
6. A person served with summons in garnishment, may appear and answer at any time after service. *Peterson v. Kingman*.. 667
7. Upon the answer of a garnishee admitting his indebtedness to an execution debtor, the court may enter an order

Garnishment—*concluded.*

for the payment of the amount into court to apply on the judgment. Such order is a final order, and execution may issue thereon. *Idem.*

8. Where a garnishee in good faith complies with the order of the court, he will be protected. *Idem.*

Head of Family.

A widow who has her children and grandchildren under her care and maintenance, is the head of a family. *Chamberlain Banking House v. Zutavern* 623

Hearsay Testimony. See EVIDENCE, 20.

Highway.

The proviso of sec. 3, ch. 78, Comp. Stats., 1899, "That all roads that have not been used within five years shall be deemed vacated," applies only to roads which have been entirely abandoned. It does not apply to the unused parts of a road lying on either side of the line of travel. *Krueger v. Jenkins* 641

Homestead. See MORTGAGE, 3. PLEADING, 15.

A homestead of less value than $2,000 is exempt from forced sale. *Chamberlain Banking House v. Zutavern* 623

Husband and Wife. See ALIMONY. DIVORCE. FRAUDULENT CONVEYANCE. MORTGAGE, 3.

Debt of Husband to Wife.

1. A husband may transfer property to his wife in payment of a debt due her, provided it is not done with intent to hinder, delay or defraud his creditors; and even though he be guilty of fraud in the matter, such transfer will be valid, if the wife was ignorant of, or did not participate in, the fraudulent purpose of her husband. *Dunn v. Bozarth*, 244

Claim of Wife Against Husband.

2. A wife may enforce her just claims against her husband on the same terms as other creditors, except as to the *quantum* of proof. *Idem.*

Incumbrance.

A junior incumbrancer who claims priority over an elder equitable lien, must allege and prove that he acted in good faith in the transaction, and that he paid out the full amount secured by his lien in ignorance of the prior equity. *Upton v. Betts* 724

Indorsement. See BALLOT, 1. NEGOTIABLE INSTRUMENTS, 1.

Inducement. See CONSTITUTIONAL LAW, 14.

Infants. INJURY TO INFANTS.

Risk. Service.

1. Infants, like adults, assume the ordinary risks of the service in which they engage. *Omaha Bottling Co. v. Theiler*... 257

Infants—*concluded.*

2. An infant engaging in a hazardous employment is entitled to warning of dangers which, on account of youth and inexperience, he does not fully comprehend. *Idem.*
3. An infant employé, who is familiar with the dangers of his employment, can not recover for an injury received in such employment. *Idem.*

Injunction.

Contract of Sale.

1. A contract, limited as to time and territory and reasonable in its terms, is valid, and enforceable by injunction, and not contrary to public policy. *Downing v. Lewis*..... 38

Execution of Sale.

2. Injunction is the appropriate remedy to prevent an execution sale of land for the satisfaction of a judgment which is neither a lien on the property nor a personal charge against the owner. *Predohl v. O'Sullivan*..... 311

Adequate Remedy at Law. Multiplicity of Suits. Unconstitutional Law.

3. Where it is alleged that a public body is proceeding to interfere with the rights of a person or corporation in a manner which will cause damage, for which there is no adequate remedy at law, or which may cause a multiplicity of suits, and it is further alleged that the law under which the proceedings are in progress is unconstitutional, the petition presents cause for relief by injunction. *Pacific Express Co. v. Cornell*..... 364

Damages.

4. Where the hearing of an application of a temporary injunction has been unreasonably postponed, attorneys' fees necessarily incurred in effecting a dissolution are a proper element of damages, if it is determined that the temporary order should not have been allowed. *Gyger v. Courtney*..... 555

Dismissal.

5. The voluntary dismissal of an injunction suit, gives a right of action on the bond. *Idem.*

Injury to Infants. See MASTER AND SERVANT, 2, 3.

Insolvency. See CREDITOR'S BILL.

Instructions. See EXPERT TESTIMONY. JURY, 5. NEGLIGENCE, 1. REVIEW, 11, 22, 27, 32, 33, 40, 42, 48, 54.

1. Alleged errors in the giving or refusal of instructions are not available, if it is clear they were not harmful to the plaintiff in error. *Van Housen v. Broehl*..... 48
2. Instructions should not submit to the jury elements of damages not embraced within the evidence adduced on the trial. *Shiverick v. Gunning*..... 73

Instructions—*continued.*

3. It is error to give an instruction which withdraws from the consideration of the jury a material issue of fact. *Hayden v. Frederickson* 141

Expert Evidence.

4. It is error to instruct the jury that "expert evidence is of the very lowest order, and is the least satisfactory." *Idem.*

5. Request for ———. See REVIEW, 11.

Preponderance of Evidence.

6. A defendant is entitled to have the jury instructed that the plaintiff must establish his case by a preponderance of the proof, and he can not be deprived of this right by an amendment of the petition after trial and verdict. *Omaha Bottling Co. v. Theiler* 257

Adultery.

7. An instruction to the effect that if the jury find that the defendant and a married woman, not his wife, had sexual intercourse during any portion of the time alleged in the information then the rule of law is that it is presumed that the defendant and said woman had sexual intercourse habitually as long thereafter as she was an inmate of defendant's dwelling house, *held* error. *Sweenie v. State* 269

Non-Direction.

8. The jury should be charged by the court to base the verdict solely upon the evidence; but a failure in this regard is a non-direction simply. If the defeated party wishes to predicate error thereon, he should prepare and ask an instruction to that effect. *Burr v. McCallum* 326

Absence of Bill of Exceptions.

9. If instructions contain statements which may have been correct and applicable to possible conditions of proof in the case, in the absence of the bill of exceptions, they must be presumed to be free from error. *McGraw v. Chicago, R. I. & P. R. Co.* 397

Filing.

10. Failure to file instructions is not available error unless excepted to at the time. *Minzer v. Willman Mercantile Co.* .. 410

Propositions Not Involved.

11. It is not error to refuse an instruction containing a correct proposition of law not involved in the case. *Nebraska Savings & Exchange Bank v. Brewster* 535

Not Assigned as Error.

12. An instruction, the giving of which is not assigned as error, is the law of the case whether right or wrong. *World Mutual Benefit Ass'n v. Worthing* 587

Instructions—*concluded.*

13. Instructions should be construed together. *Chicago, R. I. & P. R. Co. v. Zernecke* 689
Chicago, R. I. & P. R. Co. v. Eaton 698

14. It is not error to refuse an instruction which omits an important element. *Denney v. Stout* 731

Insurance.

Application.

1. When an application for an insurance policy is oral and no inquiry is made as to the character and condition of the title to the property to be insured, a failure to disclose the existence of incumbrances will not, in the absence of fraud, avoid the policy. *Seal v. Farmers & Merchants Ins. Co* 253

2. A misstatement, in an application for a policy of insurance, of a material fact, inducing the acceptance of the risks, will avoid the policy. *Idem.*

Misstatement. Incumbrance.

3. A misrepresentation as to the amount of incumbrance upon property sought to be insured, where the policy is conditioned that it will be void if the property be mortgaged or otherwise incumbered without notice to and consent of the company indorsed thereon, will, in the absence of a waiver, avoid the policy. *Idem.*

4. Insurance policy. See CHATTEL MORTGAGE, 7.

Policy. Incumbrance.

5. Where an insurance policy upon chattels contains a clause against incumbrances, the giving of a mortgage upon such chattels cancels the policy; but a cancellation of the lien revives the contract. *Home Fire Ins. Co. v. Johansen* 349

Application. Premium. Note.

6. The acceptance of an application and premium note by an insurance company, sufficiently ratifies the act of the person who prepared and forwarded the same, whether that person be an agent of the company or not. *Farmers & Merchants Ins. Co. v. Wiard* 451

7. A policy of fire insurance stipulated that it should be suspended and rendered inoperative, during the time the premium note, or any part thereof, remained overdue and unpaid. That the note remained unpaid at the time the insured property was destroyed by fire, will not defeat a recovery on a policy in case the note had not then matured. *Idem.*

Railroad Companies.

8. A railroad company is an insurer of the safe transportation of a passenger. *Chicago, R. I. & P. R. Co. v. Zernecke* 689
Chicago, R. I. & P. R. Co. v. Eaton 698

Interest. See TAXATION, 7.

1. Where the right to damages for a breach of contract is

Interest—*concluded.*

the subject for litigation, and the amount of recovery is unliquidated and must be fixed by the determination of the suit, interest can not be allowed for time precedent to such determination. *Wittenberg v. Mollyneaux* 203

2. The collection of interest is a statutory right, and did not exist at common law. *Idem.*

Junior Incumbrances. Date.

3. A junior incumbrancer who, to protect his lien, takes up a superior lien, is entitled to interest from the date of payment. *Leavitt v. Bell* 595

4. A person wishing to avoid paying interest upon an admitted obligation, where there is a dispute as to whom the obligation is due, must bring the money into court to abide its final judgment, unless the court otherwise direct under the provisions of sec. 48 of the Code. *Elkhorn Valley Lodge v. Hudson* 672

Intervention.

It is proper for a court to pass upon a petition to intervene, filed without notice, at the time of final judgment or just prior thereto. Such action taken, may bar the applicant's right to supersede upon an appeal of the main case. *State v. Holmes* 503

Inventory.

When a contract for sale of chattels provides for the taking of an inventory by the parties, the buyer can not urge as a defense to the action to recover the purchase price, that the inventory was made by the vendor alone, when the vendee was given an opportunity to participate therein and refused to do so. *Hayden v. Frederickson* 141

Irrigation Companies. See CONSTITUTIONAL LAW, 2.

Journal Entry. See NEW TRIAL, 2.

Judgment. See STATUTE OF LIMITATIONS, 3, 4.

Enforcement.

1. A ——— can not be enforced piece-meal by each of the owners whose claims have been merged therein, issuing an execution for his part. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

New Trial. Equity.

2. The provisions of the Code in regard to vacation of judgments and granting of new trials are not exclusive. The right to an independent equitable action also exists, and such action may, under certain circumstances, be prosecuted after removal and review of the judgment suit in the court of last resort. *Meyers v. Smith* 30

3. ——— in election contest. See ELECTION, 2.

Judgment—*continued.*

In Replevin.

4. The failure to render an alternative judgment, in a case where the property in controversy had been destroyed, for a return of such property or its value, is error without prejudice. *Richardson Drug Co. v. Teasdall* 150

5. Satisfaction of ———. See REPLEVIN, 3.

6. A judgment rendered by a justice of the peace in an action of replevin, for a return of the property and $50 damages, or in case a return can not be had, for $200 and costs, is valid. *Selby v. McQuillan* 158

7. An appeal from such judgment invests the district court with jurisdiction of the cause, and it may, on the trial, if the issues are found in favor of the defendant, render judgment in his favor for the ascertained value of the property, whatever that may be. *Idem.*

8. Sec. 191*a* of the Code, which declares that the judgment in favor of a defendant in replevin shall be in the alternative, was enacted in the interest of litigants, and not for the benefit of sureties, and only contemplates the rendition of a judgment in the prescribed form where, under the conditions existing at the time of the trial, such a judgment would or might be of practical value to one or both of the parties. *Idem.*

9. The failure to render an alternative judgment in replevin, is no defense to an action on an appeal bond given in behalf of the plaintiff, where the property can not be returned and that fact has, upon proper inquiry, been determined by the court. *Idem.*

Revivor.

10. The proceeding to revive a dormant judgment is not the commencement of a new action, but the continuation of an action previously commenced. *Bankers Life Ins. Co. v. Robbins* 170

11. The word "manner," found in secs. 472 and 473 of the Code, respecting the revival of judgments, does not include the element of time. *Idem.*

Lien.

12. Real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor. *Lessert v. Sieberling* 309

13. By sec. 524 of the Crim. Code, a judgment of the district court in favor of the state, for costs, is a lien on all real estate within the county owned by the accused at the time of docketing the cause. *Predohl v. O'Sullivan* 311

14. A judgment for costs in favor of the state, rendered by the district court, which has been assigned, becomes dor-

Judgment—*concluded.*

mant and ceases to be a lien on the real estate at the end of five years from the date of the assignment. *Idem.*

On Verdict.

15. A judgment will not be entered on special findings, in opposition to a general verdict, except in case of inconsistency. *Schlageck v. Widhalm* 541

In Personam.

16. In the foreclosure of a mortgage, the decree *in personam* does not become final until after the sale of the property and entry of deficiency judgment. *Parmele v. Schroeder* 553

Final Decree. Definition.

17. A decree is not final if anything remains to be done by the court before it can be executed. *Idem.*

Jurisdiction.

18. Where a court obtains jurisdiction of a party by the service of a defective summons, a judgment rendered is not void. *Ley v. Pilger* 561

Deficiency.

19. Pending actions are not affected by the repeal of a statute allowing a deficiency judgment. *Thompson v. West* 677
20. A judgment must conform to the pleadings. *State v. Dickinson* 753

Judgment on Pleadings. See PLEADING, 14.

Judicial Cognizance. See MAXIMUM RATE LAW, 2.

This court will not take judicial notice of the rules of practice of the district court. To be considered, such rules must be made a part of the record. *Dunn v. Bozarth* 244

Judicial Knowledge. See JUDICIAL COGNIZANCE.

Judicial Notice. See JUDICIAL COGNIZANCE.

Judicial Sale. See MOTION, 5, 6. SALE.

Confirmation. Objections.

1. Objections to the confirmation of a judicial sale, will be disregarded on review when not brought to the attention of the trial court. *Mandell v. Weldin* 699

Motion. Objections. Vacation.

2. On a motion to vacate a judicial sale, objections to the decree under which such sale was made, can not be considered. *Cox v. Parrotte* 701
3. Objections to the confirmation of a sale of real estate, must be specifically assigned, and called to the attention of the trial court. *Bernheimer v. Hamer* 733

Appraisal. Objections.

4. Objections to an appraisal of property to be sold at judicial sale, should, except where fraud is alleged, be filed prior to the date fixed for the sale. *Idem.*

Judicial Sale—*concluded.*

Error in Appraisal. Outlawed Lien.

5. An error in appraising real estate for judicial sale, whereby an outlawed lien was deducted, is without prejudice where the property sold for more than two-thirds its gross valuation. *Idem.*

Junior Incumbrancer. See INCUMBRANCE.

Jurisdiction. See APPEAL, 1. REVIEW, 8.

1. Consent of parties can not confer jurisdiction of the subject-matter. *Dufrene v. Smeaton* 67
2. ——— of appellate court. See REVIEW, 9.

Verification of Pleading.

3. The verification of a petition is not essential to jurisdiction. *Farmers and Merchants Bank of Holstein v. German Nat. Bank of Lincoln* 229

Supreme Court.

4. The appellate jurisdiction of the supreme court depends upon the filing with the clerk of a duly authenticated transcript of the proceedings of the district court containing the judgment or final order sought to be reversed. *Snyder v. Lapp, Snyder v. Norris* 243
5. The state board of transportation has power to inquire into the intra-state business of express, telephone and telegraph companies and to regulate their rates therefor. *Nebraska Telephone Co. v. Cornell* 737

Jury. See INSTRUCTIONS.

1. In a law action, a party is entitled to a jury trial as a matter of right. *Lett v. Hammond* 339
2. The fact that there are incidental issues which are equitable in their nature, does not alter the rule. *Idem.*
3. The refusal of the demand for a jury in such a case, is error. *Idem.*
4. The hearing and favorable determination of a motion to transfer a cause to the equity docket, or the subsequent fact of its being placed on such docket, does not necessarily decide the right of the party demanding it, to a jury trial. If the demand is made before or at the time the case is called for trial, denial is error. *Idem.*

Instruction.

5. The jury are bound to follow the instructions given by the court, and act on them in making up a verdict. *World Mutual Benefit Ass'n v. Worthing* 587
6. It is the business of a jury, in an action for libel, to determine the amount of damage. *Bee Publishing Co. v. World Publishing Co.* 713

Justice of the Peace. See JUDGMENT, 6.

Prior to the enactment of ch. 92, Session Laws, 1899, the juris-

Juctice of the Peace—*concluded.*

diction of a justice of the peace, in an action of replevin, depended upon the appraised value of the property in suit. *Selby v. McQuillan*..... 158

Justification. See PLEADING, 36.

Laches.

Mere delay of a party in proceeding against a void tax, will not constitute laches. *Casey v. County of Burt*..... 624
See, also, NOTICE, 7.

Land Office Receipt. See EVIDENCE, 2

Larceny.

The crimes of stealing cattle and of receiving stolen cattle, described in sec. 117*a*, Crim. Code, are separate and distinct offenses. *George v. State*..... 163

Lease.

A tenant is not bound, by an assumption in a lease, to pay void taxes. *Scott v. Society of Russian Israelites*:..... 571

Legal Holiday.

1. No court can be opened, nor can any judicial business be transacted on Sunday, or on any legal holiday, except certain matters specifically designated in the statutes. *Deere, Wells & Co. v. Hodges*..... 288

2. The approval by a county judge of an appeal bond on a legal holiday, is not within the inhibition of sec. 38, ch. 19, Comp. Stats., which provides that "no court can be opened, nor can any judicial business be transacted, on Sunday or on any legal holiday." *Idem.*

Legislative Journals. See EVIDENCE, 42.

1. The legislative journals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution. *State v. Abbott*..... 106
Webster v. City of Hastings..... 563

2. Entries in the legislative journal will prevail over the enrolled bill, if the former explicitly contradict the latter. *Idem.*

Legislature.

There are three branches of the legislative department; one of these is the governor. *Weis v. Ashley*..... 494

Letter See REVIEW, 30. STATUTE OF LIMITATIONS, 6.

——— of officer. See EVIDENCE, 3.

Levy. See TAXATION.

Liability.

The provision of the charter of cities of the first class, requiring real estate owners and occupants to maintain cer-

Liability—*concluded.*

tain sidewalks, and making them liable for injuries occasioned by reason of the defective condition thereof, does not relieve the city in the premises. *City of Lincoln v. Pirner* 634

Liability of Employer. See MASTER AND SERVANT, 2, 3.

Libel. See DAMAGES, 7, 8. EVIDENCE, 52-56. JURY, 6.

A newspaper article in which it is falsely stated that a business corporation is maintaining a precarious existence, that it is not able to meet its financial obligations and is tottering, bankrupt and about to pass out of existence, is libelous *per se*. *Bee Publishing Co. v. World Publishing Co.*. 713

Lien. See JUDGMENT, 12-14. JUDICIAL SALE, 5. SUBSEQUENT PURCHASE.

1. Waiver of ———. See CHATTEL MORTGAGE, 6.

Get of Bulls, Jacks and Stallions.

2. The law that the owners of jacks, stallions and bulls shall have a lien for the get of such animals, is unconstitutional and void. *Weis v. Ashley* 494

3. In certifying liens for the information of a sheriff at a judicial sale, an official without a seal is not required to use one. *Orcutt v. Polsley* 575

Lobbyist.

A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it, and make arguments in its favor before legislative committees, and do all things needful and proper to secure its passage, is vicious, illegal and void, as against public policy; and the claimant can not recover, either on an implied contract or a *quantum meruit* for the services performed. *Richardson v. Scott's Bluff County* 400

Locus in Quo. See EVIDENCE, 40.

Lost Instrument.

In an action to recover on a lost note, instructions in regard to the burden of proving the loss are not prejudically erroneous, where it appears conclusively that the note was non-negotiable and had been delivered to the defendant. *Walsh v. Peterson* 645

Machinery and Appliances. See MASTER AND SERVANT, 4.

Malice. See EVIDENCE, 52. PLEADING, 36.

Mandamus. See BILL OF EXCEPTIONS, 8. TAXATION, 5.

1. ——— lies to compel an irrigation company to erect and maintain bridges and crossings on the highways where its roads, canals or ditches cross such highways. *State v. Farmers & Merchants Irrigation Co* 1

2. ——— will lie to compel the district board to lease a build-

Mandamus—*concluded.*

ing for a schoolhouse selected by the district at a special meeting. *Krull v. State*..... 97

3. A finding in an equity cause which does not respond to the issues, and which is, at plaintiff's instance, treated as and declared to be advisory only, will not warrant the court in rendering a personal judgment against the defendants; and in such case mandamus will not lie to compel the court to render a personal judgment in favor of the plaintiff on such finding. *State v. Dickinson*..... 753

Married Woman. See SALE, 2.

Separate Property.

1. In equity, prior to the enactment of the married woman's act, the separate property of a *feme covert* was liable for the satisfaction of her engagements made with reference to it. *Kocher v. Cornell*..... 315
2. At common law a *feme covert* was incapable of contracting a personal obligation. *Idem.*
3. By the enactment of ch. 53, Comp. Stats., 1899, married women were given, as a legal right, the power to bind their separate property which in equity they already possessed. *Idem.*
4. A married woman can bind her separate property by contract to the same extent only that she could formerly bind it in equity. *Idem.*
5. The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract. *Idem.*
6. Authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her. *Idem.*
7. And in such case it is immaterial what the intention of the parties was at the time of the execution of the contract. *Idem.*

Master and Servant. See NEGLIGENCE. NOTICE, 2.

Personal Risk of Servant.

1. A servant, while temporarily employed in a more hazardous service than that for which he was engaged, assumes only such risks in connection with the work as are equally open and apparent to himself and his employer. *Norfolk Beet-Sugar Co. v. Hight*..... 100

Liability of Master.

2. A master is liable to an infant who has been injured in his service in consequence of being exposed to a danger which, on account of his youth and want of experience, he did not fully understand and appreciate. *Omaha Bottling Co. v. Theiler*..... 257

Master and Servant—*concluded.*

3. But if the infant, from the length and character of his previous service, was familiar with the dangers of the employment, he can not recover. *Idem.*

Negligence of Master.

4. It is not negligence for a master, in the conduct of his business, to use such machinery and appliances as are in common and general use. *Idem.*

Knowledge of Servant.

5. And if a servant, conscious of the risks and dangers incident to a business conducted with such machinery and appliances, sustains an injury he can not recover therefor. *Idem.*

Notice. Personal Injury.

6. A servant who, from the length or character of previous service or experience, may be presumed to know the ordinary hazards pertaining to the conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of, or inexperienced in, the particular work. *Idem.*

Evidence.

7. In an action by a servant against his master for personal injuries, evidence examined and found not to sustain the verdict. *Idem.*

Maxim.

The law serves the vigilant, not those who sleep. *Peterson v. Kingman* 667

Maximum Rate Law.

Definition of Duties.

1. The act of 1893, known as the "Maximum Rate Law" (Session Laws, ch. 24), does not materially modify the provisions of the law enacted in 1887 (Session Laws, ch. 60), defining the duties and powers of the state board of transportation. *Nebraska Telephone Co. v. Cornell* 737

2. This court does not take judicial cognizance of the net earnings of railroad companies and can not assume, without proof, that the "Maximum Rate Law" (Session Laws, 1893, ch. 24) is now, or was at the time of its enactment, confiscatory legislation. *Idem.*

Mechanic's Lien.

Miller v. Neely 539
Bullard v. De Groff 783

Merger.

1. ——— of estates. Generally, if two unequal estates are vested in the same party at the one time, and there is no intervening estate, the inferior is merged in the superior. *Oak Creek Valley Bank v. Helmer* 176

Merger—*concluded.*

Title. Intention.

2. The merger is not an absolute effect of the vesting of the unequal titles in the one person at the same time. Whether such will be the effect may depend upon the intention of the party in whom the titles appear, either as directly expressed or as it may be inferred or implied from the facts and circumstances of the particular case. *Idem.*

Misconduct of Counsel. See REVIEW, 36, 51.

Prejudicial and otherwise. See *Ashland Land & Live Stock Co. v. May* 735

Mortgage. See COUPON. NOTICE, 4. RENT.

Release.

1. A mortgagor of real estate is ordinarily entitled to the possession thereof until confirmation of foreclosure-sale. *Clark v. Missouri, Kansas & Texas Trust Co* 53
2. The record of a mortgage is constructive notice of the existence of the debt. *Whitney v. Lowe* 87
3. The homestead of a married person can not be incumbered by a mortgage which is not acknowledged by both the husband and the wife. *Council Bluffs Savings Bank v. Smith.* 90
4. A creditor may become entitled to the benefit of a mortgage given by the principal debtor to his surety for the payment of the debt, which mortgage provides for the discharge or payment of the debt and for indemnity to the surety; and, after the creditor's right to the security attaches, the latter can not usually be released without the participation and consent of all parties interested. *Oak Creek Valley Bank v. Helmer* 176

Motion. See REVIEW, 49. SUMMONS, 2.

1. A motion which can not be granted in the form in which it is made is properly overruled. *Beebe v. Latimer* 305
   Palmer v. First Bank of Ulysses 412

To Dismiss.

2. The merits of a proceeding can not be disposed of upon a summary motion to dismiss. *Bower v. Cassels* 620
3. In a motion to dismiss an appeal, the court can not consider the merits of the controversy. *Idem.*
4. A general motion to strike certain affidavits from the files, on the ground that they contain certain objectionable statements, is rightly overruled if such affidavits contain material evidence regarding the subject under consideration. *Zimmerer v. Fremont Nat. Bank* 661

Bill of Exceptions.

5. A motion to vacate a sale, when filed, is a part of the record and should not be embodied in the bill of exceptions. *Mandell v. Weldin* 699

Motion—*concluded.*

Certificate.

6. A motion to set aside a sale can not be considered, unless certified in the transcript by the clerk of the district court. *Idem.*

7. ——— to quash. See SUMMONS, 2.

Municipal Corporations. See TAXATION, 3, 4, 5.

1. A municipal corporation is liable for the death of a child who was drowned in a pond of water situate in part on a public street and in part on abutting lots, when shown that the accumulation of water was occasioned by the negligence of the city in filling in the street with earth, that no fence or barrier was erected, and that the child entered the pond from the street. *Bowman v. City of Omaha* 84

2. The council of a city of the second class, having over 5,000 inhabitants, can not lawfully incur expense, or enter into a contract therefor, unless money has been previously appropriated for that purpose, or the expenditures have been previously sanctioned by a majority of the electors of the city. *City of Kearney v. Downing* 549

Names of Judges. See CONSTITUTIONAL LAW, 1.

Negligence. See EVIDENCE, 18. MASTER AND SERVANT, 4. MUNICIPAL CORPORATION, 1. NOTICE, 2.

1. In the trial of an action grounded in negligence it is proper to submit to the jury the question whether the plaintiff was, at the time he received the injury, engaged in performance of work outside of his contract, and different in character from that which he had undertaken to perform. *Norfolk Beet-Sugar Co. v. Hight* 100

2. If a servant is called by his master to perform work beyond the scope and terms of his employment, and there are hazards, incident to the extra service, which are in fact known to the servant, or if the accident could be avoided by the exercise of ordinary care on his part, the doctrine of contributory negligence forbids a recovery. *Idem.*

Personal Injury.

3. Where contributory negligence was the proximate cause of personal injury, there can be no recovery of damages. *Brady v. Chicago, St. P., M. & O. R. Co* 233

4. ——— of master. See MASTER AND SERVANT, 4.

Definition.

5. Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. *McGraw v. Chicago, R. I. & P. R. Co* 397

Negotiable Instruments.

1. The conclusions announced in *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Nebr., 149, approved and followed. *First Nat. Bank of Hastings v. Omaha Nat. Bank*.. 192

Innocent.

2. One who purchases a negotiable note from an innocent holder acquires a title free from equities existing between the original parties. *Knight v. Finney*..... 274

Indorsed Statement.

3. A statement in writing upon the back of a negotiable promissory note that "this note is secured by a contract on land" (describing it) *held* not to be notice to purchasers of the note of infirmities thereof. *Idem.*

4. In the trial of an action on a promissory note, the execution of which is denied, evidence of facts and circumstances surrounding the parties and attending the giving of the note is relevant. *German-American Bank of Milwaukee v. Stickle*..... 321

New Parties. See REVIEW, 50.

Newspaper. See LIBEL.

New Trial. See BILL OF EXCEPTIONS, 2. REVIEW, 27, 49.

Motion.

1. A motion for a new trial must be filed at the term the verdict or decision is entered, and, except for newly-discovered evidence, within three days after the rendition of such verdict or decision. *Nebraska Nat. Bank v. Pennock*.... 61

2. Time dates from rendition of verdict or decision and not from entry on journal. *Idem.*

3. Where a crime consisting of several degrees is charged in different counts of an information, the allowance of a new trial goes to the whole case. *George v. State*..... 163

4. Except upon the ground of newly-discovered evidence, a motion for a new trial must be filed within three days after the verdict or decision was rendered, unless the filing in time was unavoidably prevented. *First Nat. Bank of Broken Bow v. Stockham*..... 304

5. A motion for a new trial on the ground of accident or surprise is addressed to the sound discretion of the trial court. *Zimmerer v. Fremont Nat. Bank*..... 661

Motion.

6. An exception to the overruling of a motion for a new trial is necessary to obtain a review of the question presented by such motion. *State v. Clark*..... 702

7. The lack of a motion for a new trial will not justify a dismissal of a petition in error. *Biart v. Myers*..... 711

Notice. See PRINCIPAL AND AGENT, 2. STATE WARRANT.

School Meeting.

1. A notice calling a district meeting to fix the place where school shall be held is sufficiently comprehensive to justify the electors, assembled in pursuance to the call, in adopting a resolution directing the district board to rent a designated building to be used as a schoolhouse. *Krull v. State* 97

Master and Servant.

2. ——— of danger. If a servant is called by his master to perform work beyond the scope and terms of his employment, and there are hazards incident to the extra service which are, or ought to be, known to the master, and which the servant, on account of ignorance or lack of experience, does not understand or appreciate, it is the duty of the master to point them out—to indicate the peril and the means of avoiding it. *Norfolk Beet-Sugar Co. v. Hight* 100

See, also, MASTER AND SERVANT, 1. NEGLIGENCE.

3. ——— to pledgor. See TROVER, 1.

Record of Mortgages.

4. The record of a mortgage is notice to the world of the existence of the debt it was intended to secure. If a portion of the debt has been assigned, and the mortgage is released by the person owning the other portion, the release is ineffective except as to innocent purchaser. *Whitney v. Lowe* 87

5. ——— of application. See RECEIVER, 2, 3.

Municipal Authorities. Personal Injury.

6. A notice to municipal authorities of the time, place and cause of a personal injury is sufficient, as to place, if it suggests inquiries which will lead to the discovery. *City of Lincoln v. Pirner* 634

See STATUTES, 7.

Void Tax. Laches.

7. When the record fails to show affirmatively that a person objecting to a void tax had notice of the levy he will not be held guilty of laches, for mere delay. *Casey v. County of Burt* 624

See, also, APPRAISEMENT. LACHES.

Objection.

——— to the admission of testimony. See EVIDENCE, 8, 19.

Onus Probandi. See BURDEN OF PROOF.

Partnership Property. See EXEMPTION, 1. PROPERTY, 2.

Party. See ADMINISTRATOR. REVIEW, 55.

In an action against joint debtors the plaintiff, unless the court otherwise direct, may proceed against such of the

Party—*concluded.*
defendants as have been served with process. *Gyger v. Courtney* 555

Payment. See BANK CHECK. PRINCIPAL AND AGENT, 4.
A state treasurer, who is his own successor, and turns over to himself, as such, credits against solvent banks for cash, relieves his first-term bondsmen of liability. *Paxton v. State* 460

Perjury.
Intentional perjury or subornation thereof, committed for the purpose of sustaining an action or defense, in a proper case, will entitle the adverse party, if unsuccessful, to the vacation of a judgment. *Meyers v. Smith*.....30, 36
Barr v. Post..... 361

Permanent Improvements. See SUBSEQUENT PURCHASE, 2.

Personal Injury. See CITY OF FIRST CLASS. CONTRIBUTORY NEGLIGENCE. MASTER AND SERVANT, 2, 3, 5, 7. RIGHT OF ACTION. STATUTES, 10, 12.
Evidence examined, and *held* not to sustain the verdict. *Omaha Bottling Co. v. Theiler*..... 257

Pleading. See EVIDENCE, 21, 28, 38, 55, 60. FORCIBLE ENTRY AND DETAINER. JUDGMENT, 20.
1. Petition in an independent action in equity to set aside judgment, examined and *held* to be sufficient. *Meyers v. Smith* 30
2. Relief in such an action is not barred on account of the judgment having been reviewed and affirmed in the supreme court. *Idem.*

Demurrer.

3. A petition in equity which prayed that a judgment or decree be vacated and a new trial granted in a prior action, on the ground that the decree was based upon the false or perjured testimony of the successful party, and that since the trial he has made statements out of court at variance with or contradictory to his testimony, and which alleges no positive knowledge of such statements, is open to attack by a general demurrer. *Idem*..... 36
4. The question of the ownership or interest of one of the parties to a contract of sale of business and good-will *held* not to be in issue upon pleadings. *Downing v. Lewis*... 38

Demurrer to Answer.

5. If an answer raises material issues upon the allegations of the petition, it will resist a general demurrer. *Van Housen v. Broehl* 48

Amendment.

6. A petition in which the cause of action is insufficiently or defectively stated, may be amended by adding other allega-

Pleading—*continued.*

tions to remedy or cure the defect. *Norfolk Beet-Sugar Co. v. Hight* 100

Judicial Notice.

7. It is unnecessary to plead facts of which the court will take judicial notice. *George v. State* 163

Issue.

8. In a criminal case but one issue can be properly before the court at one time. . *Idem.*

9. The cross petition in this action *held* to contain matter which left issuable the question of merger of two unequal estates. *Oak Creek Valley Bank v. Helmer* 176

10. Inconsistent defenses. See WAIVER, 3.

Amendment After Verdict.

11. In an action for an injury resulting from the alleged negligence of the defendant in failing to furnish suitable and safe machinery and appliances, it is improper, after a verdict, to permit plaintiff to amend his petition by alleging a distinct actionable wrong, unless the essential facts of the amendment were fairly contested at the trial, and submitted to the jury under proper instructions. *Omaha Bottling Co. v. Theiler* 257

Admission.

12. Matters pleaded and admitted need no proof. *Knight v. Finney* 274

General Denial.

13. A general denial of an affirmative defense places the burden of proving the same upon the defendant. *Idem.*

Affirmative Relief.

14. To warrant affirmative relief to a party in a cause submitted upon the pleadings, he must be entitled thereto from the facts therein stated. The question is not upon whom is the burden of proof, but who is to be accorded judgment upon the facts pleaded. *Boldt v. First Nat. Bank of West Point* 283

Evidence. Homestead.

15. Where there is a proceeding by creditors, to set aside an alleged fraudulent conveyance of real estate, and the answer sets up a homestead right without pleading value, and admits there was a consideration, and the reply admits the plea of homestead right as to a portion of the premises, evidence a to a homestead is admissible. *Idem.*

Petition Cured by Answer.

16. A defective or ambiguous petition may be aided, and its infirmity cured by the averment of the answer. *Beebe v. Latimer* 305

Pleading—*continued.*

Character of Action.

17. The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought. *Lett v. Hammond* 339

Reply. Construction.

18. A reply which refers in vague and general terms to the allegations of the answer should be construed as responding to the particular matters set forth in such answer. *Home Fire Ins. v. Johansen* 349

Confession and Avoidance.

19. A party, by pleading in avoidance of matter set forth in his adversary's pleading, concedes the truth of such matters in seeking to avoid their legal effect. *Idem.*

Sufficiency of Petition.

20. In an original suit to annul a judgment on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction. *Barr v. Post* 361

21. Where, in a suit on account, a copy of such account is attached to the petition; and where terms are used in the petition which clearly show the significance of the figures; and where the account, as shown by the copy, is admitted in the answer, an objection that the petition is defective will not avail. *Minzer v. Willman Mercantile Co* 410

Reply.

22. If, during the trial of an action, new matter pleaded in the answer is treated by the parties as denied or placed in issue, it will be so considered by this court, notwithstanding no reply was filed below. *Idem.*

23. Material averments in an answer, controverted by the reply, place the burden upon the defendant. *Pennsylvania Co. v. Kennard Glass & Paint Co* 435

Insurance Policy.

24. Where the insurer relies upon a stipulation in a policy to defeat a recovery, he must plead affirmatively a breach thereof as a defense. *Farmers & Merchants Ins. Co. v. Wiard* 451

Amendment.

25. It is not reversible error to refuse a request to amend a pleading, when the undisputed evidence would not sustain a verdict upon the amended pleading. *Schlageck v. Widhalm* 541

Identity of Issues.

26. On appeal to the district court a plaintiff is not required

Pleading—*continued.*

to state his cause of action in the same language in which it was pleaded in the court below. It is sufficient that the identity of the cause of action is preserved. *Citizens State Bank v. Pence* 579

General Denial. Ultra Vires.

27. The defense of *ultra vires* is not available under a general denial. *Idem.*

Answer After Demurrer.

28. The filing of an answer after a special demurrer to the petition is overruled, is a waiver of an exception to the decision of the court on the demurrer. *Idem.*

Answer.

29. A defense not pleaded can not be considered in the decision of the case. *World Mutual Benefit Ass'n v. Worthing* ... 587

Petition.

30. A petition which alleges that the defendant is indebted to the plaintiff for the sum mentioned, which is the reasonable value for work and labor done and performed for the defendant by the plaintiff, at its instance and request, through its foreman and engineer, states a cause of action. *Burwell Irrigation Co. v. Lashmett* 605

Estoppel.

31. Estoppel must be specially pleaded. *Idem.*

Legal Fiction.

32. It is not necessary to plead a legal fiction. *Ball v. Beaumont* 631

Facts Implied by Law.

33. It is not necessary to plead facts implied by law. *Idem.*

Implied Facts.

34. A plea of implied facts is not a departure. *Idem.*

Amendments.

35. Where a pleading has been amended by leave of court, it is error to exclude proof in support of its averments, on the ground that the amendment should not have been allowed. *Idem.*

Justification.

36. In an action for libel, where a plea of justification has been interposed, evidence of express malice is competent to disprove the defense of good faith in the publication. *Bee Publishing Co. v. World Publishing Co* 713

Defective.

37. A plea is defective if evidential facts instead of ultimate facts are alleged. *Idem.*

38. If the court and litigants treat a defective plea as sufficient, and proof is received on such theory, its infirmity may be cured by amendment. *Idem.*

Pleading—*concluded.*

39. An affirmative defense to an action upon a contract should be pleaded. *Denney v. Stout* 731

40. Petition for rescission of contract. *Alfree v. Grape* 777

Plea in Bar. See AUTREFOIS ACQUIT, 3, 4.

Pledge. See CONVERSION.

Police Power. See STATUTES, 10.

Pond. See MUNICIPAL CORPORATION, 1.

Presumption. See BONDS, 6, 7. CRIMINAL LAW, 2, 3. EVIDENCE, 30, 38, 51. REVIEW, 19.

Principal and Agent. See AUTHORITY OF ATTORNEY. BOND, 12, 17. CORPORATION, 1.

Sale of Corporate Property.

1. A sale of corporate assets, made by an agent in excess of his authority, will be, ordinarily, ratified by the acts of the corporation in dealing with the purchaser as the owner of the property. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

2. Notice to an agent is notice to his principal. *Farmers & Merchants Ins. Co. v. Wiard* 451

3. A principal must adopt the unauthorized contract of his agent as a whole, or not at all. *Citizens State Bank v. Pence* 579

4. Payment by a debtor of the principal of his note, before due, to an agent of the payee who has neither the possession of the note nor authority to collect it, is made at the risk of such debtor. *Walsh v. Peterson* 645

5. Authority to collect interest on a debt does not carry with it an implied agency to collect the principal of a debt before it is due. *Idem.*

6. Where the question of agency is in dispute, it is a question of mixed fact and law. *Idem.*

7. The authority of an agent to retail lumber carries with it no implied power to sign his principal's name to a bond. *Bullard v. DeGroff* 783

Unauthorized Act of Agent.

8. An agent of a material man can not, by an unauthorized act, waive his principal's right to a mechanic's lien. *Idem.*

9. In order that a ratification of the unauthorized act of an agent may be made efficacious, it must be made with full knowledge of the material fact, by one who has power to act in the first instance. *Idem.*

Property.

1. A mere hope of succession to an estate is not property. *Kocher v. Cornell* 315

Property—*concluded.*

2. A deed of assignment which purports to convey to the assignee all the assigning partnership's property, except such as is exempt from attachment or execution, is valid, and transfers the title to all the firm property to the assignee. *Miller v. Waite* 319
3. The volume of business transacted by an insurance company is not property. *State v. Poynter* 417

Public Policy. See INJUNCTION, 1.

Question. See WITNESS, 5.

Quia Timet.

In an action *quia timet*, where the only issue was the validity of a deed under which defendant asserted title, a decree in favor of the plaintiff will not preclude the defendant from afterwards asserting an equitable lien for money paid by him in discharging a valid mortgage on the property. *Upton v. Betts* 724

Railroad Companies. See INSURANCE, 8.

Ratification. See PRINCIPAL AND AGENT, 1, 9.

A principal will not be permitted to accept and confirm so much of a contract as is beneficial to him, and reject the remainder. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

Receiver.

Application. Verification. Waiver.

1. The application or petition for a receiver should be verified by the applicant; but verification is not essential to jurisdiction, and the verification may be waived. *Farmers & Merchants Nat. Bank of Holstein v. German Nat. Bank of Lincoln* 229

Notice.

2. Notice of an application for the appointment of a receiver is required to be given at least five days before the proposed hearing. The party adverse to the application may waive the statutory notice, and will be held to have done so when he has appeared and resisted the application entirely upon other grounds. *Idem.*
3. When proper notice has been given, or the parties interested have voluntarily appeared, the court may appoint as receiver a suitable person other than the one proposed or named by the plaintiff or applicant, without the giving of formal notice of such proposed action to the parties. *Idem.*

Res Adjudicata.

4. An order appointing a receiver constitutes an adjudication of insolvency. If no appeal is taken from such order, the same is forever conclusive upon that question against the insolvent. *State v. German Savings Bank* 292

Receiver—*concluded.*

5. For facts as to a certain receiver's sale, see *State v. Holmes*, 503

Receiving Stolen Cattle. See LARCENY.

Recognizance.

A recognizance in a bastardy proceeding was conditioned that the accused "shall be and appear before the district court on the first day of the next term thereof and appear thereat from day to day to abide the order of the court." The term "order" in such condition does not include an order of continuance over the term. *State v. Murdock*.... 521

Record. See EVIDENCE, 35. MORTGAGE, 2. NOTICE, 7. REVIEW, 19, 25. TROVER, 4.

The verity of an official record is presumed. *Paxton v. State*.. 460

Relatives. See FRAUDULENT CONVEYANCE, 2.

Release.

Mortgage.

The release of a mortgage by one who is not the owner of the debt, although possessed of apparent authority to enter satisfaction, is ineffective except as to those who deal with the property relying in good faith upon such release. *Whitney v. Lowe*..... 87

Religious Society.

Liability of member of ———. See DEBT.

Remedy.

——— of purchaser at partition sale. When, after real estate has been sold under a decree in partition, the purchase-money has been paid into court, but before the delivery of the deed one of the parties to the suit injures or removes fixtures which passed by the sale, the purchaser may have the same rescinded, or, at his election, the court may, in the partition suit, award him compensation for damages sustained, out of the share of the purchase-money in its hands belonging to the transgressing party. *Oliver v. Lansing* 219

Remittitur. See DAMAGES, 9.

Rent.

Mortgagor's Right.

1. A mortgagor by virtue of his right of possession has a proprietary interest in the rents and profits. *Clark v. Missouri, Kansas & Texas Trust Co*..... 53

Purchaser's Right.

2. The sale of the mortgagor's interest in the subject of the mortgage, under a foreclosure of the same, conveys to the purchaser, after confirmation, a proprietary interest in the rents and profits. *Idem.*

Replevin. See JUDGMENT, 4, 9. VERDICT, 2.

1. In a replevin action the plaintiff is entitled to a verdict

Replevin—*concluded.*

and a judgment for the property, or the value thereof, at the commencement of the suit. *Heidiman-Benoist Saddlery Co. v. Schott* 20

2. Plaintiff can not recover for property which was not in the defendant's possession or under his control, at the beginning of the suit. *Idem.*

3. A plaintiff in replevin can not satisfy a judgment against him for a return of the property by offering to return other property of a like kind and value, but must return, or offer to do so, the identical property replevied. *Richardson Drug Co. v. Teasdall* 150

4. Jurisdiction of justice of the peace. See JUSTICE OF THE PEACE.

5. ———, judgment in. See JUDGMENT, 6.

Bond. Surety. Essence of Contract.

6. The essence of a contract entered into by a surety in behalf of a plaintiff in an action of replevin is that he will satisfy the judgment which the law requires to be rendered, in case the findings of the trial court are in favor of the defendant. *Selby v. McQuillan* 158
See, also, JUDGMENT, 8.

7. Amount of damages assessed, and for which judgment was rendered, *held* excessive and not warranted by the evidence. *Karbach v. Clark* 201

8. When a defendant in replevin denies plaintiff's title and right of possession of the property, and pleads a right of possession thereof in himself, and prays a return of the property, proof of demand before bringing of action is unnecessary. *Herman v. Kneipp* 208

Plaintiff's Title.

9. A plaintiff in replevin must recover, if at all, on the strength of his own title or right of possession. *Idem.*

10. In an action of replevin, there can be no recovery for damages sustained by plaintiff for property of which the defendant had not possession or control when the action was begun. *Burr v. McCallum* 326

11. Verdict as to property taken under writ, and as to property not taken. *Idem.*

Res Adjudicata. See GARNISHMENT, 8. RECEIVER, 4.

1. The determination of questions presented to this court, in an appellate proceeding, becomes the law of the case, and, ordinarily, will not be re-examined when the cause is again brought up for review. *Hayden v. Frederickson* 141
Richardson Drug Co. v. Teasdall 150
Wittenberg v. Mollyneaux 203
Home Fire Ins. Co. v. Johansen 349

Res Adjudicata—*concluded.*

Todd v. Houghton 538
Leavitt v. Bell 595
See, also, REVIEW, 34.

2. A matter in issue covered, either generally or specifically, by the decree of the court can not be again litigated without a modification or vacation of that decree. *Upton v. Betts* 724

3. A judgment is binding only between the parties to the action in which it was rendered. *Nebraska Telephone Co. v. Cornell* 737

Rescission of Contract. See CONTRACT, 9. PLEADING, 40. SALE, 3.

Reversal.

Where a cause has been reversed upon a proceeding in error from the county court to the district court, and retained for trial, and a different result had upon a trial *de novo*, the judgment will not be erroneous as a reversal of the sustaining of the petition in error. *Knight v. Finney* 274

Review. See DEFAULT. DEFECT OF PARTIES. FINDINGS. INSTRUCTIONS, 12. NEW TRIAL. STATUTE OF LIMITATIONS, 7. VARIANCE.

1. The finding of a trial court or the verdict or special findings of a jury based on substantially conflicting evidence, will not be disturbed. *Interstate Savings & Loan Ass'n v. Strine* 27
Van Housen v. Broehl 48
Sturtevant v. Bohn Sash & Door Co 82
Norfolk Beet Sugar Co. v. Hight 100
Woodworth v. Hascall 124
Omaha Loan & Trust Co. v. Fitzpatrick 303
Nebraska Savings & Exchange Bank v. Brewster 535
Todd v. Houghton 538
Orcutt v. Polsley 575
World Mutual Benefit Ass'n v. Worthing 587
Merrifield v. Farmers Nat. Bank 602
Burwell Irrigation Co. v. Lashmett 605
Elkhorn Valley Lodge v. Hudson 672
Denney v. Stout 731

Appeal.

2. An appeal in equity does not present for review rulings made during the progress of the trial. *Zimmerman v. Zimmerman* 80
Orr v. Bailey 128

Question Not Litigated Below.

3. A question not litigated in the court below will not ordinarily be considered by this court. *Arlington State Bank v. Paulsen* 94

Review—*continued.*

Brief.

4. When the appellant fails to file a brief in this court, the judgment will be affirmed. *Edney v. Baum* 147

5. Harmless error. See JUDGMENT, 4. VERDICT, 2.

Plea in Bar.

6. Where a court entertains and considers the merits of a plea in bar, without a formal withdrawal of the plea of "not guilty," it is, at most, a mere irregularity, and the action of the court thereon may be the subject of review. *George v. State* 163

7. In such case the plea of "not guilty" will be considered as constructively withdrawn. *Idem.*

Petition in Error. Jurisdiction.

8. This court has no jurisdiction of an action, purely legal in its nature, in which no petition in error has been seasonably filed. *Cary v. Kearney Nat. Bank* 169

Question First Raised Here.

9. A question raised for the first time in this court will not be considered, except it be of a jurisdictional character. *Bankers Life Ins. Co. v. Robbins* 170

10. Former appeal. See RES ADJUDICATA, 1.

Instructions.

11. Error in giving an instruction that fails to fully or definitely state the issues in a case is not available unless the complainant prepared and requested a full charge upon the point. *Wittenberg v. Mollyneaux* 203

Proceedings Below after Remanding of the Cause.

12. When a cause is remanded by this court with directions as to further proceedings, the court below has no power to do anything but carry out the directions thus given it. *Farmers & Merchants Bank of Holstein v. German Nat. Bank of Lincoln* 229

Assignment.

13. Alleged errors must be specifically assigned in a petition in error, or they will not be reviewed. *Bennett v. McDonald* 234

14. An assignment in a petition in error that the court erred in sustaining an objection to a question of a certain number, found on a page of a designated number, is sufficiently specific. *Idem.*

Harmless Error.

15. Error which is not prejudicial to the party complaining, will not work a reversal. *Van Housen v. Broehl* 48
Davidson v. Gretna State Bank 63

Assignment.

16. An assignment in a petition in error that "the court erred

Review—*continued.*

in overruling the objections of plaintiff in error to each of the following questions," giving the number of the question and the page of the record where found, is sufficiently specific to entitle the party to have the same reviewed. *Bennett v. McDonald*..... 234

Joint Assignments.

17. Joint assignments of error in a petition not good as to all who join, must be overruled. *American Bank of Beatrice v. Hand*..... 273

Transcript.

18. A proceeding in error will be dismissed where a copy of the final judgment included in the transcript is not authenticated by the certificate of the clerk of the trial court. *Burr v. Henry*..... 301

Record. Presumption.

19. Error will not be presumed, but must be affirmatively revealed by the record. *First Nat. Bank of Broken Bow v. Stockham* 304

Verdict. Court Not Triers of Fact.

20. A verdict, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached. *German-American Bank of Milwaukee v. Stickle*..... 321

Attention of Trial Court Should be Challenged.

21. Rulings of the trial court in the admission or rejection of testimony are not reviewable in the appellate court, where the attention of the trial court was not challenged thereto in the motion for a new trial. *Humpert v. McGavock*..... 346

Instructions.

22. Instructions, to which no exceptions were taken at the time they were given to the jury, are not reviewable in this court. *Idem.*

Assignments.

23. This court will not review the evidence to ascertain whether it is sufficient to support the verdict when the question is not raised by the assignments contained in the petition in error. *Idem.*

24. Assignments of error not argued at the bar or in the briefs filed, are waived. *Idem.*

Record.

25. Where all the evidence given on a former trial is not contained in the record under review, the court can not determine whether the judgment rendered on such trial was the result of false testimony. *Barr v. Post*..... 361

Bill of Exceptions.

26. If the bill of exceptions in a cause has been quashed, questions, the decision of which necessarily call for an

Review—*continued.*

examination of the evidence, can not be considered. *McGraw v. Chicago, R. I. & P. R. Co*..... 397

27. An assignment of error that the verdict is contrary to an instruction, if not presented by the motion for a new trial, is not available on error to this court. *Palmer v. First Bank of Ulysses*..... 412

Failure to Object.

28. Alleged errors in the admission of testimony can not prevail if, during the trial, there was no objection made to the introduction of said testimony. *Idem.*

Assignments.

29. An assignment of error of the trial court in refusing to strike out testimony should specifically designate the portion of the record to which it is sought to challenge attention. *Idem.*

Parol Testimony as to Written Instruments.

30. Where one party gives oral testimony in detail as to the contents of a letter, it is not prejudicial error when the other party gives like testimony. *Idem.*

Parties.

31. A judgment can not be reviewed by one not a party thereto, or who is not affected thereby. *Pennsylvania Co. v. Kennard Glass & Paint Co*..... 435

Instructions.

32. Neither the giving of a technically erroneous instruction nor the refusal of one technically correct will reverse a judgment, where the error is not prejudicial. *Idem.*

33. In reviewing a judgment rendered on a verdict, given in obedience to a peremptory instruction, it is the duty of the reviewing court to assume the existence of every material fact which the evidence of the complaining party establishes or tends to prove. *Paxton v. State*..... 460

Former Hearing.

34. The points of law decided on a former appeal ordinarily can not be reviewed on a subsequent appeal. *Home Fire Ins. Co. v. Johansen*..... 349
Nebraska Savings & Exchange Bank v. Brewster..... 535
Todd v. Houghton..... 538

35. Sufficient evidence. *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*..... 348
Nebraska Savings & Exchange Bank v. Brewster..... 535
Todd v. Houghton..... 538
Thompson v. LaRue..... 614

Misconduct of Counsel.

36. Comment by counsel on anything outside the record is not a matter for review, if made in reply to opposing counsel. *Nebraska Savings & Exchange Bank v. Brewster*.... 535

Review—*continued.*

37. Questions raised for the first time in this court will not be examined. *Bankers Life Ins. Co. v. Robbins*..... 170
Miller v. Neely..... 539

Assignment.

38. Errors not assigned in the petition in error will not be reviewed. *Schlageck v. Widhalm*..... 541

Sufficiency of Pleading. Transcript.

39. An assignment of error predicated upon the insufficiency of a petition will not be considered upon review, unless a copy of the proceeding is included in the transcript. *Western Seed & Irrigation Co. v. Morton*..... 579

40. An assignment of error directed against a group of instructions will be considered no further than to ascertain that one of the instructions complained of, was properly given. *World Mutual Benefit Ass'n v. Worthing*..... 587

41. An assignment of error that the district court erred in refusing to admit the evidence of a certain witness will be overruled, if the record shows that a portion of the evidence was omitted. *Idem.*

42. An instruction to the effect that a waiver of provisions contained in a written instrument must be proved by evidence which is clear and unequivocal, is erroneous. *McCord-Brady Co. v. Moneyhan*..... 593

Error in Computation.

43. Where a decree brought here for review is found to be erroneously computed, the mistake will be corrected here, or the cause will be remanded with directions to the trial court to render the proper judgment. *Leavitt v. Bell*..... 595

44. On the hearing of a motion to dissolve an attachment, error can not be predicated on the admission of improper evidence. *Merrifield v. Farmers Nat. Bank*..... 602

45. In reviewing the ruling of a trial court on a motion to dissolve an attachment, this court will not reverse the decision, unless it is against the clear weight of the evidence. *Idem.*

Assignment.

46. A joint assignment in a petition in error made by two or more persons, which is not well taken as to all, will be overruled as to all. *Moseman v. State*..... 629

47. Errors which have not been specifically assigned will not be considered. *Baer v. State*..... 655

48. Error can not be predicated upon an instruction in regard to the computation of interest, unless exception is taken at the time. *Elkhorn Valley Lodge v. Hudson*..... 672

49. A motion for a new trial is not essential to a review of a decision of the district court affirming a cause taken to that court by proceedings in error. *Biart v. Myers*..... 711

Review—*concluded.*

Cross-Assignments. New Parties.

50. When a defendant in error has filed a cross-assignment of errors without bringing in new parties, he is thereby precluded from urging the dismissal of the petition in error of his adversary, on the ground of defect of parties. *Idem.*

Misconduct of Counsel.

51. Where there is reason to believe that the jury may have been influenced in any degree in favor of the prevailing party by the misconduct of his counsel in arguing the cause, the verdict should be set aside, and a new trial awarded; otherwise, where it is not prejudicial. *Ashland Land & Live-Stock Co. v. May* 735

52. If the trial court has reached a correct conclusion, its judgment will not be disturbed, notwithstanding its reasons stated may be faulty. *State v. Dickinson* 753

53. Proper meaning of "appeal." *Mauck v. Brown* 382

54. Misleading instructions, foreign to the issue, are prejudicial error. *Alfree v. Grape* 777

55. One not prejudiced by a judgment can not obtain a review thereof. *Sturtevant v. Bohn* 82

Right of Action. See BOND, 4. TIME.

A passenger on a railroad train has a right of action for personal injuries, unless the same are caused by his own criminal negligence, or by his violation of an express rule of the carrier, of which he had notice. *Chicago, R. I. & P. R. Co. v. Zernecke* 689
Chicago, R. I. & P. R. R. Co. v. Eaton 698

Right of Parties. See GARNISHMENT, 4. INVENTORY.

Risks of Employment. See INFANTS, 1. MASTER AND SERVANT, 6.

Road Tax. See TAXATION, 1-5.

Rules of Trial Court. See JUDICIAL COGNIZANCE.

Sale.

Corporate Property.

1. ——— of corporate property and disposition of proceeds, distinct acts. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

2. A married woman who joined with her husband in a contract of sale has by her acts acquiesced in the payment of the consideration to him. *Downing v. Lewis* 38

Fraud. Rescission.

3. A vendor of property who was induced to deliver possession thereof to the vendee by or through the fraudulent representations of the latter may, at his election, ratify the sale and recover the consideration, by action on the

Sale—*concluded.*

contract or the account, or may rescind the contract, and reclaim the article or articles sold. But he shall not pursue both remedies. *First Nat. Bank of Chadron v. Tootle*.... 44

4. Where personal property is in possession of the buyer at the time of the sale, and no other place of delivery is specified, no formal delivery is necessary to maintain an action for the purchase price. *Hayden v. Frederickson*..... 141
See, also, INVENTORY.

5. A stipulation in a conditional sale of merchandise, against depleting the stock while any portion of the purchase money remains unpaid, does not authorize the vendee to purchase new goods on the credit of the vendor. *Richardson Drug Co. v. Raymond Bros*..... 157

6. Private ———. See CHATTEL MORTGAGE, 6.

7. Partition ———. See REMEDY.

Judicial.

8. The appraisement of property for judicial sales, as being too low, can be assailed only for fraud. *Omaha Loan & Trust Co. v. Fitzpatrick*..... 303

9. Conditional ———. See *Baker v. Priebe*..... 597

Future Delivery.

10. A valid contract of sale for future delivery of a thing not in the possession of the seller, may be enforced. *Rogers v. Marriott* 759

School. See SCHOOL DISTRICT.

School District. See CONTRACT, 1. MANDAMUS, 2.

Schoolhouse. Special Meeting.

A school district which does not own a schoolhouse may, at a special meeting duly called, select a building in which to hold school, and direct its board to lease the building selected. *Krull v. State*..... 97

Schoolhouse. See SCHOOL DISTRICT.

Scope of Employment. See MASTER AND SERVANT, 1. NEGLIGENCE, 1.

Seal. See LIEN, 3.

Service. See SUMMONS.

Service.

After service of summons, in a personal action in the county where commenced, upon a party who by the pleading filed is a real defendant, summons may properly be issued to any other county of the state for service upon other defendants. *McCormick Harvesting Machine Co. v. Cummins* 330

Special Finding. See JUDGMENT, 15. REVIEW, 1.

Special Legislation. See CONSTITUTIONAL LAW, 2, 10, 11, 12. STATUTES, 3.

State and State Officers. See BOND.

Governor.

1. The governor is a part of the law-making power. *Weis v. Ashley* 494

2. No officer can so act as to ratify an unconstitutional act. *State v. Home Ins. Co* 524

Treasurer.

3. An appropriation authorizing the state treasurer to reimburse the sinking fund from the general fund is a mandate to make an entry in his book of such transfer. But such act does not authorize the issuance of a warrant evidencing a debit to him as an individual; and, being a trustee, he has no salable interest in such warrant. *State v. Omaha Nat. Bank* 483

4. The state treasurer is without authority to pay any part of the public money to one claiming to be the owner, by purchase of a warrant drawn on the general fund "to reimburse the sinking fund." *Idem.*

Auditor.

5. The payment of fees to the auditor and their reception by him are absolutely prohibited by statute and a former decision by this court. *State v. Home Ins. Co* 524

6. Money paid to the auditor as fees does not belong to the state. *Idem.*

7. An insurance company, having the benefit of the certificate issued by the auditor, owes the state for the same, notwithstanding the amount of such fees has been paid to the auditor. *Idem.*

8. An auditor who collects fees which the constitution forbids him to take, does not act as the agent of the state. *Idem.*

9. A suit commenced through a misconception of the law does not bind the state under the doctrine of election of remedies. *Idem.*

10. A state can only act through its officers; and they can only act as authorized and empowered by law. *Idem.*

11. The act of 1887 (Session Laws, ch. 60), creating the board of transportation and defining its powers, is not in conflict with sec. 26, art. 5, of the constitution, which forbids the legislature to create any executive state office, nor is it in conflict with sec. 2, art. 5, of the constitution, which declares that no executive state officer shall be eligible to any other state office. *Nebraska Telephone Co. v. Cornell* 737

State Warrants. See TROVER, 12.

Whether the recitals on the face of a state warrant impute notice to a person handling the same, is a question for the jury. *State v. Omaha Nat. Bank* 483

Statute of Frauds.

1. A contract for the sale of lands is void unless the contract, or some note or memorandum thereof, is in writing, signed by the owner, or his agent authorized in writing. *Soward v. Moss* 71
2. Case reported in 54 Nebr., 548 affirmed. *Home Fire Ins. Co. v. Johansen* 349
3. Where a promise to answer for the debt of another is an independent contract, founded upon a consideration between the parties, it is not within the statute of frauds. *Swayne v. Hill* 652
4. Former hearing sustained. *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha* 348

Statute of Limitations.

Amended Pleadings.

1. ——— does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Norfolk Beet-Sugar Co. v. Hight* 100

Revivor of Judgment.

2. The general law as to limitation of actions, does not apply to proceedings to revive dormant judgments. *Bankers Life Ins. Co. v. Robbins* 170

Revivor of Action.

3. The limitation as to the time within which steps must be taken to revive an action in the name of representatives of a deceased person does not apply to the revival of dormant judgments. *Idem.*

Time.

4. The statute of limitations begins to run against the assignee of a judgment in favor of the state, from the time of the assignment. *Predohl v. O'Sullivan* 311

Waiver.

5. The defense of the statue of limitations is waived if not pleaded. *McCormick Harvesting Machine Co. v. Cummins* 330

Letter. Renewal of Right of Action.

6. A letter in which a surety on a note states to the payee that he is informed that the note, describing it, is not paid, and asks the payee to collect the money due upon it, and declares that he "will not longer be held good for the note," in case it be not promptly collected, is a sufficient acknowledgment of the indebtedness to arrest the running of the statute of limitations. *Harms v. Freytag* ... 359

Statute of Limitations—*concluded.*

Foreclosure.

7. This court can not review a decree of foreclosure when the same was rendered more than two years prior to the perfecting of the appeal. *Cox v. Parrotte*..... 701

Statutes. See CONSTITUTIONAL LAW. EVIDENCE, 10, 30, 41. STATUTE OF LIMITATIONS.

1. ———, uniformity of operation. *State v. Farmers & Merchants Irrigation Co.* 1
2. The enrolled bill, authenticated by the proper officers of the house, approved by the governor and filed with the secretary of state, together with the journals of the house and senate are the official records of the proceedings of the legislature relative to the enactment of a law; and they are the only competent evidence in a controversy with regard to the due passage of a bill, or in respect to alleged material errors in its substance. *State v. Abbott*.. 106
3. A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation. *State v. Farmers & Merchants Irrigation Co*..... 1
4. The so-called "Maximum Rate Law" of 1893, or so much thereof as enacted the schedule of rates, was declared unconstitutional under the then existing conditions, by the supreme court of the United States. The schedule carried with it section 6 of the act. *Pacific Express Co. v. Cornell*.. 364
5. The act of 1897 (Session Laws, p. 303, ch. 56) is not amendatory of the act of 1887. *Idem.*
6. Chapter 14, Session Laws of 1885, is void as amendatory legislation not covered by the title of the original act. *Webster v. City of Hastings*..... 563
7. A statute requiring notice to be given to a city of the time, place and cause of a personal injury, should receive a liberal construction. *City of Lincoln v. Pirner*..... 634
8. The provisions of sec. 4, art. 1, ch. 89, Comp. Stats., relating to drainage of swamp lands, must be strictly complied with. *Casey v. County of Burt*..... 624

Saving Clause.

9. In the absence of a saving clause, the repeal of a statute will not effect a pending action founded thereon. *Thompson v. West*..... 677
10. A statute making carriers liable for injuries to passengers, in the absence of negligence, is within the police power of the state. *Chicago, R. I. & P. R. Co. v. Zernecke*.. 689
    Chicago, R. I. & P. R. Co. v. Eaton..... 698
11. No conflict of ———. See 4th syllabus. *Chicago, R. I. & P. R. Co. v. Zernecke*..... 689

Statutes—*concluded.*

Lord Campbell's Act.

12. Under ch. 21, Comp. Stats. [taken from English Statute 9 and 10 Vic., 1846], a right of action for personal injuries is given to the widow and next of kin of the deceased, where the injured person could have maintained an action had he survived. *Idem.*

In Pari Materia.

13. All statutes *in pari materia* must be taken together and construed as though they were one enactment. *Idem.*

Statutes, Invalid Portions. See CONSTITUTIONAL LAW, 2-4.

Stockholder.

——— may maintain action for accounting and contribution. See CONTRIBUTION.

Strangers to Record. See RES ADJUDICATA, 3.

Subsequently Acquired Property. See MARRIED WOMAN, 6.

Subsequent Purchase. See JUDGMENT, 12. LIEN

1. Where a judgment debtor purchases and subsequently sells certain real estate after the rendition of the judgment against him, his vendee, taking the property with actual or constructive notice, holds it charged with the judgment lien. *Lessert v. Sieberling* 309
2. Permanent improvements erected upon such property which partake of the character of realty, whether constructed by the judgment debtor or his grantees, are bound for the satisfaction of the judgment lien. *Idem.*

Summons. See SERVICE.

1. A summons in which an erroneous return day is inserted is irregular, but not void. *Ley v. Pilger* 561
2. In such a case, the remedy is a motion to quash the writ. *Idem.*

Indorsement. Deficiency Judgment.

3. In a foreclosure of mortgage it is not necessary, for the recovery of a deficiency judgment, to indorse upon the summons the amount of plaintiff's claim. *Orcutt v. Polsley* 575
4. A summons served constructively on a resident of the state, who has neither absconded nor concealed himself with intent to defraud creditors, or to avoid the service of process, does not confer jurisdiction over the person of the defendant, nor justify the rendition of a judgment condemning his property. *Wood Harvester Co. v. Dobry* ... 590
5. The summons issued by a county court for service upon a defendant resident in a county other than the one in which the action is commenced, may properly be directed to the sheriff or any constable of that county. *McCormick Harvesting Machine Co. v. Cummins* 330

Summons—*concluded.*

6. The summons so issued is not void, because the names of all the defendants in the action do not appear therein. *Idem.*

Sunday. See LEGAL HOLIDAY.

Surety.

Liability of ———. See REPLEVIN, 6. TROVER, 7.

Taxation. CONSTITUTIONAL LAW, 9-12.

Road.

1. By sec. 77, art. 1, ch. 77, Comp. Stats., 1899, the power conferred on the board of county commissioners to levy a road tax is limited to the levy of such tax for county purposes. *Libby v. State* 264
2. The money raised by the levy of such tax for county purposes belongs to the county road fund, to be expended under the direction of the county authorities, unless otherwise provided by statute. *Idem.*
3. Sec. 84, art. 1, ch. 14, Comp. Stats., 1899, which provides that the county treasurer "shall pay over, on demand, to the treasurer of any city or village, all money received by him arising from taxes levied belonging to such city or village," is not applicable to moneys arising from the levy of road tax on property situate within the corporate limits of such city or village. *Idem.*
4. Incorporated municipalities are road districts within the meaning of section 76 of the road law (Compiled Statutes, 1899, ch. 78), and as such are, except where otherwise provided, entitled to one-half the moneys arising from the road tax levied by the county commissioners upon the property situate within their limits. *Idem.*
5. Where it appears that a city of the second class, having less than five thousand inhabitants, has received from the treasurer of the county one-half the moneys collected on the county levy of the road tax on property situate within the limits of such city, an action of mandamus will not lie, on the relation of such city, to compel such county treasurer to pay over the remainder of the moneys so collected. *Idem.*

Property Used for Religious Purposes.

6. Property used directly, immediately and exclusively for religious purposes is exempt from taxation, without regard to the question of absolute ownership. *Scott v. Society of Russian Israelites* 571

Interest. Lien.

7. Interest due on delinquent taxes constitutes part of lien. *Leavitt v. Bell* 595
8. A tax levied under void proceedings is unenforceable. *Casey v. County of Burt* 624

Telephone. See BOARD OF TRANSPORTATION.

Tender.

In Court.

1. Bringing money into court is the act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty. *Dirks v. Juel*..... 353
2. The clerk of the court is the proper custodian of money paid into court pursuant to an order or judgment. *Idem.*
3. Money paid to the clerk of the district court by referees in partition proceedings, in obedience to an order directing the money to be brought into court, is received by such clerk in his official capacity. *Idem.*

Testimony, False. See PERJURY. WITNESS, 1.

Time. See APPEAL, 5. STATUTE OF LIMITATIONS.

The time of a stipulation was fixed by its terms at two years. In this action, commenced prior to the expiration of the full time, there could be no recovery of damages for breaches of the agreement which occurred subsequent to the institution of the suit. *Wittenberg v. Mollyneaux*..... 203

Title. See ADVERSE POSSESSION. EVIDENCE, 2.

Transcript. See APPEAL, 1. JURISDICTION, 4. MOTION, 6.

Transfer. See BANK CHECK.

Trial.

A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention. *Barr v. Post*..... 361

Trover.

Sale of Pledge.

1. A sale of a pledge by a pledgee without notice to the pledgor to redeem, in the absence of stipulation for such a sale, constitutes its conversion. *Woodworth v. Hascall*.. 124
See also, DAMAGES.

Lienor's Right Against Owner.

2. A lienor in possession may maintain an action for conversion of chattels against the owner who has wrongfully dispossessed him. *Beebe v. Latimer*..... 305

Assignee for Benefit of Creditors.

3. An assignee, for the benefit of creditors, to whom possession of the trust property has been delivered, may maintain an action for conversion against one who wrongfully seizes such property. *Miller v. Waite*..... 319
4. Such right is not divested by the mere failure to file the deed of assignment for record within twenty-four hours after its delivery. *Idem.*

Trust Fund.

5. A trustee who deposits trust funds in a bank to his private

Trover—*concluded.*

account is, in the absence of special authority so to do, guilty of conversion. *Dirks v. Juel*..... 353

Remedy.

6. In case a trustee has converted trust funds, the *cestui que trust* may either pursue the fund or sue for the conversion. *Idem.*

Surety. Liability.

7. The surety upon the bond of a clerk of the district court is liable for the tortuous act of his principal in conversion of the trust funds. *Idem.*

Tort-Feasors Jointly and Severally Liable

8. Where two or more persons have converted the property of another, the latter may sue them, either jointly or severally, as he may elect; and a court of equity will not require the injured party to pursue one of the wrongdoers rather than another. *Paxton v. State*..... 460

Definition.

9. Every act of dominion over property, without the owner's authority, is a conversion. *State v. Omaha Nat. Bank*..... 483

Subject.

10. ——— may be maintained for every species of personal property which is the subject of private ownership. *Idem.*

Money. Negotiable Paper.

11. ——— does not lie to recover money or negotiable instruments in the hands of a *bona fide* holder. *Idem.*

State Warrant.

12. The purchase of a state warrant by the state treasurer (as an individual) with public money, from a person claiming to be the owner, is conversion. *Idem.*

13. The receiving of such money by a person who knows to whom the money or negotiable paper belongs, is likewise a conversion. *Idem.*

Bailee.

14. A bailee who fails, or refuses, to surrender trust property to the owner in accordance with the express or implied terms of the bailment is liable in an action for conversion, unless he can show a prior lawful seizure of the property under judicial process against the owner, or some other legal and valid excuse. *Wood Harvester Co. v. Dobry*..... 590

Trusts.

A trustee of an express trust is entitled to enforce the same, for the beneficiary, according to the terms thereof. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings* 7

Ultra Vires. See CORPORATION, 4. PLEADING, 27.

1. A religious corporation has no power to acquire or hold property for the purpose of speculation. *Thompson v. West* 677

Ultra Vires—*concluded.*

Canvassing Board.

2. A county canvassing board has no authority to find and declare the total vote polled at an election; and a finding in that respect made by it, will be rejected as surplusage. *State v. Clark* 702

Undertaking. See APPEAL, 4, 5.

Usury.

1. The defense of usury is personal to the borrower, his sureties and privies. It is not available to the purchaser of an equity of redemption. *Building & Loan Ass'n of Dakota v. Walker* 456

2. A foreign building and loan association is subject to the penalties of the statute against usury. *Interstate Savings & Loan Ass'n v. Strine* 27
Building & Loan Ass'n of Dakota v. Bilan 458

3. The defense of usury is of no avail to a purchaser of the equity of redemption, who has assumed and agreed to pay the mortgage debt. *Building & Loan Ass'n of Dakota v. Bilan* 458

Vacation.

——— of judgment. See JUDGMENT, 2. PERJURY.

Variance.

Variances between allegation and proof which are immaterial or are not prejudicial, do not call for a reversal of a judgment. *Knight v. Finney* 274

Vendor. See STATUTE OF FRAUDS.

Verdict. See FINDINGS. JUDGMENT, 15.

Upon Two Pleas.

1. Where, of two pleas in an answer, one is sufficient and the other is not, a verdict for the defendant will be sustained, if there is sufficient evidence in the record to sustain it under the plea *held* to be good. *Van Housen v. Brochl* 48

Replevin.

2. Where a verdict in replevin is for the defendant as to a portion of property, the omission to describe therein the portion which the defendant is entitled to have returned, is error without prejudice, when it is disclosed that all the property seized under the replevin writ has been destroyed by fire. *Richardson Drug Co. v. Teasdall* ... 150

3. ——— in replevin. See REPLEVIN, 1, 11.

4. ——— not sustained by evidence. See MASTER AND SERVANT, 7.

Description in Petition Made Part.

5. A verdict which refers to a description of real estate in

Verdict—*concluded.*

the plaintiff's petition, and makes such description a part of the verdict is not for that reason defective. *Cervena v. Thurston* 343

Form.

6. Objections to the form of a verdict must be made at the time of its rendition to be available in the appellate court. *Idem.*

Directing.

7. Where the evidence is neither conflicting nor contradictory, and but one conclusion can be reached, it is proper to direct a verdict. *Rogers v. Marriott* 759

Verification. See JURISDICTION, 3. RECEIVER, 1.

Voluntary Assignment. See PARTNERSHIP PROPERTY.

A chattel mortgage given by a debtor to several creditors, who by the terms of the instrument are to prorate in the proceeds of the mortgaged property, is not a voluntary assignment under the statute. *Skinner v. First Nat. Bank* .. 17

Wagering Contract.

The true test of a wagering contract of sale as being against public policy, is: was there in the minds of either party to the transaction an intention in good faith to secure an actual transfer and delivery of the thing to be sold. *Rogers v. Marriott* 759

Waiver. See APPRAISEMENT, 2. BOND, 23. INVENTORY. STATUTE OF LIMITATIONS, 5.

1. ——— of verification. See RECEIVER, 1.
2. ——— of notice. See RECEIVER, 2.

Motion to Elect.

3. Where an amended answer presents inconsistent defenses, the appropriate remedy is to require defendant to elect upon which defense he will proceed. If there be no motion to require an election, the objection that inconsistent defenses are presented will be waived. *Dunn v. Bozarth* .. 244
4. A trial upon the merits is a waiver of a defect of parties. *Bower v. Cassels* 620
5. Points not argued in this court will be deemed to be waived. *Mandell v. Weldin* 699

Warning of Danger. See INFANTS, 2.

Will.

A will executed by a single woman is revoked by her subsequent marriage at least to the extent it would operate to exclude her husband from his right as tenant by curtesy. *Vandeveer v. Higgins* 333

Withdrawal of Issue. See INSTRUCTIONS, 3.

Witness. See EVIDENCE.

Impeachment.

1. A witness may be impeached by showing that he made statements out of court contrary to those made in court, in regard to some matters relevant to the issue. *Zimmerman v. Kearney County Bank* 23
2. Unless made by a party of record, against his interest, such declarations are not substantive evidence. *Idem.*
3. Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness. *Idem.*
4. To lay the foundation for such testimony of the witness his attention should be directed, with reasonable certainty, to the time, place and circumstances of making the declarations, so that he may refresh his recollection and reconcile, if he can, his declarations with his evidence. *Idem.*
5. Questions propounded to a witness must not assume the existence of a fact not proven in the cause. *Bennett v. McDonald* 234

Words and Phrases.

1. "Appeal." *Mauck v. Brown* 382
2. "Bringing money into court." *Dierks v. Juel* 353
3. "Character" of certain liens. *Orcutt v. Polsley* 575
4. "Fixtures." *Oliver v. Lansing* 219
5. "Head of family." *Chamberlain Banking House v. Zutavern* .. 623
6. "Manner." *Bankers Life Ins. Co. v. Robbins* 170
7. "Negligence." *McGraw v. Chicago, R. I. & P. R. Co* 397
8. "Order." *State v. Murdock* 521
9. "Road districts." *Libby v. State* 264
10. "Sureties." *Gyger v. Courtney* 555
11. "Vacated road." *Krueger v. Jenkins* 641
12. "Wagering contract." *Rogers v. Marriott* 759

Written Instrument. See EVIDENCE, 8.