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EDWARD JEROME V. STATE OF NEBRASKA.

FILED MARCH 6, 1901. No. 11,702.

1. **Malicious Shooting:** MOTIVE: EVIDENCE. On the trial of a person charged with the crime of maliciously shooting with intent to kill and wound it is not error to permit the state to show that the motive for the act was robbery.
2. **Hypothesis Implying Defendant's Guilt:** EVIDENCE. On the trial of a criminal case every hypothesis that implies the defendant's guilt, is pertinent, and any evidence fairly tending to sustain such hypothesis is relevant to the issue.
3. **Trial of Criminal Case:** STATE'S REBUTTAL. On the trial of a criminal case the state is under no legal obligation to produce evidence in rebuttal.
4. **Failure of Adversary to Produce Evidence.** A party can not be prejudiced in a legal sense by the failure of his adversary to produce evidence against him.
5. **Evidence:** INSTRUCTIONS. Rulings upon the admission and rejection of evidence, and upon the giving and refusal of instructions, examined and approved.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Affirmed.*

F. Dolezal, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

SULLIVAN, J.

The information upon which the defendant, Edward Jerome, was tried in the district court for Dodge county was drawn under section 16 of the Criminal Code and contained two counts, the first charging a malicious shooting with intent to kill, and the second a malicious shooting with intent to wound. There was an acquittal upon the first count and a conviction on the second. The questions raised by the petition in error and discussed by counsel are numerous, but none of them important or intrinsically difficult.

Jerome lived in the city of Fremont, where he was engaged in the confectionery and cigar business. Over his store was a card room, which is euphemistically described as a place where some people found entertainment and others experience. Jerome borrowed money from U. S. Pope, the complaining witness, and gave him as security a bill of sale of his stock and store fixtures. This indebtedness was afterwards paid by Jerome transferring to Pope a half interest in his business. One morning, about a week after the parties became partners, Jerome stopped on his way down town and bought a revolver and five cartridges. He then proceeded to his place of business. He accosted Pope in a friendly manner, spoke about borrowing money and buying his interest in the store and then went up stairs to the card room. Soon afterwards he returned to the store and said that the roof of the building had been leaking, and that the card room was damaged and ought to be repaired. At his suggestion Pope then went with him to view the room. Immediately afterwards, either at the head of the staircase or in the gambling room, the defendant fired five shots at Pope, all of them, but one, taking effect. According to Pope's account of the transaction, Jerome, without any provocation whatever, said to him, "I will show you how to give me the worst of it," and commenced firing. The defendant testified that Pope said to him, "Jerome, you have got to get out of here; I have got to get rid of you," and because he refused to assent to the proposition assaulted him with a chair. According to all the testimony the parties had no previous quarrel or misunderstanding; and if either had a motive for assaulting the other, it was shown inferentially and not by direct proof.

The first assignment of error here necessary to consider arises on the ruling of the court permitting the state to show that Pope had money on his person at the time of the shooting and that Jerome knew it. This evidence was introduced on the theory that the defendant

was the aggressor and that his motive was robbery. The hypothesis was a pertinent one; it implied that the defendant was guilty of the crime charged, and hence any evidence logically tending to sustain it was relevant to the issue.

The defendant complains because the prosecuting witness was not put upon the stand in rebuttal. It was altogether discretionary with the state whether any evidence in rebuttal should be produced. Besides, the ruling of the court upon this point was not, and could not have been, under any circumstances, legally prejudicial. There is an obvious logical difficulty in holding that a party has been injured because the testimony of his witnesses was not contradicted by his adversary.

The exceptions based upon the admission and rejection of evidence and upon the giving and refusal of instructions do not, in our judgment, present a single question that has not been, by the decisions of this and other courts, long since removed from the domain of legitimate discussion. We have read with care the entire record in this case and are entirely satisfied that the defendant was given a fair and impartial trial, that the verdict rendered was a righteous one and that the district court did not err in refusing to set it aside. The judgment is

AFFIRMED.

STATE, EX REL. W. C. BULLARD & COMPANY, V. GEORGE W. NORRIS.

FILED MARCH 6, 1901. No. 11,790.

1. **Mandamus:** MANDATE. Mandamus is an appropriate remedy to make the mandate of a reviewing court effective.
2. **Mandate:** TRIAL COURT: FINDING: INTEREST: DISOBEDIENCE. Where a finding in favor of one of the litigants does not include interest, the trial court does not, by refusing to render judgment for interest, disobey the mandate of this court directing it to render judgment for the amount found due.

ORIGINAL procedure in mandamus to enforce a mandate of the supreme court directing the district court to enter judgment for the amount found due. *Writ denied.*

Switzler & St. Clair, for relators.

Webster S. Morlan, contra.

SULLIVAN, J.

This is an original application for a mandamus directing the respondent, George W. Norris, as judge of the fourteenth judicial district, to enter a decree in favor of relators in compliance with the decision and mandate of this court in the case of *Bullard v. De Groff*, 59 Nebr., 783. The essential facts are not in controversy. The relators brought an action against De Groff and others to foreclose a mechanic's lien upon certain real estate in Red Willow county. De Groff pleaded a counter-claim. On October 9, 1896, a trial was had, which resulted in a finding that there was due to the plaintiffs upon their first cause of action the sum of $1,056.71, and that there was due to the defendant De Groff upon her counter-claim the sum of $1,000. For the difference between these amounts, with interest added from August 10, 1893, together with the amount found due upon the second cause of action, the plaintiffs were given a lien upon the property described in the petition. On appeal to this court the decision in favor of De Groff upon the counter-claim was set aside and the cause remanded with direction to the district court "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." De Groff afterwards paid into court for the purpose of satisfying the decree the sum of $1,491.62, which was received and receipted for by the plaintiffs. The amount so paid and received did not include any interest on the sum of $1,000 from the time it became due, to-wit, August 10, 1893, to the

date of the trial. Claiming that they were entitled to interest on the entire amount found due them upon both causes of action, the plaintiffs, after the mandate had been filed in the district court, moved for judgment for interest on $1,000 from August 10, 1893, to October 9, 1896. The motion was denied and the plaintiffs thereupon instituted this proceeding on the theory that the ruling was, in substance, a refusal of the district court to execute the mandate of this court. Mandamus is, of course, an appropriate remedy to make the mandate of a reviewing court effective. *State v. Omaha Nat. Bank*, 60 Nebr., 232; *Perkins v. Fourniquet*, 14 How. [U. S.], 313; *In re Washington & G. R. Co.*, 140 U. S., 91; *In re City Nat. Bank*, 153 U. S., 246; *Mason v. Pewabic Mining Co.*, 153 U. S., 361; *In re Sanford F. & T. Co.*, 160 U. S., 247. But we think the writ should not issue in the case now before us. The court did not at any time find that the plaintiffs were entitled to the interest for which they claimed judgment, and consequently did not, in overruling their motion, refuse to give effect to the decision of this court. The plaintiffs were undoubtedly entitled to interest on their entire claim from August 10, 1893, but the trial court did not so find. What it did find was that the amount due upon the first cause of action and the amount due upon the counter-claim were, on August 10, 1893, compensated to the extent that they equaled each other, and that the balance only, being the sum of $56.71, should bear interest. Having never found that there was interest due to the plaintiffs upon their entire claim, the action of the district court was not a refusal to execute the mandate of this court, and, therefore, the peremptory writ should be denied.

WRIT DENIED.

NORVAL, C. J.

I concur in the judgment.

BLAIR STATE BANK, APPELLANT, V. V. BUNN ET AL., APPELLEES.

FILED MARCH 6, 1901. No. 9,403.

1. **Delivery of Deed:** PRESUMPTION: PROOF OF MANUAL DELIVERY. The presumption of law of the delivery of a deed of conveyance on the date of its execution is overcome by proof of a manual delivery and acceptance by the grantee at a subsequent date, where there is nothing warranting a conclusion that a delivery was intended by the grantor prior to the time of the manual delivery.

2. **Fraudulent Conveyance:** PREFERRING CREDITOR: CONVEYANCE TO DEBTOR'S WIFE. Where land was sold by a debtor to one of several creditors for an ample and fair consideration in satisfaction of *bona fide* pre-existing debts, and the purchaser afterwards contracted to reconvey the land to the wife of the grantor, *held* that the subsequent transaction was not evidence of a fraudulent conveyance in the first instance for the purpose of defrauding, hindering or delaying other creditors in the collection of their debts.

3. **Conveyance by Debtor to Relative.** A transfer of property by a debtor to a relative, which has the effect of hindering or delaying other creditors in the collection of their debts, will be scrutinized very closely; yet it will be sustained if made in good faith and for an adequate consideration. *Farrington v. Stone*, 35 Nebr., 457, followed.

4. **Debtor's Right to Satisfy or Secure Creditor.** A debtor has a right to satisfy or secure one or more of his creditors by the transfer of a reasonable amount of his property as security or payment of a *bona fide* debt; and the debtor has the right to make such preference of his creditors, even though the effect thereof be to defeat, hinder or delay other creditors in the collection of their debts; and this is so even though the parties knew that such would be the effect, and even though the property so taken as security was all the debtor had, if the value of the property so transferred is reasonably proportionate to the amount justly owing to the creditor so preferred, and was taken by the creditor for the sole and only purpose of protecting himself in the collection of his debt.

5. **Procedure to Dissolve Attachment.** Proceedings taken by a debtor to dissolve an attachment levied on his property, and after the dissolution thereof securing and preferring certain of his creditors to the exclusion of the attachment creditor, *held* not to constitute evidence of a fraudulent transfer of the debtor's property for the purpose of hindering or delaying his other creditors.

APPEAL from the district court for Washington county. Heard below before DICKINSON, J. *Affirmed.*

Osborn & Aye, for appellant.

D. W. Merrow, C. C. Wright, H. E. Burnam and *Walton & Mummert, contra.*

HOLCOMB, J.

In an action at law the appellant, in January, 1894, obtained a judgment for over $7,000 against the appellee, V. Bunn, upon which there was realized and credited the sum of about $2,000. Thereafter, and in February, 1895, an action in equity was begun by the appellant in the nature of a creditor's bill, for the purpose of having declared fraudulent and void, as to it, certain transfers of property, both real and personal, made by the judgment debtor, V. Bunn, and to subject such property to the payment of said judgment. After trial, in which all necessary parties were brought, issues joined, and the submission of a great deal of evidence, the trial court found on the issues in favor of the appellees, and a judgment was rendered in their favor, from which the appellant appeals to this court.

The more important features of the case, in which are included the essential elements of the controversy, as disclosed by the record, appear to be as follows: The said Bunn, being the owner of considerable property and engaged in farming on an extensive scale, was, at the time of bringing the law action first mentioned, indebted to divers persons in various sums of money, including the plaintiff in that action who was the heaviest of his creditors. In the law action the appellant caused to be issued a writ of attachment on the ground of alleged fraud on the part of the defendant as to the disposition of his property, which was levied on the property of the defendant in that action, now the judgment debtor. A motion to dissolve the attachment, supported by affi-

davits, was interposed by the defendant, which upon hearing was sustained and the attachment dissolved, from which order of dissolution no appeal or other proceeding was taken, and the same thereupon became final. Immediately after the dissolution of the attachment the defendant executed several conveyances, by which his other creditors were secured, and in which conveyances was included all his property, both real and personal, save a certain quarter section of land, which, after judgment in the law action, was levied upon and sold to satisfy such judgment. The present proceedings were thereafter instituted in an attempt to reach the property conveyed to the other creditors as aforesaid.

The evidence in the equity action is without serious or substantial conflict or contradiction, and the only important question arising thereon is as to the proper deductions to be made therefrom. It is practically conceded that the transfers complained of were made to secure and satisfy *bona fide* debts owing by the grantor, but it is insisted that such transfers were made for the purpose also of defrauding, delaying or hindering the appellant in the collection of its debt, in which fraudulent and unlawful purpose the grantees participated, thereby rendering such conveyances fraudulent and invalid as to the appellant under the provisions of section 17, chapter 32, Compiled Statutes, entitled "Frauds." The section just referred to provides that conveyances of the kind under consideration, made with intent to hinder, delay or defraud creditors, or persons of their lawful rights, debts or demands, shall be void as against the person so hindered, delayed or defrauded. It is earnestly insisted that in the present case, under the evidence, it is shown that the preferred creditors were not acting in good faith for the sole purpose of securing their past debts, but were engaged in a preconcerted effort, in conjunction with the judgment debtor, to so cover up all his property as to keep it under his and the preferred creditors' control, and prevent appellant from collecting its

judgment, all in fraud of its rights as a judgment creditor. We are unable to make extended reference to the evidence in the case, and content ourselves by saying that in the examination which we have been enabled to make we find no violation of the provisions of the statute referred to, nor of any rule of law giving to a debtor, under certain circumstances, when done in good faith, the right to secure some of his creditors to the exclusion of others, even though the inevitable effect of the preference is to delay or hinder other creditors of the same debtor in the collection of their just demands. It is fairly well established by the evidence that the several transfers and conveyances of which complaint is made were to secure or satisfy actual and *bona fide* pre-existing debts, and that the security taken, or the property transferred, was not so disproportionate in value as to raise any presumption of fraud by reason of such transfer.

The right of a debtor to prefer certain creditors to the exclusion of others, if done in good faith, being admitted, it is required of us only to examine into the case with a view of ascertaining whether, in the transactions entered into in making such preference, there has been any violation of law which would invalidate the contract or agreement by which the same was accomplished. It appears that all the chattel property of the debtor was mortgaged to secure debts then existing, and that such mortgages were, in the manner provided by law, foreclosed, and the property sold to satisfy the debts for which the mortgages were given. Certain real estate was sold and transferred in payment of other debts then owing by the grantor. It thus appears that all of the property of the debtor, which is sought by these proceedings to be reached and applied to the satisfaction of appellant's judgment, has actually been sold and transferred from the debtor in the payment of just obligations owing by him.

A deed of conveyance was made by the debtor to one of his creditors, in which certain other debts secured by

mortgage on the same land were assumed by the grantee. It is insisted that because the deed was signed by the grantor alone, and acknowledged a day prior to the day the mortgages were executed, that delivery must be presumed to have been made on the day of its date, and that the mortgages of the subsequent date conveyed no title, and were, therefore, void. A fair construction of the different transactions leads us to the conclusion that the deed was not delivered until after the execution of the mortgages securing the debts assumed by the grantee, and that the deed, when delivered, was subject to such mortgages. This was the grantee's view of the transaction, and the debts which the mortgages secured were specifically assumed by him as a part of the consideration. The land was a homestead. The wife of the grantor did not sign the deed until the day subsequent to its date, and on the same day the mortgages were executed securing other debts assumed by the grantee. The grantee testifies in effect, that the deed was not delivered until so acknowledged, when he had it filed and recorded. There is nothing warranting the conclusion that a delivery was intended by the grantor until the time of manual delivery to the grantee and acceptance by him. The presumption that the deed was delivered on the date of its execution is thus overcome, and there is nothing from which the fact may be inferred that a delivery was intended before it was actually received by the grantee. The grantee paid a full and fair consideration for the land, obtained satisfaction of a *bona fide* debt thereby, and there is nothing deducible from the evidence which impeaches the good faith of the transaction. While it is argued that a subsequent contract for the resale of the homestead to the wife, by the grantor and creditor, is evidence of a want of good faith in the original transaction, we view it only as a laudable effort to preserve the homestead to the use of the family, while at the same time devoting all property which might lawfully be exacted to the payment of the debts of the homestead

owner. It is entirely clear that the property had been honestly transferred to one having a lawful right to claim the same in satisfaction of a debt, and if he thereafter contracts to resell to the wife of the debtor, such transaction can in no manner impair the rights of other creditors, but rather assists them in making it more probable that the debtor will satisfy all debts in full.

Some of the transfers were made to relatives of the debtor, and it is argued that the evidence does not show that the debts thus secured or satisfied were *bona fide* and the transfers made in good faith. From the evidence we think it fairly inferable that the debts, to secure and satisfy which the transfers were made, were actual, subsisting and just obligations, existing against the debtor, and it is not disclosed by the evidence that in the transactions by which the debts were secured or satisfied there was a want of good faith, or that the creditors were actuated by other motives or acted for other purposes than the securing of just demands owing them by the grantor. One was a son and the other a sister of the debtor. In *Davis v. Schwartz*, 155 U. S., 631, 638, it is said by Mr. Justice Brown in the opinion: "The fact that the assignee or the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the persons making the loan are relatives ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship. *Magniac v. Thomson*, 7 Pet. [U. S.], 348; *Prewit v. Wilson*, 103 U. S. 22; *Estes v. Gunter*, 122 U. S. 450; *Bean v. Patterson*, 122 U. S. 496; *Garner v. Second Nat. Bank*, 151 U. S. 420, 432; *Aulman v. Aulman*, 71 Iowa, 124; *Van Patten v. Thompson*, 34 N. W. Rep. (Ia.), 763; *In re Alexander*, 37 Iowa, 454; *Doyle v. McGuire*, 38 Iowa, 410." In *Farrington*

v. Stone, 35 Nebr., 456, it is stated in the third paragraph of the syllabus that "while a transfer of property to a relative by a person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained, if made in good faith for an adequate consideration;" and the opinion by MAXWELL, C. J., sustains the proposition thus announced. Says HARRISON, J., in *Steinkraus v. Korth*, 44 Nebr., 777, 782: "The rule in this state as to such transactions has been established as follows: Where property is conveyed from one relative to another as a payment of an alleged past due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* must be clearly established," citing a number of cases decided by this court. Whether or not, in the present case, the conveyances to the relatives of the grantor were made in good faith and for the sole purpose of protecting a *bona fide* debt is a question of fact to be determined from all the evidence in the case. Applying the rule spoken of with reference to transfers of the kind now under consideration, we are of the opinion that the conclusion of the trial court, as evidenced by its general finding in favor of the appellees, is correct and justified by the facts and circumstances surrounding the transactions and connected therewith. As to the right of a debtor to secure and prefer one of his creditors to the exclusion of others, it is said in an instruction quoted and approved by this court in *Jones v. Loree*, 37 Nebr., 816, 821: "A creditor has a right to take a chattel mortgage on a reasonable amount of his debtor's personal property as security for his *bona fide* pre-existing debt, and the debtor has a right to make such preference of his creditors, even though the effect thereof be to defeat, hinder, or delay other creditors in the collection of their debts; and this is so even if the parties knew that such would be the effect, and even though the property so taken as security was all the

debtor had, but in value reasonably proportionate to the amount justly owing to the creditors so preferred." Says IRVINE, C., writing the opinion: "To say that knowledge upon the part of an existing creditor of the debtor's intention to defraud creditors would render any security demanded by such creditor fraudulent would be equivalent to saying that the creditor is estopped from protecting himself by knowledge of the very facts which warrant him in seeking protection. A fraudulent intent may be very properly imputed to a stranger who knowingly assists the debtor in defeating his creditors by a purchase of the debtor's property, but no such intent can be imputed to an existing creditor because of his knowledge of such intent, when for the sole purpose of protecting himself he receives sufficient and reasonable security for that purpose." To the same effect are the following: *Bamberger v. Schoolfield*, 160 U. S., 149; *Rock Island Plow Co. v. Hill*, 32 S. W. Rep. [Tex.], 242.

It is urged that the steps taken by the debtor to dissolve the attachment levied at the instance of appellant in the action at law, supported, as was the case, by affidavits of other creditors afterwards given a preference by securing their debts, sustains the contention that the subsequent acts of the debtor with reference to the disposition of his property to secure other creditors is evidence warranting the conclusion that the transfers so made are fraudulent and void as to appellant. In all these proceedings he was doing only that which is permitted by law. If no cause existed for suing out the writ of attachment, as we must assume from the order of the trial court,—and it is lawful to secure one debt to the exclusion of another, if done in good faith, as seems to be in the present instance,—then each and all of the acts performed by the debtor are consistent with each other and in harmony with law. In the attachment proceedings the creditors of the defendant, whose debts were afterwards secured and satisfied, could exercise no control, and were in nowise responsible for the action taken.

Again, it must be assumed that the defendant was in the right in those proceedings, and if so, wrong can not be predicated thereon. The weakness in the position of appellant is its contention that because other just debts of the debtor were secured and satisfied, and thereby it was prevented from collecting its debts, the evidence warrants the inference that the transactions by which these results were accomplished were for the purpose and with the intent of delaying or hindering it in the collection of its debts. It proceeded by suit and attachment to collect its debts. This proved abortive. The other creditors, by the action taken by appellant, would naturally become concerned about their own debts, and were justified in resorting to all lawful methods to secure or satisfy the same. It became a struggle among several creditors to have satisfaction of their demands, and it is not strange under the circumstances that the debtor felt more disposed to secure those whom he did, or that some of the creditors were more successful than appellant in obtaining the desired security or payment. It can not, we think, be said that there was on the part of the different creditors any purpose or intent shown, except to obtain security or satisfaction of their demands, and that in doing so they acted within the limits prescribed by law, and obtained only such property as was reasonably sufficient at a fair valuation to answer the purpose for which it was transferred. Bad faith, or an intent to hinder or delay the appellant in the collection of its debts, on the part of the other creditors, or either of them, is not, we think, shown by the evidence. It is not necessary for us to discuss the evident purposes or intent of the debtor. It may be conceded that his object, intent and purposes were those condemned by the statute, but it does not appear that the other creditors shared or participated in such wrongful intent or purposes, or assisted him in carrying them into execution any further than was the necessary and inevitable result in securing to themselves that which was justly due them and which they might

lawfully do. The conclusion of the trial court must be regarded as being right and justified by the evidence. There was no restraint on the debtor to make such lawful disposition of his property as he might desire. Those who were vigilant and active in securing the debts owing to them are not at all blamable for obtaining satisfaction or security, if done honestly and for that purpose alone, even though such acts had the effect of depriving the attaching creditor of full satisfaction of its judgment afterwards obtained. The whole transaction involves, primarily, questions of fact. The trial court heard all the witnesses, was acquainted with all the circumstances, and was in an advantageous position to make just and proper deductions from the evidence in the case, and the conclusion reached we hold to be justified by the record.

For the reasons given the judgment should be affirmed, which is accordingly done.

AFFIRMED.

GREEN & VAN DUYN V. LANCASTER COUNTY.

FILED MARCH 6, 1901. No. 11,076.

1. **Evidence.** Evidence examined, and *held* to support the verdict of the jury and the judgment rendered thereon.
2. **Instructions.** Instructions given, set out in the opinion, *held* to correctly state the law under the evidence regarding the plea of accord and satisfaction in the answer of defendant.
3. ———. It is not error to refuse an instruction regarding a proposition which is substantially covered by another instruction already given.
4. ———. Ruling of trial court refusing an instruction requested to the effect that the claims filed by the plaintiffs were in part only of their demands against the county, *held* proper.
5. **Accord and Satisfaction:** EVIDENCE. An agreement of accord and satisfaction, which has been performed, between a county board representing the county and those having claims against the county, may be proven by parol evidence in the absence of any written record or minutes of the county board of such agreement.

6. **Contract:** ACCEPTING BENEFIT: RECORD: ESTOPPEL. Where such contract has been executed and the plaintiffs have accepted its benefits, they can not be heard to complain because the same was not entered on the minutes of the county board.

7. **Session of Board:** RECORD: MEETING: PRESUMPTION. Where the minutes show a session of the county board for the transaction of business of the county, the session will be presumed to have been legally convened, and the burden is on the party assailing its legality to prove that it was neither a called nor a regular session.

8. **Beneficiary:** ESTOPPEL. A party who has received the benefits of an executed contract entered into with the county at a meeting of the county board is estopped from denying the legality of the session at which such contract was entered into.

9. **Testimony:** VALUE OF SERVICE. Objection to certain testimony of witnesses, who were permitted to testify as to the value of services claimed to have been rendered by plaintiffs, *held* not well taken.

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

Walter J. Lamb, Lorzenzo W. Billingsley and *Robert J. Greene*, for plaintiffs in error.

Thomas C. Munger and *James L. Caldwell, contra.*

HOLCOMB, J.

Suit was instituted by the plaintiffs in error in the lower court against Lancaster county, defendant in error, on a written contract for services alleged to have been rendered and money expended in assisting the county commissioners of defendant county in refunding at a lower rate of interest, and negotiating a sale thereof, a series of bonds theretofore issued by the county and aggregating in amount some $350,000. Although stated in different ways in three separate causes of action, the gist of the petition is, in substance, that the plaintiffs had been employed to assist the county commissioners in the refunding of the bonds of the county at a lower rate of interest, for which, according to the contract on which

the action was based, they were to receive "a fair compensation for their services rendered and moneys expended in that behalf for the county," and that in pursuance of such agreement services were rendered and money expended of the total amount and value of $7,500, of which $4,500 was for moneys expended in and about the refunding and negotiating the aforesaid bonds, and that there had been paid the plaintiffs on account the sum of $2,000, leaving a balance due of $5,500, for which judgment was prayed. To this petition an answer was presented which consisted, first, of an admission of the contract, and that the plaintiffs rendered some services thereunder, a denial that there was anything due and a denial of all the other allegations of the petition; and, second, of a plea of accord and satisfaction, it being alleged, in substance, that after the bonds mentioned had been refunded, and all transactions connected therewith completed, demand was made against the county for services and expenditures claimed to have been made and performed under the contract; that the claims and demands were disputed by the county, and that the plaintiffs and defendant thereupon entered into an agreement of settlement of all demands of plaintiffs, whereby they agreed to file two claims of $1,000 each against the defendant, which it was agreed should be allowed, and that the defendant had satisfied and discharged all of said claims by paying the said plaintiffs the sum of $2,000 by the method agreed upon; and that the plaintiffs accepted and received the same in full satisfaction of their claims under the original contract. To this answer, in reply a general denial was filed. Upon a trial to the court and a jury a verdict was returned in favor of the defendant county. After a motion for a new trial was overruled, and judgment was entered on the verdict, proceedings in error were instituted in this court to obtain a reversal of such judgment. Several alleged errors are assigned and argued as grounds for a reversal, the principal ones of which will be noted in their order of presentation.

It is argued that the evidence is not sufficient to support the verdict and judgment. In other words, it is claimed that the plea of accord and satisfaction is not sustained by the evidence in the case. The argument is based on the following view of the case, assumed by plaintiffs in error as correct. It will be observed that under the causes of action as pleaded by the plaintiffs the sum of $4,500 is claimed to be due them for moneys expended in behalf of the county under their contract, and the further sum of $3,000 as compensation for services performed, which, after deducting or crediting the amount paid them, viz., $2,000, left a balance of $5,500 due. It is claimed by the plaintiffs that while there may be evidence tending to show and which may support a finding as to an accord and satisfaction of the claim for compensation for services rendered, it is entirely insufficient to prove any settlement of plaintiffs' demand for money expended in and about the matter of their employment under the contract. We are disposed to the view that this is too narrow a construction to place on the evidence relative to the alleged accord and satisfaction, and that if it justifies a finding in favor of the county of a settlement of any part or item covered by the original contract, it will warrant the conclusion that the accord and satisfaction was a settlement for all purposes. In other words, if the evidence justifies the inference that an agreement of accord and satisfaction was entered into, and that the claim for compensation for services was included therein, then it is sufficient to show a settlement of all matters in dispute between the county and the plaintiffs growing out of or in relation to the contract of employment.

In the claims filed by the plaintiffs and allowed by the county board it is stated that the claim is made for services or commissions, and also for moneys alleged to have been expended in behalf of the county. It is stated by several witnesses that the settlement was for expenses as well as for services, and for the whole transaction by

reason of which the plaintiffs claimed a right of recovery. The contract itself is but a single, indivisible instrument, which, once satisfied, cancels all obligations arising thereunder. Under a claim made by the plaintiffs, based on the terms of the instrument, which has been adjusted, the natural, probable and rational inference to be drawn therefrom is that it covered every item in controversy, and unless there is something disclosed by the evidence to indicate that the settlement was restricted to one branch only of the matters in controversy, we think a jury would be warranted in finding that the settlement was intended as a satisfaction and discharge of all obligations under the contract, even though each item may not be clearly and specifically expressed in the subsequent agreement. The evidence in this case we regard as amply sufficient to show that the agreement, if established, was intended to, and did, embrace the disputed item of moneys alleged to have been expended, as well as the claim for services rendered. Both or neither, we think, were satisfied in the manner alleged by defendant.

Regarding this same subject it is suggested that error was committed by the trial court in the giving and refusal of certain instructions to the jury. It is urged that before an accord and satisfaction can operate as a settlement of a prior claim of indebtedness, in the agreement there must have been a meeting of the minds of the parties touching the whole matter. The same point regarding the evidence is sought to be made and applied to the instructions, in which it is claimed this distinction or difference was not clearly presented to the jury, and by the refusal of an instruction requested by plaintiffs in which the distinction is recognized the plaintiffs were prejudiced to an extent calling for a reversal of the judgment. The requested instruction, among other things, says: "It is not sufficient on the part of the defendant to establish that at the time of the proposed settlement that they refused to pay more than $2,000.00 * * *

and that in pursuance thereof the plaintiffs might file two claims of $1,000.00 each and that the plaintiffs did so file two claims of $1,000.00 each which were allowed, but it is necessary in addition thereto for the defendant to establish to your satisfaction that the plaintiffs and each of them actually understood that and assented to their proposals, and agreed in fact to receive such sums as a satisfaction in full, and to release the county from all claims and demands under the contract." On the same point, the court, on its own motion, instructed the jury as follows:

"You are instructed that if you find from the evidence that there was a dispute in good faith between the board of county commissioners of defendant county, and the plaintiffs as to the amount justly due them under said contract, and that said dispute was settled by such county board agreeing to allow and pay, and the said plaintiffs to accept and receive, $2,000.00 in full settlement and satisfaction of said claim, and that in pursuance of said claim and that in pursuance of such settlement and agreement such sum of money was allowed by such board and paid to and received by said plaintiffs, then said plaintiffs cannot recover in this action, and your verdict should be for defendant.

"And you are further instructed that if you find from the evidence that there was a disagreement in good faith between the plaintiffs and said board of county commissioners with respect to the amount due and owing said plaintiffs under said contract, and that said board proposed to allow and pay to them the sum of $2,000.00 in full satisfaction and settlement of said claim, that then it was optional with said plaintiffs to accept said sum or to refuse the same. But if you further find that said plaintiffs exercised such option by accepting such allowance and receiving such sum, then they would be bound by the condition that such allowance and payment was in full satisfaction and settlement of said claim, to the same extent that they would have been bound had they

expressly agreed to such condition; and this would be true even as against any secret or expressed intentions to the contrary or any protests then or subsequently made."

We think the instructions given are a fair exposition of the law, and submitted the question to the jury in such manner that they were not misled or the plaintiffs in any way prejudiced. In the instructions given there was enunciated substantially the same proposition contained in the instruction requested and refused, the giving of which would have been only in the nature of a repetition and therefore unnecessary. The jury were required to ascertain and find whether there was a disputed claim existing between the litigants; whether, for the purpose of reaching a settlement and adjustment of the matter, both parties, in settlement and satisfaction of the prior demands and claims, entered into an agreement whereby the defendant agreed to pay the sum mentioned, and the plaintiffs to accept the same, in satisfaction of their claims and demands, and whether the money was so paid in pursuance of such agreement. It will hardly be contended that any secret intention or mental reservation could be considered by the jury in determining the truth of the matter. The question of the existence of the substituted agreement for the original contract was one properly for the jury, to be determined from the actions, conduct and statements of the parties thereto, and was fairly submitted to them in the instructions given. If they found that the defendant county proposed to pay the sum mentioned in settlement of the demands against the county made by the plaintiffs, and the proposition accepted and the money thereafter paid as agreed, this would be a complete bar to any recovery on the original contract. There was no error in the ruling of the court in refusing the instruction requested.

The payment of the $2,000 credited by plaintiffs on account and claimed by the defendant as a satisfaction of the entire demand was secured by filing two claims against the county which were allowed by the board,

each claim being of the same date, consecutively numbered, filed at the same time, for $1,000 each, and in each of which it was stated that the claims were "to part expenses, services and commissions for refunding $350,000 5% Lancaster county bonds to $350,000 Lancaster county bonds drawing 4% interest." An instruction was requested based on the wording of the two claims, in which it was stated in substance that the filing and allowance of these claims were for part only of the amount due, and that they furnish no evidence of anything beyond or different from that contained in the record, that they are a payment and satisfaction of the amount claimed as written down and set forth in the claim upon which the board acted. The instruction was rightly refused. Whether or not these claims were allowed and paid in pursuance of the alleged agreement of accord and satisfaction, or otherwise, was a question for the jury, not on the wording of the claims alone, but under all the evidence bearing on the subject. In each claim, it is true, it is stated that it is in part of the expenses, services, etc., but the two parts when taken together may be compensation in whole or in full. Whether the compensation secured under the two claims was in full or only in part of the entire demand can not be ascertained from a reading of the claims themselves, but resort must be had to extraneous evidence to explain the ambiguity. The wording of the vouchers was not inconsistent with the claims of either of the respective parties. The jury were compelled to look elsewhere for evidence to satisfy them regarding their true intent and purpose.

The agreement of settlement claimed by defendant was proven by parol testimony, there being no record or minutes of the same kept in the journals of the county board. It is insisted that such evidence is incompetent and that the record of the filing and allowance of the claims can in nowise be affected by such parol testimony. It is said that the action of the board on the claims is judicial in its nature, and that any conversation or verbal

agreement in relation thereto is wholly immaterial and incompetent. We think counsel fails to distinguish between acts of the board which are administrative in character and those usually held to be *quasi*-judicial. In this case the contract, if made, of accord and satisfaction is administrative. It is the exercise of an authority belonging to the county board in the administration of the affairs of the county. It rests on the same power exercised in making the original contract. While the approval of the two claims was in form a *quasi*-judicial act, it was in this case a very perfunctory one, and, if defendant's theory is correct, was done in pursuance of, and for the purpose of carrying into execution, the prior agreement of accord and satisfaction. Leaving out of mind the judicial act of approval of the claims as filed, we are to consider whether the agreement of settlement, assuming it to have been made and not entered on the journal or minutes of the county board, can be proven by parol testimony. The county board was authorized to make such agreement. They appear to have made it. The same has not only been entered into, but also fully executed. We know of no rule, or of any reason for a rule, that would not allow a contract thus made and executed to be established by parol testimony in the absence of any record of the same. So far as our observation has gone, the authorities are uniform to the effect that such may be done in the absence of a statutory requirement that a record shall be made of a contract in order to render it valid and binding. *Ragoss v. Cuming County*, 36 Nebr., 375; *Jordan v. Osceola County*, 59 Ia., 388; *Baker v. Johnson County*, 33 Ia., 151; *Chicago, K. & W. R. Co. v. Stafford County*, 36 Kan., 121; *County of Franklin v. Layman*, 145 Ill., 138; *McCabe v. Commissioners of Fountain County*, 46 Ind., 380. The contract having been executed and the plaintiffs having accepted its benefits, can not be heard to complain because the same was not entered on the minutes of the county board. *Commissioners of Athens County v.*

Railroad Co., 37 Ohio St., 205; *Pacific Bridge Co. v. Clackamas County*, 45 Fed. Rep., 217.

Finally, it is urged that the county board was not in legal session at the time of making the alleged contract, and could not, therefore, enter into any valid and binding agreement of the kind alleged by defendant. For two good and sufficient reasons this contention can not prevail. The evidence bearing on the subject is without contradiction, and the sole and only question is as to the proper conclusion to be reached therefrom. To maintain their position that the board was not in legal session the plaintiffs rely on the fact that the record or minutes of the county board do not contain any record of a call for a special meeting to be held on the 19th of February, the day the alleged contract was entered into, and, second, the record is silent as to adjournments of the board of its regular sessions from day to day from the time of its meetings in regular session on the second Tuesday in January until the 19th of February. Whether the board did in fact adjourn from time to time after meeting in regular session in January, to and including the 19th of February, is neither proven nor disproven from the record, except as to the proper presumptions which may be indulged in from the record as it appears. The record shows no final adjournment after the board convened in regular session in January prior to its session on February 19, when the alleged agreement was entered into; nor is it shown that an adjournment was taken from one meeting to another, which by the minutes appear to have been held for the purpose of transacting the business of the county. The presumption is in favor of the regularity of the proceedings after the regular meeting in January, and in the absence of a record showing an adjournment *sine die*, where it is shown that the board has met and transacted business from time to time, it will be presumed such sessions were continuous or in pursuance of prior adjournments, although the several adjournments are not noted on the records. The proof that the min-

utes of the meetings of the board did not show a call for a special session does not prove that notice of a called meeting was not in fact given as required by section 57, chapter 18, Compiled Statutes. That section provides for the county clerk calling a special session upon giving five days' notice of the time and object of the meeting, but the fact that a record was not made of the call would not invalidate it if notice was actually given. The presumption being in favor of the regularity of the proceedings of the county board in the exercise of their general powers and duties in administering the affairs of the county, and that they were duly convened when by the record a session is purported to have been held, the burden was on the plaintiffs to show that the meeting was illegal or unauthorized, and having failed so to do, the session will be held to have been duly convened and held in the manner provided by law. *Rutherford v. Hamilton*, 97 Mo., 543; *Board of Supervisors of Wayne County v. Circuit Judges*, 106 Mich., 166; *Allen v. Cerro Gordo County*, 34 Ia., 54; *Prezinger v. Harness*, 114 Ind., 491; *Stockton v. Powell*, 29 Fla., 1, 61; *Brigins v. Chandler*, 60 Miss., 862. Assuming, however, that the session of the board at which the agreement was made was irregular and not properly called, the plaintiffs are not in a position to take advantage of the irregularity. The contract having been entered into, under which they have enjoyed its benefits and advantages by receiving and accepting the sums of money paid thereunder, and the contract having been fully performed, they can not now be heard to question the regularity of the proceedings by which the agreement was made and entered into. Under the pleadings and the evidence, conceding the contract to have been made as claimed by the defendant, the plaintiffs are clearly estopped from questioning the legality of the session of the county board at the time the agreement was entered into. *City of Buffalo v. Balcom*, 32 N. E. Rep. [N. Y.], 7; *Wilder v. Commissioners of Hamilton County*, 41 Ohio St., 601; *Commissioners v. Railroad Co.*, 37 Ohio St., 205; *Pacific Bridge Co. v. Clackamas County, supra.*

Some objection is offered to certain testimony of witnesses for the defense residing in Chicago, who, over objections, were permitted to testify as to the value of the services claimed to have been rendered by the plaintiffs in the matter of refunding the bonds of the county under the contract. These witnesses show themselves qualified to testify on the subject, and we find no valid objection to the admission of the evidence objected to.

The judgment of the trial court is

AFFIRMED.

CHARLES J. OLSON, APPELLEE, V. WALTER J. LAMB ET AL., APPELLANTS.

FILED MARCH 6, 1901. NO. 11,672.

1. **Appeal:** REVERSAL: TRIAL DE NOVO: AMENDMENT: DISCRETION: REVIEW. Where on an appeal to this court in an equity action the judgment of the trial court is reversed and the cause remanded with instructions to retake an accounting between the parties, the trial court may, in its discretion, permit an amendment to the pleadings and a trial *de novo* respecting such issue; and unless there is an abuse of discretion, the allowance of the amendment will be held not erroneous.

2. ———: ———: COSTS. Where one of the litigants in the trial of the case was denied any relief and decreed to pay half the costs, and on appeal the decree was held erroneous and the party entitled to affirmative relief, the judgment of reversal also reverses the decree as to costs.

3. **Motion to Retax Costs:** FILING AT SUBSEQUENT TERM: EFFECT: JURISDICTION. A decree as to costs having been rendered in the action, and a motion to retax filed at a subsequent term, *held*, that the motion was in effect a motion to vacate or modify the decree as to costs, and being filed at a subsequent term, the court was without jurisdiction to act thereon.

4. **Action for Accounting:** REDEMPTION AND EQUITABLE RELIEF: PLEADINGS: EVIDENCE: PERSONAL JUDGMENT. The action being in equity for an accounting between the parties, for the right to redeem and "for such other and further relief as equity may require," a personal judgment under the pleadings and the evidence *held* proper.

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

Walter J. Lamb, for appellants.

Ricketts & Wilson, contra.

HOLCOMB, J.

This is an action in equity, which for the second time is here for consideration. On the first appeal an exhaustive opinion was filed, determining and disposing of all the essential points of difference in controversy and remanding the case with special directions for further proceedings in accordance with the views expressed in the opinion. *Olson v. Lamb*, 56 Nebr., 104. The case is fully stated in that opinion and need not here be repeated.

The controversy as it now stands is with regard to the rights of the respective parties as determined by the trial court in the subsequent proceedings after the remanding of the case on the last appeal. Lamb appeals from the judgment last rendered in the district court, and the other parties, by reason of a cross-appeal, appear also in the role of appellants. In the opinion referred to it is said: "As to Olson the case must be reversed and remanded with directions to the trial court to retake the account, allowing to Olson the benefit of the discounts at which Lamb purchased the liens, including the $1,000 remittitur, and to allow him also the reasonable value of his work under the contract to complete the building; to charge Lamb with rents. On the other hand Lamb should be credited with his actual disbursements in buying the property, in completing the building and in managing the same. He should be allowed nothing for legal services, but receive a reasonable compensation for superintending and managing the property after he acquired title."

With reference to the appellee, the Prentice Brownstone Company, the opinion says: "The stone company

must also be permitted to redeem. In adjusting its account it should be allowed credit for such proportion of this $1,000 [the remittitur] as it would have been apportioned had the bid been that much higher and no remittitur entered. It should also be given the benefit of the discounts on the two liens" [referring to the two liens purchased by Lamb at a discount].

The case is thus narrowed down to an accounting between the contesting parties according to the method held in the opinion to be proper in determining their respective rights and interests in the subject-matter of the litigation.

After the cause was remanded, permission was applied for and obtained to amend the pleadings as against Lamb, by alleging that for one of the liens purchased by him, denominated the Leavitt lien, he paid nothing therefor, having secured the same by trading worthless paper. In the first pleading the discount was alleged to be $100; by the amendment it was sought to allege and prove that it was much greater and equaling the face value of the lien. Under the amended pleadings and proof the amount found to have been paid for the Leavitt lien by Lamb was $1,050, some $525 less than under the former decree.

Complaint is made because of the action of the trial court in allowing the amendment spoken of, it being contended that under the special mandate the amendment was not permissible and that the finding thereunder should be disregarded, and the parties' rights with respect to the item affected by the amendment be held to be as fixed in the first decree. Under the special mandate the cause was remanded with directions to retake the accounts of the parties, the first having been improperly taken. This was in effect a direction to relitigate the question of the state of the accounts of the litigants. Upon this issue a trial *de novo* was permissible, or the case might proceed on the evidence already taken. The pleadings might be amended with respect to the accounts

of the parties, not as a matter of right, but in the exercise of a sound discretion vested in the trial court, and its action in regard thereto will not be held erroneous unless there appears an abuse of discretion. *Troup v. Horbach*, 57 Nebr., 644; *Pinkham v. Pinkham*, 60 Nebr., 600.

On the first hearing half the costs of the action was decreed against the defendant, the Prentice Brownstone Company. On the second trial a decree was entered assessing the costs of the action made by plaintiff and defendant stone company, against defendant Lamb, and it is now urged that the decree awarding costs in the first trial became final on the affirmation of the judgment on appeal, with the exceptions noted. We think the decision of this court reversing the decree as to the stone company and awarding it the right to redeem, as well as directing that it be apportioned its proportionate share of the amount bid, on the sale of the premises, carried with it the reversal of the decree awarding one half of the costs of the first trial against the company. That decree gave the stone company no relief whatever. On appeal it was determined that it was entitled to affirmative relief, and the judgment of the lower court was reversed accordingly. This left the question as to the proper disposition of the costs made in the action under the control and subject to the decision of the trial court until the case was finally disposed of in that tribunal. In the subsequent proceedings had the defendant stone company obtained a judgment for its *pro rata* share in the proceeds of the sale of the property on which it held a lien and the right to redeem the property in the event of the plaintiff's failure to do so. It was also given judgment for its costs. The motion to retax the costs was, in effect, a motion to vacate or modify the decree as to costs, and being filed at a subsequent term, the court was without jurisdiction to entertain it. The decree as to the costs in the action was subject to the judgment of the trial court in the exercise of its judicial functions, and appears to be founded on the usual considerations gov-

erning the subject. We observe no erroneous action in the decree rendered awarding costs against the party complaining.

Objection is also made because a personal judgment was rendered in favor of the company for its *pro rata* share of the purchase price of the property on which it held a lien. We regard this question as having been settled in the former opinion. It was there specifically held that this defendant was entitled to a share in such proceeds, and that the remittitur of the appellant Lamb should be treated as increasing his bid to that amount. The decision in the former appeal regarding this matter has become the law of the case and will be followed.

The amended answer and cross-petition of the stone company stated the facts on which it relied for relief, and prayed in addition to be allowed to redeem and "for such other and further relief as equity may require." It was entitled to the relief due under the pleadings and the evidence. *Bank of Stockham v. Alter*, 61 Nebr., 359. The court having acquired jurisdiction would retain it for a full and complete disposition and adjudication of all questions involved in the controversy. The controversy could not be finally adjusted and determined save by adjusting the accounts of the parties, ascertaining what was due each and decreeing that in case a redemption was not had the same should be satisfied as a personal judgment. The right of the stone company to redeem is dependent on the action of the plaintiff. Its right to share in the proceeds of the sale of the property has been adjudicated and made certain.

Olson and the stone company by their cross-appeal challenge the correctness of the findings and judgment of the trial court as to the amounts due them respectively as a personal liability against the other defendant. It is urged that the judgment is too small in each instance. We have made a careful examination of the record and find the conclusions reached by the trial court substantially correct. While the several sums from which the

computations are made and the date from which interest is properly calculated may occasion some slight difference in results, we find no substantial variation, and possibly we are in error in our calculations rather than the trial court. We are satisfied, however, that if there does exist a difference between the true amount and that named in the decree, it is inconsequential and trifling only.

While there is a finding as to a *pro rata* share of the remittitur, or the increased bid for the property, if we view it as such, as due to Olson, which we are not in accord with, yet the conclusion or result reached as to the accounting between him and Lamb agrees with our view as to the correct balance, and the result being correct, we need not specially concern ourselves as to the process by which it was reached.

The former decision, as we construe it and think it should be from the record in the case, is to the effect that the bid made for the property now owned by the appellant Lamb, and for which the others desire the right of redemption, should be treated as being for $8,001, the excess of which above the prior liens should apply on the liens of the same class belonging to the stone company, to Lamb and to the other two lienors mentioned, *pro rata,* according to the amounts due each; and that the amount due Lamb should be determined by the amounts he had actually paid for the liens owned by him, rather than the face value thereof. That such excess should be applied in this manner, giving to the stone company the right to a personal judgment against Lamb for its *pro rata* share, giving to Lamb his *pro rata* share, which reduces to that extent his claim against Olson by reason of Olson's personal liability for the debts; and that to determine such liability the true sum is the actual amount paid by Lamb for the Leavitt and Holmes liens less the amount paid thereon by his purchase of the property as for the sum, $8,001.

The decree is, we think, in all respects correct, in ac-

cordance with the former opinion, and should be affirmed. The parties will have the right to redeem in the order and within the time fixed by the trial court after the filing of this opinion. In case a redemption is had, the district court is authorized to permit supplemental proceedings for the purpose of an accounting between the appellant Lamb and the party redeeming for rents and profits of the property redeemed from the date of the accounting last had in the trial court to the date of such redemption. The decree is, therefore, affirmed, with the time for the right of redemption extended as herein provided for.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF CITY OF LINCOLN, RELATOR, APPELLEE, V. MARTIN I. AITKEN, TREASURER OF THE CITY OF LINCOLN, RESPONDENT, APPELLANT.

FILED MARCH 6, 1901. No. 11,874.

1. **Payment of Occupation Tax Not Condition Precedent to Conduct of Business.** The payment of an occupation tax can not be made a condition precedent to obtaining a license to conduct the business sought to be taxed.
2. **Money Paid on Condition of Obtaining License is Not Tax Under Statute.** Where money is collected or paid as a condition of obtaining a license, it is license money, and not a tax, under the provisions of section 5, article 8, of the constitution.

APPEAL from the district court for Lancaster county. Heard below before FROST, J. *Affirmed.* SULLIVAN J., dissenting.

E. C. Strode and *D. J. Flaherty*, for appellant.

B. F. Johnson, contra.

HOLCOMB, J.

From a judgment directing the issuance of a peremptory writ of mandamus, requiring the respondent, as city treasurer, to place to the credit of the relator and

pay into its funds certain moneys then held by the respondent which were claimed by relator under the provisions of section 5, article 8, of the constitution, an appeal is taken to this court, and we are asked to reverse the judgment of the trial court allowing the writ. No question arises as to the right of the city to levy an occupation tax.

The controversy involves the right of the city to retain the moneys mentioned as belonging to the city treasury as funds derived from the levy and collection of an occupation or business tax as against the school district, which claims the same under the provisions of the section of the constitution referred to. Omitting that which is inapplicable to the present controversy the section reads as follows: "All fines, penalties and license moneys arising under the rules, by-laws, or ordinance of cities * * * shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." Constitution, art. 8, sec. 5. The ordinance of the city, under which the moneys in controversy were collected and paid into the city treasury, is entitled "An ordinance to regulate, license and impose an occupation tax * * * and prescribing penalties for violation of the provisions thereof." By section 1 it is provided: "It shall be unlawful for any person or persons or associations to exercise, engage in or conduct any of the following occupations in the City of Lincoln, Nebraska, without first having paid the occupation tax hereinafter provided, and the license fee therefor; *it is hereby expressly provided, however, that the granting of the license provided in this ordinance is not conditioned upon the prepayment of the occupation tax herein provided, and it is expressly provided that the occupation tax may be paid and a receipt given therefor without the payment of the license fee, and the license fee may be paid and the license issued without the prepayment of the occupation tax.*"

The section quoted as originally enacted did not contain the portion italicized. The amendment made subsequent to its passage, with some others, and all of the same general character, was evidently intended in the same ordinance to provide for the collection of a small sum of money as a license fee, and at the same time a larger sum, denominated an occupation tax, the disposition of which latter tax would not be controlled by the provisions of the constitution quoted, but left in the city treasury for the use of the city in meeting its current expenditures. From an examination of the entire ordinance, and a consideration of its scope and character, legal effect and the results accomplished thereby, we can only regard the amendment placed in the original section as the mere *ipse dixit* of the city council, in an attempt, under the guise of collecting an occupation tax, in truth and in fact to invoke the power of the law for licensing different trades, occupations and businesses and collecting a license fee therefor. The fact that it is stated that one sum is a license fee and the other an occupation tax, and that each is independent of the other, does not, we think, have the effect that a literal application of the language used would produce. In view of the entire ordinance, and the method of collecting these disputed funds, it appears quite clear that they are interdependent and inseparably connected. To obtain a license under the ordinance the occupation tax is required to be paid, and to obtain a receipt for the occupation tax the license fee must also be forthcoming. This is the spirit and essence of the entire ordinance, as we construe it. To illustrate further: By section 2, under the subhead "amusements," it is specifically provided that "no person, or persons, within the limits of the city, shall give any of the entertainments mentioned in this chapter, for gain, without first having paid the occupation tax and license fee for that purpose," etc. Subdivision "*a*" of the same section provides, "Each license shall express for what it is granted, and the time it is

to continue, and the following *occupation tax and license fee* shall be respectively imposed, as aforesaid, and paid to the city treasurer before the issuing of the receipt for the occupation tax or the granting of the license upon the payment of the license fee."

By section 6, wherein the clerk is made the judge of the class to which the applicant belongs, it is provided: "And the person or persons to whom the license may be granted, shall pay the occupation tax and license fee herein fixed for such license."

Paragraph 23 of section 767 declares: "There shall be charged and paid to the city treasurer for the use of the city, on the issuing of said licenses, by the parties to whom they are granted, the following sums as a license fee; *and, also,* there shall be charged and paid into the city treasury for the use of the city on the issuing of a receipt for the occupation tax, the following sums as an occupation tax."

In subdivision "*a*," paragraph 4 of section 1173, it is provided, in substance, that applicants for a license shall first pay to the city treasurer a license fee, whereupon a license shall be issued; "and in addition thereto," the said applicant shall pay an occupation tax, whereupon the city treasurer shall issue a receipt showing payment of the same.

Section 34, containing the penalty clause, declares that any person who shall violate any of the provisions of the ordinance or duties by it imposed shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in an amount therein stated. This section would be void and of no force as to the collection of an occupation tax (*Magneau v. City of Fremont*, 30 Nebr., 843), and yet, as a penalty for doing business without a license, it is operative. It is doubtless operative, as it was intended to be, in the collection of the taxes denominated both a license fee and an occupation tax, and gives additional emphasis to contention of relator, that the occupation tax as well as the license fee was required to be paid as a precedent condition to obtaining a license.

It is quite evident from a perusal of the ordinance in its entirety, that while there is an attempt to give it a dual character, one providing for licensing the business mentioned, and the other for the levy and collection of an occupation tax, the right to engage in the business and obtain a license therefor is dependent, not only on the payment of the license fee, but the occupation tax as well.

By the stipulation of the parties as to the facts in the case it is agreed that the city treasurer collected both the amounts, denominated an occupation tax and a license fee, at the same time. The only rational conclusion to be drawn is that the payments were made because of the provisions of the ordinance requiring the party engaging in the business taxed to obtain a license therefor before engaging in the business. This makes the payments, whatever they are called, essentially and in fact license money, to be disposed of in the manner provided by the constitution. It was the requirement of the ordinance licensing the business and providing for the payment of a license fee, and, in addition thereto, the collection of what is termed an occupation tax, that brought the funds in controversy into the city treasury and produced the result leading to this litigation. In *State v. Bennett*, 19 Nebr., 191, it is held quite positively that the payment of an occupation or business tax can not be made a condition precedent to sell intoxicating liquors. And in *State v. Wilcox*, 17 Nebr., 219, it is said that where a tax is collected or paid as a condition of obtaining a license, it is license money and not a tax under the provisions of the constitution quoted. Says MAXWELL, J., in speaking of that case: "No part of this sum is obtained as a tax, but as a condition of obtaining the license. The $1,000 is paid as a whole for the license—not a part for license and a part as tax, because without the payment of the entire sum the license would not be issued." We think the case at bar comes entirely within the rule announced in the case last mentioned.

Said the trial court, who awarded the writ in this case: "The question presented therefore by the record in this case is not whether the city through its council has authority to impose by ordinance an occupation tax upon certain dealers, but whether or not the council has authority to impose by ordinance an occupation tax as a condition precedent to the issuing of a license. The ordinance so adroitly drawn in controversy in this case clearly makes the payment of such occupation tax a condition precedent to the issuing of the license, and the issuing of a license a condition precedent to the payment of an occupation tax. In other words, by the terms of the ordinance, one can not procure a license without paying the occupation tax, or pay an occupation tax without procuring the license. The payment of the tax is a condition of the obtaining of the license, 'not a part for license and a part as tax, because without the payment of the entire sum the license would not be issued.'"

With the views thus expressed we are in entire accord, and for the reasons stated must hold that the writ was rightly issued. The judgment is accordingly

AFFIRMED.

SULLIVAN, J., dissenting.

I do not concur in the judgment. I think the fund in controversy came into the hands of respondent as the result of an exercise of the taxing power by the city authorities, and not as the result of an attempt to regulate and license occupations. It seems to me that the opinion gives too much importance to matters of form and too little to matters of substance.

THE STATE OF NEBRASKA, APPELLEE, V. NEBRASKA SAVINGS & EXCHANGE BANK, APPELLEE, AND WILLIAM K. POTTER, RECEIVER, APPELLEE, AND WILLIAM O. BARTHOLOMEW, A CREDITOR, APPELLANT.

FILED MARCH 6, 1901. No. 11,882.

1. **Absence of Bill of Exceptions:** PRESUMPTION AS TO EVIDENCE. It will be presumed, in the absence of a bill of exceptions, that there was before the trial court acting on a motion to approve the report of a receiver, and the objections thereto, evidence sufficient to support the order made.
2. **Presumption of Regularity of Proceedings:** ONUS PROBANDI. All presumptions are in favor of the regularity of the proceedings and the order of the trial court, and the burden of proving the contrary is on the one asserting error, and until such is made to appear affirmatively from the record, the order or judgment complained of will not be disturbed.
3. **Receiver of Insolvent Bank is Officer of Court.** A receiver of an insolvent bank appointed by the district court for the purpose of taking charge of its assets and winding up its affairs is a special officer of the court, and his report, being verified, is *prima facie* evidence of its correctness and entitled to the same consideration as the return of any other officer of the court, and in order to be impeached must be overcome by other competent evidence.
4. **Receiver:** COMPENSATION: DISCRETION OF COURT. The allowance of compensation of a receiver for his services is largely in the discretion of the trial court having charge of the receivership, and unless it is made to affirmatively appear that the amount allowed is erroneous, and there has been an abuse of discretion, the order of allowance will be sustained.

APPEAL from the district court for Douglas county. Heard below before FAWCETT, J. *Affirmed.*

William O. Bartholomew, for himself.

Frank N. Prout, Attorney General, for the state.

Silas Cobb, for the receiver.

HOLCOMB, J.

From an order approving and confirming a report of the receiver in the matter of winding up the affairs of the Nebraska Savings & Exchange Bank an appeal is taken

by the appellant, on objections and exceptions entered by him against the acceptance of the report, as a creditor of the institution in the control of the receiver. No bill of exceptions has been preserved, and the case is before us on a transcript of the record. It will be presumed, in the absence of a bill of exceptions, that there was before the trial court acting on the motion to approve the report, and upon the exceptions thereto, evidence sufficient to support the order made. *Fisk v. Thorp*, 60 Nebr., 713; *Van Etten v. Test*, 49 Nebr., 725.

Complaint is made because the form of the report of items of debit and credit is according to rules of double entry bookkeeping. This objection does not go to the correctness of the report, but only to its form. The one question is whether the receipts and expenditures by the receiver are in accordance with the directions of the court and in conformity with the law in the accomplishment of the purposes for which the receiver was appointed. The presumptions are all in favor of the regularity of the proceedings and order of the trial court, and the burden of proving the contrary is on the one asserting error, and until such is made to appear affirmatively from the records, the order or judgment complained of will not be disturbed. *Wright v. State*, 45 Nebr., 44; *Ætna Ins. Co. v. Simmons*, 49 Nebr., 811; *American Investment Co. v. McGregor*, 48 Nebr., 779. The office of the receiver is to aid and assist the court in the collection and distribution of the assets of the insolvent bank. He is, as it were, a special officer of and under the orders and direction of the court. "He is the arm of the court," says NORVAL, J., in *State v. Bank of Rushville*, 57 Nebr., 608, and where there is no abuse of discretion in any action taken in regard to the action of the receiver, this court will not on review disturb an order thus made. The report of the receiver being verified was, we think, *prima facie* evidence of its correctness and sufficient to justify the conclusion reached by the trial court in its approval and adoption, and to overcome this presumption there must be some

evidence showing wherein it is incorrect. It is entitled to the same consideration as the return of any other officer of the court, and in order to be impeached must be overcome by other competent evidence.

As to the compensation to be allowed the receiver for his services, this is a matter largely in the discretion of the court having charge of the receivership; and unless it be made to appear affirmatively that the amount allowed is erroneous and there has been an abuse of discretion in the action taken in approving the report, it will not for that reason be reversed. In making such allowance the court is not confined to evidence formally introduced, in respect to the matter, but may act on his own knowledge and judgment as to the reasonableness of the charge in connection with what has been done by the receiver in discharge of the duties of his receivership, and the nature, extent and value of the services rendered. *In re State Bank*, 57 Minn., 361.

Without determining the right of appellant to be heard in this court, which is doubtful, because no appealable interest is disclosed by the record, our judgment is that the order complained of is in conformity with law and should be affirmed, which is accordingly done.

AFFIRMED.

LYMAN K. EDDY, APPELLEE, V. JAMES KIMERER ET AL., APPELLANTS.

FILED MARCH 20, 1901. No. 9,421.

1. **Taxes Precede All Other Liens.** Taxes upon land, whenever levied, take precedence of all other liens.

2. **Value of Judgment Debtor's Interest Equals Gross Value of Land Minus Prior Liens.** Within the meaning of the appraisement law, the value of a judgment debtor's interest in land about to be sold is the difference between the gross value and the amount of all liens prior to the one for the satisfaction of which the sale is to be made.

3. **Objections to Confirmation: SCOPE OF INQUIRY.** On the hearing of objections to the confirmation of a judicial sale the court will

not inquire whether the person designated in the decree to make the sale is an agent or attorney of the creditor, unless fraud or misconduct in making the appraisement or sale is alleged.

4. **Decree of Foreclosure: COLLATERAL ATTACK.** If a decree of foreclosure is by its terms to be executed by a person disqualified by interest from making the sale, the party complaining should assail the decree directly and not by motion to vacate the sale.

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

Wolfenbarger & Williams, for appellants.

D. M. Vinsonhaler, contra.

PER CURIAM.

This is an appeal from an order of the district court for Lancaster county confirming a sale of real estate made in pursuance of a decree of foreclosure. The objection to the appraisement, grounded on the fact that all taxes lawfully charged against the mortgaged premises were deducted from the gross value thereof, is manifestly without merit. Taxes upon land, whenever levied, take precedence of all other liens. The value of appellants' interest in the property sold was, within the meaning of the appraisement law, the difference between its gross value and the amount of the county, city and other taxes charged against it. A right conclusion having been reached by the appraisers, we will not inquire into the character of the evidence upon which they relied. *Sessions v. Irwin*, 8 Nebr., 5; *Stratton v. Reisdorph*, 35 Nebr., 314. The contention that the sale should have been set aside because the special master by whom it was made had acted as attorney for the plaintiff can not be sustained. This objection was, in substance, a collateral attack on the decree, and for that reason properly overruled. *State Nat. Bank v. Scofield*, 9 Nebr., 499; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Nebr., 900; *Hoover v. Hale*, 56 Nebr., 67. The order of confirmation is

AFFIRMED.

JOSEPH GARNEAU V. MOSES L. COHN.

FILED MARCH 20, 1901. No. 9,322.

1. **Terms of Promissory Note Can Not Be Contradicted by Prior or Contemporaneous Parol Agreement.** The terms of a promissory note can not be contradicted, altered or varied by evidence of a prior or contemporaneous parol agreement between the payor and the payee.
2. **No Conflict, No Error for Court to Refuse to Submit to Jury.** Where there is no conflict in the evidence, it is not error for the court to refuse to submit the case to the jury.

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

Charles Ogden and *Joel W. West*, for plaintiff in error.

James H. McIntosh, contra.

NORVAL, C. J.

Moses L. Cohn was the state agent of the New York Life Insurance Company. He solicited and received the application of Joseph Garneau for a policy in said company. The policy was issued, and Garneau gave Cohn his promissory note for the premium, the latter having advanced the premium money to the company. The note was subsequently renewed by Garneau, he giving to Cohn another note, and this action is on said note given in renewal. Upon the trial, a verdict was returned for the plaintiff, under the direction of the court, and from the judgment entered thereon defendant has prosecuted error.

One of the matters pleaded as a defense was that at and prior to the time the original note was given there was a mutual parol agreement between the parties relative to the giving of the note, which it is claimed constituted a defense to the action. Defendant sought to introduce evidence to establish this parol agreement, which was excluded, and the defendant thereupon of-

fered to show that "at the time of the execution of the promissory note sued upon, and as a part of the same transaction, and as a consideration for the execution of it, that the plaintiff Cohn then and there agreed, promised and undertook with the defendant, the witness, that in consideration of the defendant, the witness, delivering to the plaintiff letters of introduction to prominent people with whom he was acquainted recommending and confirming the policy which was written in the New York Life Insurance Company, the plaintiff would be enabled to write a large amount of life insurance business out of which he would earn large commissions and be enabled to do such a profitable business as that the witness, the defendant, would never be required to pay any part of the promissory note in question and sued upon but that the percentage of the commissions which he had agreed to allow the defendant would be ample and sufficient to speedily pay the note in question in full, and that in no event should the defendant, the witness, ever be called upon to pay in money any part of the note sued upon." Objection to this tender of proof was sustained, which ruling is the first question presented on review. The ruling assailed was perfectly proper. It is the doctrine of this court, established by repeated decisions, that a written contract can not be varied or contradicted by a prior or contemporaneous parol agreement between the parties. *Kaserman v. Fries*, 33 Nebr., 427; *Van Etten v. Howell*, 40 Nebr., 850; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Nebr., 545; *Gerner v. Church*, 43 Nebr., 690; *Quinn v. Moss*, 45 Nebr., 614; *Commercial State Bank v. Antelope County*, 48 Nebr., 496; *Sylvester v. Carpenter Paper Co.*, 55 Nebr., 621. The original note stipulated for the payment by Garneau of a certain sum of money on a specified date, while the proffered evidence tended to establish that the defendant was never to pay this note. The evidence was properly excluded, as its tendency was to vary and contradict the terms of the note.

Another defense interposed was that the policy of in-

surance was never delivered to Garneau, and it is insisted that the trial court erred in not submitting that issue to the jury. The undisputed evidence disclosed that the policy was issued by the New York Life Insurance Company and sent to Cohn for delivery to the defendant. The former carried the policy to the office of the latter, and after exhibiting the same to Garneau, Cohn asked, and obtained, permission of defendant to take the policy with him to aid in procuring other insurance. Garneau examined the policy, and on turning it over to plaintiff received from him the following receipt:

"NEW YORK LIFE INSURANCE CO., 346 & 348 BROADWAY.
"OMAHA, NEB., Aug. 4, 1891.

"Received of Joseph F. Garneau, Jr., to be held by me in trust, policy No. 399,672 in the New York Life Insurance Company, insuring life of said Garneau for $25,000. Said policy dated April 18, 1891. It is understood that said policy is to be delivered to said Garneau at any time upon demand. M. L. COHN, *General Agt.*"

This receipt was produced upon the trial by defendant. The evidence was ample to establish the fact of the delivery of the policy to Garneau, and there being no conflict in the evidence upon that question, it was not error to refuse to submit that issue to the consideration of the jury. The record is free from error, and the judgment is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JOHN F. WOLFE.

FILED MARCH 20, 1901. No. 9,338.

1. **Special Session of Legislature.** At a special session of the legislature no business can be transacted except such as is included in the objects of legislation stated in the proclamation of the executive convening the law-making body.

2. ——: SCOPE OF GOVERNOR'S CALL. Section 3, article 1, chapter 72,

Compiled Statutes, was passed at a special session of the legislature held in 1867, and is within the scope of the third object designated by the governor in his proclamation convening the legislature.

3. **Governor's Proclamation.** The entire proclamation of the governor convening the legislature in special session should be considered in determining whether any given act at such session is germane to the objects stated in the call of the executive.

4. **Passenger on Railroad Train:** INJURY: PRESUMPTION. When one is injured while a passenger on a railroad train, the presumption is that such injury was caused by the negligence of the carrier.

5. **Liability of Carrier.** A carrier is liable for damages resulting from injuries sustained by a passenger, unless the latter was guilty of criminal negligence.

6. **Statute:** FOURTEENTH AMENDMENT. Section 3, article 1, chapter 72, Compiled Statutes, does not contravene the fourteenth amendment to the constitution of the United States.

ERROR from the district court for Phelps county. Tried below before BEALL, J. *Affirmed.*

J. W. Dewcese, Frank E. Bishop, Webster S. Morlan and *W. P. Hall,* for plaintiff in error.

T. J. Mahoney, S. A. Dravo and *F. J. H. Larson, contra.*

NORVAL, C. J.

In 1894 John F. Wolfe was injured while a passenger on one of the trains of the Chicago, Burlington & Quincy Railroad Company, and for such injury recovered judgment against defendant under section 3, article 1, chapter 72, Compiled Statutes, from which said company brings error to this court.

The brief of defendant is devoted almost wholly to a discussion of the validity of this statute. All arguments presented, save one, have been repeatedly passed upon by this court adversely to the contention of defendant, and we are convinced that the rulings mentioned are right. To the one new point we purpose to devote the principal part of this opinion.

The law attacked, entitled "An act to define the duties

and liabilities of railroad companies" (Session Laws, 1867, p. 88), was passed at a special session of the legislature which met, pursuant to a proclamation of the governor, on May 16, 1867. The constitution of 1866 contains the following limitation on the power of the legislature when convened in special session (General Statutes, 1873, art. 2, sec. 12, p. 55): "But the legislature may, on extraordinary occasions, be convened by proclamation of the governor, and when so convened, shall transact no business except such as relates to the object for which they were so convened, to be stated in the proclamation of the governor." Section 3 of the act whose title is above quoted is the present section 3, article 1, chapter 72, Compiled Statutes, and it is contended that this section is in contravention of said constitutional limitation, in that it is foreign to any of the objects for which that legislature was convened, as stated in said proclamation. The latter is too long to admit of insertion in full here, but we think the law attacked is clearly included in one, if not more, of the objects stated in the proclamation. Among the objects therein specified is one numbered 3, as follows: "3. The revision or amendment of the general incorporation law." Senate Journal, 1867, third session, p. 42. At that time the general incorporation law of the state comprised chapter 25, Revised Statutes, 1866, page 187 *et seq.*, and included in its scope regulations for the incorporation, control, regulation and government of a large number of corporations, including railroad companies, the laws governing the latter being sections 72-122, inclusive, of that chapter. This portion of the general incorporation laws of the state includes many provisions regulating the formation, government and control of railroad corporations, defines their rights and duties, and is as much a part of the general incorporation laws of the state as any other portion of the chapter. There is no doubt that the act of 1867 had an effect to amend the general incorporation laws of the state, and for that reason was germane to point 3 of the call above quoted. Being an

act complete in itself, it was not necessary that it refer to any particular portion of the laws to be amended. *Jones v. Davis*, 6 Nebr., 36; *State v. Page*, 12 Nebr., 386; *Herold v. State*, 21 Nebr., 52.

It is contended, however, that section 3, with the remainder of the act, was enacted pursuant to section 21 of the proclamation, which provided that the legislature take action relating to "the responsibility of railroad companies for damages done to stock by their employees." It is argued that from an investigation of the origin and progress of the bill through the legislature it appears that, as first introduced, it related wholly to damages to live stock, but that as it progressed it was amended by the insertion of section 3, and that this is evidence that that body construed its power in passing the act and incorporating this section into it as being derived solely from section 21 of the call; and that, therefore, the court is not at liberty to infer that it obtained its authority from any other portion of the proclamation. We do not think that the history of this section is evidence that the legislature construed its authority as contended for. On the contrary, to give full force and effect to the controlling presumption that acts of the legislature are within the limitations of the constitution, unless the contrary clearly appears, we are bound to assume that the legislature looked to the proclamation as a whole with a view to determine whether this amendment to an act which originally was wholly within the purview of one object of the call was not germane to some other portion of the call. The fact that one section of the act may be consonant to one portion of the call, while another section may be authorized by another, does not in anywise militate against the power of the legislature to enact the law. Such an interpretation of the fundamental law would leave out of sight the rule we have already mentioned, and turn the presumptions against the validity of a law, once it is shown that a portion of a bill is not consonant to one portion of a proclamation, though

others may be. It is the duty of this court to uphold, rather than to tear down legislation, and we strain no rule of interpretation in holding that the legislature had ample authority, under sections 3 and 21 of the call to pass the bill. A wide scope for legislation relative to corporations is given by section 3 of the call, for it authorizes the revision or amendment of the general incorporation laws of the state, of which those relating to railroad companies are a part.

To sustain its argument, that the legislature transcended the limitations of its power in the respect stated, defendant cites the court to decisions, some of which we will review, with a view to ascertaining whether they are in point here. The principal case relied upon is *Wells v. Missouri P. R. Co.*, 110 Mo., 286. The constitutional limitation placed upon legislatures convened in special session may be assumed to be similar in the two states. The constitution of Missouri also contains the following provision: "The general assembly shall pass laws to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." Constitution, art. 12, sec. 14. The governor of that state called the legislature to meet in special session for the purpose, among others, "To provide the legislative enactments necessary or expedient to enforce and execute those laws and principles with reference to railways and railroad companies which the people themselves have enacted and declared in their constitution." The legislature met and enacted a law entitled "An act to provide for the prevention of accidents to railroad employees and others, by requiring that switches, frogs and guard rails be properly blocked" (Missouri Session Laws, (Extra Session) 1887, p. 14), and the supreme court of that state very properly held the

act not within the scope of the proclamation, and for that reason unconstitutional. A very cursory examination of the act is sufficient to convince the reader that a law which requires railroad companies to properly block their switches, frogs and guard rails, in order to protect persons from injury, is extremely foreign to the authority given the legislature to enact laws to correct abuses of, and to prevent unjust discrimination and extortion in, freight and passenger rates, and to pass laws establishing reasonable maximum freight and passenger rates. The legislation attempted very clearly did not come within the sweep of the proclamation, assuming that the portion quoted was the only one relating to railroad companies, and was, therefore, *ultra vires*. On the other hand, the act in question here was clearly comprehended in that portion of the call of the governor which asked the legislature to consider legislation relative to revising or amending the general incorporation laws of the state. This is true even though we assume that it was within the power of the governor to limit the legislature to acts merely amendatory or revisory of such laws. The lesser is always included in the greater, and those portions of the laws relating to railroads were a part of the general incorporation laws of the state; hence there is no more doubt that the act came within the scope of the call than there is that the legislation attempted by the legislature of Missouri did not fall within the range of the call of the governor of that state. In *Jones v. Theall*, 3 Nev., 233, the court held that a legislature, under a clause of the constitution similar to ours, has no power at a special session to legislate upon any subjects, except those to which their special attention has been called by the governor, with a view to legislative action thereon. In *Davidson v. Moorman*, 2 Heisk. [Tenn.], 575, the supreme court of that state held that an act of the legislature passed at a special session, which provided that certain persons shall have a certain time in which to redeem real estate sold under judicial process, was not

within the range of a proclamation of the governor, by which it was called to meet to legislate upon the military and political interests of the state. These cases are clearly not in point on the question before us, for the reasons stated, that the bill in question in this case does come within the purview of one or the other of the sections of the governor's call, and for that reason the legislature did not transcend its power.

It is also contended that the act is not authorized by the call, for the reason that it destroys the defense of contributory negligence, except in case the injured party is criminally negligent, and that there is nothing in the call which would authorize the legislature to deliberate upon or pass an act with that object in view. We take it that the governor has not the power to limit the legislature to some specific subject of general legislation, but that, when he points out to the legislature the general scope of legislation, as he did in both sections 3 and 21 of the call, he has exhausted his powers, and that the legislative branch may then proceed to legislate upon any subject relating to such general head. *People v. District Court*, 46 Pac. Rep. [Colo.], 681; *Baldwin v. State*, 21 Tex. App., 591; *Brown v. State*, 22 S. W. Rep. [Tex.], 596; *Mitchell v. Turnpike Co.*, 3 Humph. [Tenn.], 455; *State v. Shores*, 31 W. Va., 491. The legislation in question is clearly regulative of corporations formed under the general incorporation laws of the state, and, therefore, within the range of the powers conferred upon the legislature by the executive proclamation.

The remaining questions of law may be answered more briefly, having been decided by this court, in one form or another, in numerous decisions, adversely to the contention of defendant, and from which rulings we have no reason to recede.

It is argued that, as the evidence of plaintiff did not establish any act of negligence on the part of defendant which resulted in injury to plaintiff, he failed to make out a cause of action. He did prove that he was a pas-

senger on one of defendant's trains, and that while such passenger he fell from the train and one of his feet was cut off by the passing train. Under such a state of facts this court has a number of times held that a conclusive presumption of negligence on the part of a common carrier arises, on which presumption a party injured is entitled to recover, if damage is proved. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Nebr., 689; *Chicago, R. I. & P. R. Co. v. Young*, 58 Nebr., 678, and cases there cited.

Again it is claimed that an examination of the various laws in existence at the time this act was passed, and those passed afterwards, and before the constitution of 1875 was adopted, together with decisions of this court existing at the last named time, all tend to show that it has been and is the policy of the legislature to adopt a rule of liability of railroad companies in exact accordance with such liability as it stood at common law; and that the act should, therefore, be construed to mean that a railroad company should be liable only in case an injury to a passenger occurs through, and was caused by, the negligence of such common carrier. Without citing these acts, which we do not think in any sense tend to establish such rule, we will simply say that if such was the intention of the legislature or of the people who adopted the constitution now existing, there was no necessity to pass the act, for the liability of common carriers contended for already existed at common law, and there was no obscurity to be cleared up or settled by a declaratory statute. The argument is far-fetched, as is evident when we find defendant attempting to bring within the sweep of the rule contended for section 4, article 11, of the constitution, wherein it is provided that the liability of railroad corporations as common carriers shall never be limited; and it is argued that this is a limitation upon the power of the legislature to increase the liability of such common carriers beyond that liability as it existed at common law. As a matter of fact, the reason for the adoption of that section was very

different from that contended for. Railroads and other common carriers were, through clauses inserted in bills of lading, attempting to evade their common law liabilities as carriers; and this clause was put in the constitution, not to prevent the legislature from enlarging their liabilities, but to prevent them from narrowing them, and this clause accomplished that result. *Union P. R. Co. v. Vincent*, 58 Nebr., 171; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Nebr., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Nebr., 356.

We are also urged to recede from our former definitions of the meaning of the term "criminal negligence" employed in said section. The rulings of this court on said term are many and well known. The definition seems apt and logical, and will be adhered to.

Again, it is argued that the statute is in derogation of the fourteenth amendment of the constitution of the United States. This has been also decided adversely to that contention, and is well sustained by authority and reason. *Chicago, R. I. & P. R. Co. v. Young, supra*, and cases cited; *Chicago, R. I. & P. R. Co. v. Zernecke, supra*, and cases cited.

Other questions argued in the brief have been so recently presented to this court and examined at great length and with much care, that it seems unnecessary to further discuss them at length. It is sufficient to say that we are content with the soundness of the conclusions arrived at relative thereto, and see no reason for abrogating or modifying them. The statute so strenuously attacked was progressive in its nature. The legislature in passing it took into consideration the fact that since the time the liability of common carriers became fixed at common law through the decisions of courts, the means of travel had been revolutionized. From comparatively safe and easy controlled means of travel invention had progressed until this means had become a complicated and exceedingly dangerous machine, propelled through space at an extremely rapid rate of speed,

and with the workings of which the public were unfamiliar and over which they had not the slightest control. Considering, then, the old law and the mischief that had arisen through the application of the inventive genius of the newer age to the means of locomotion, the legislature rightly conceived that the old law relative to the liabilities of common carriers in the respect indicated by this legislation had become obsolete, and it therefore proceeded to exercise the function for which it had been created, by curing that wherein the old law had become defective and inapplicable to modern conditions. Added to this, perhaps, was the consideration that there was no reason for making common carriers insurers of the safety of personal property confided to them that would not apply with equal force to the owners of that property when their persons were being transported from point to point, except perhaps those indicated by the exceptions contained in this law. It would seem that in law the owner should be at least equal to, if not "A little better than his dog, a little dearer than his horse." This equality the law in question establishes, excepting the common carrier from such liability only in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger.

From a careful reconsideration of all our former decisions, and the facts and circumstances connected with the passage of the law, we are of opinion that the law was correctly complied with on the trial in the court below, and that its judgment in the premises should be, and it therefore is,

AFFIRMED.

CAHN, WAMPOLD & COMPANY ET AL. V. CARPLESS COMPANY ET AL.

FILED MARCH 20, 1901. No. 9,374.

1. **Garnishment:** ATTACHING CREDITOR: DEBTOR. An attaching creditor acquires no greater rights by garnishment than had his debtor.

2. **Assignment of Judgment:** PARTIAL PRIOR ASSIGNMENT. An assignment of a judgment which excepts therefrom a specific portion thereof, previously assigned to another as security for a debt, is not equivalent to an assignment subject to the interest of the first assignee.

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

Tibbets Bros., Morey & Ferris for plaintiffs in error.

Robert B. Windham, contra.

NORVAL, C. J.

Joseph Klein was engaged in the mercantile business at Plattsmouth, and as a result thereof he became indebted to various persons and corporations. His stock of goods was covered by a policy of insurance in the Western Assurance Company of Toronto, Canada, in the sum of $2,000. The goods were destroyed by fire, and Klein instituted an action on the policy in the district court of Cass county, and recovered a judgment, on November 8, 1893, against the company in the sum of $2,140.50. On July 27, 1894, he executed to his creditor, the Citizens Bank of Plattsmouth, an assignment of a portion of said judgment, to secure a *bona fide* indebtedness of his. Said assignment is as follows:

"In the District Court of Cass County, Nebraska.

JOSEPH KLEIN, Plaintiff
vs.
THE WESTERN ASSURANCE CO. OF TORONTO, Defendant.
} Assignment of Judgment.

"For value received, I hereby assign and set over to

the Citizens Bank of Plattsmouth, Nebraska, all of my right, title and interest to the amount of fifteen hundred dollars of, in and to a certain judgment by me the undersigned, obtained against the above named defendant Insurance Company upon the 8th day of November, A. D. 1893, in the district court of Cass county, Nebraska, in the above entitled suit, which was then and there pending, for the sum of $2,140.50.

"And I hereby authorize the said Citizens Bank to issue execution and to collect the same in any manner that I might do if personally present, to the amount of $1,500, and to receipt and release therefor upon payment of the same.

"In witness whereof, I have hereunto set my hand, this 27th day of July, A. D. 1894.

"In presence of

"W. H. CUSHING. JOE KLEIN."

On December 1, 1894, Klein failed in business, and executed and delivered to Cahn, Wampold & Co., another of his creditors, as security for an indebtedness, the following assignment:

"In the District Court of Cass County, Nebraska.

JOSEPH KLEIN, Plaintiff,
vs.
THE WESTERN ASSURANCE CO. OF TORONTO, Defendant.
} Assignment of Judgment.

"For a valuable consideration in hand paid, the receipt of which is hereby acknowledged, I hereby assign, sell and set over to Cahn, Wampold & Co., of Chicago, Illinois, all my right, title and interest in and to the judgment of $2,140.50, which I obtained in the district court of Cass county, Nebraska, on the 8th day of Nov., A. D. 1893, against the defendant, the Western Assurance Company of Toronto, as the same appears of record in the above entitled cause in the office of the clerk of the district court of Cass county, Nebraska, excepting the interest which the Citizens Bank of Plattsmouth and the interest

which Byron Clark has in said judgment as shown by assignments now on file, each of which is hereby excepted and not assigned to said Cahn, Wampold & Co.

"In witness whereof, I have hereunto set my hand this 1st day of December, A. D. 1894.

"In presence of

"A. W. WHITE. JOE KLEIN."

On December 3, 1894, the Carpless Company brought an action against Klein in the district court of Cass county, aided by the attachment, to recover the amount due it from him, and Byron Clark and the Western Assurance Company of Toronto were garnished. Mr. Clark answered that he obtained for Klein the judgment against the insurance company, and that he had a lien on the judgment in the sum of $750 for service rendered, and $250 for expenses. The Western Assurance Company answered that it was indebted to Klein by virtue of said judgment in the sum of $2,140.50. The Carpless Company subsequently obtained judgment against Klein in the sum of $341.54 and costs. It is disclosed that the lien of Mr. Clark has been paid out of funds other than those arising from the judgment on the policy of insurance, and he indorsed the following release upon the judgment docket in said cause:

"March 12, 1895. For value received, I hereby release all claim of attorney's fees in full to this date.

"BYRON CLARK."

On June 20, 1896, after the garnishment proceedings, Klein made another assignment of this judgment against said Western Assurance Company, of which the following is a copy:

"In the District Court of Cass County, Nebraska.

JOSEPH KLEIN, Plaintiff,
vs.
WESTERN ASSURANCE CO. OF TORONTO, Defendant.
} Assignment of Judgment.

"I, Joseph Klein, plaintiff in the above entitled case,

for value received, and in consideration of an agreement heretofore made, and for the purpose of fully carrying out said contract and agreement and to cure any defects there may be in an assignment by me heretofore made in this case and filed, do hereby assign, set over to and fully convey all my right, title and interest in and to a certain judgment, and all accruing interest by me obtained in this case against the defendant on November 8, A. D. 1893, to Cahn, Wampold & Co. of Chicago, Ill., and hereby authorize and empower my said assignee, Cahn, Wampold & Co., of Chicago, Illinois, to receive the said moneys due upon said judgment, together with all accruing interest, to receipt for and release the same either in my name or their own as may be necessary, the same as I might or could do, hereby ratifying all they may do in the premises.

"In witness whereof, I hereunto set my hand this 20th day of June, A. D. 1896.

"In presence of

"FRANK ALSCHULER. JOSEPH KLEIN."

On March 12, 1895, the Citizens Bank of Plattsmouth, by its receiver, entered the following upon the judgment docket in the case of Klein v. Western Assurance Company:

"March 12, 1895. Lien of Citizens Bank of Plattsmouth is satisfied in full, and is hereby released.

"CHARLES C. PARMELE,
"*Receiver Citizens Bank.*"

In the case in which the garnishment issued, Cahn, Wampold & Co. intervened and were permitted to introduce evidence as to their interest in the said judgment of Klein against the Western Assurance Company, and on the hearing the court ordered and adjudged that the garnishee, the Western Assurance Company, should pay the amount of the judgment obtained against it into court, and that out of the same the clerk of the court should pay to the Carpless Company the amount of its

judgment against Klein, with interest and costs. To reverse this order Cahn, Wampold & Co., and Joseph Klein prosecute a petition in error.

It is argued that an attaching creditor can acquire no greater rights by garnishment proceedings than had the debtor. This is undoubtedly sound, and this court has so held. *Fitzgerald v. Hollingsworth*, 14 Nebr., 188. It therefore follows that the Carpless Company acquired by its garnishment the interest, if any, which Klein then had in the judgment against the Western Assurance Company, and no more. This is plain. It is strenuously urged that Klein had no interest in it. This contention is based upon the several assignments made by Klein already set out. It is obvious that by the assignment to the Citizens Bank Klein did not part with or transfer all his interest in the judgment. He merely assigned to the bank his right, title and interest in the judgment to the amount of $1,500 as security for an indebtedness. The judgment, to the extent it exceeded that sum, was not affected by the assignment to the bank. When the indebtedness to the bank was paid, Klein again became the owner of that portion of the judgment assigned to the bank. The assignment of Cahn, Wampold & Co., of date December 1, 1894, does not purport to transfer the entire judgment to them, but expressly excepts from the operation of the assignment "the interest which the Citizens Bank of Plattsmouth, and the interest which Byron Clark has in said judgment as shown by assignments now on file, each of which is hereby excepted and not assigned to said Cahn, Wampold & Co."

It is insisted that notwithstanding the clause in the assignment just quoted this conveyed all of Klein's interest in the judgment. To this proposition we are unable to assent. To so hold would be to disregard the plain terms of the assignment. The portion of the judgment previously assigned to the Citizens Bank of Plattsmouth was in express language excepted from the assignment, and was not transferred to Cahn, Wampold &

Co. The assignment to them was not made subject to the lien of the bank on the judgment, but excepted from its terms the judgment to the extent of $1,500, so that when the indebtedness to the bank was paid Klein became the absolute owner of that portion of the judgment covered by the assignment to the bank, and it was subject to the payment of his debts. Nothing can be predicated upon the second assignment to Cahn, Wampold & Co., since at the time the same was made the garnishment had become operative, and Klein's interest in the judgment had been seized thereunder. It follows that the order of the district court must be

AFFIRMED.

EDWARD GURSKE, APPELLANT, V. EDWARD KELPIN ET AL., APPELLEES.

FILED MARCH 20, 1901. No. 9,400.

1. **Finding of Fact Based on Conflicting Evidence Not Reviewable.** A finding of fact by the district court based on conflicting evidence will not be disturbed on review.
2. **Pleader of Statutory Counter-Claim Must Allege Facts Bringing It Within Statute.** When the right to a counter-claim depends wholly upon statute, the defendant must not only plead a good cause of action in his favor against the plaintiff, but he must allege facts which bring his claim within the provisions of the statute.
3. **Counter-Claim Can Not Accrue After Bringing of Action.** Matters accruing subsequently to the bringing of the action can not be pleaded as a counter-claim.

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

C. A. Baldwin, A. S. Churchill and *Warren Switzler*, for appellant.

Constantine J. Smyth, contra.

NORVAL, C. J.

This suit was instituted to foreclose a real estate mortgage given by the defendants to plaintiff. One of the defenses was payment. The defendants also sought to recover, by way of a counter-claim, the statutory penalty of $100 for failure of plaintiff to release and discharge the mortgage of record. The court found that the mortgage debt had been paid, and denied defendants the $100 penalty. Both parties complain of the decision.

On the question of payment the evidence was very conflicting. That adduced by the defendants was sufficient to establish that the note and mortgage had been paid, while the proofs introduced by plaintiff were ample to sustain his conclusion. The doctrine of this court, long adhered to, is that findings based upon conflicting evidence will not be investigated on review. So, applying the rule to this case, the decree canceling the mortgage is sustained.

There was no error committed in refusing to allow defendants the statutory penalty of $100, for more than one reason. In the first place, the alleged counter-claim is not sufficiently pleaded in the answer. It is there alleged that "These defendants, Edward and Matilda Kelpin, state to the court that they demanded of the said Gurske that he cancel said mortgage of record, and at the same time they tendered to him his reasonable charges therefor, but the said Gurske refused and neglected, and still refuses and neglects to discharge the same, or to execute and acknowledge a certificate of discharge or release thereon, and he has thereby become and is not liable under the statute to these defendants, Edward Kelpin and Matilda Kelpin, in the sum of $100 damages." By section 29, chapter 73, Compiled Statutes, the mortgagee of real estate, his personal representative or assignee, after full payment of the mortgage debt, is liable to the statutory penalty of $100 if he shall, for the space of seven days after being requested, and after tender of his

reasonable charges, refuse or neglect to discharge the same, or to execute or acknowledge a certificate of discharge or release of the mortgage. The penalty accrues only where there has been a neglect or refusal to discharge the mortgage, or to execute or acknowledge a certificate of discharge for the space of seven days after demand, and the tender of reasonable charges therefor. It will be observed that it is not alleged that plaintiff, for the period of seven days, or for any other stated time, had neglected or refused to release the mortgage. The demand upon him and the tender of fees or charges may have been made the day the answer was filed. The defendants' right to the $100 depends wholly upon the statute, and they must allege facts which bring their claim within the terms of the statute. This they did not do.

Further, it is not disclosed that any demand was made upon plaintiff to release or discharge the mortgage, or that any tender of fees or charges was made prior to the commencement of the suit. Matters accruing subsequently to the bringing of the foreclosure suit are not available as a counter-claim. *Simpson v. Jennings*, 15 Nebr., 671; *Kansas Loan & Investment Co. v. Hutto*, 48 Kan., 166; *Jones v. Swank*, 54 Minn., 259. The decree is, therefore,

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. RICHARDSON COUNTY ET AL., APPELLANTS.

FILED MARCH 20, 1901. No. 11,126.

1. **Railroad Bridge Across Navigable River Assessable by State Board.** A railroad bridge across a navigable river, owned, used and operated by a railroad company as a part of its line of road, is assessable for taxation by the state board of equalization, and not by the local assessor.

2. **Prior Decision Overruled.** *Cass County v. Chicago, B. & Q. R. Co.*, 25 Nebr., 348, overruled.

APPEAL from the district court for Richardson county. Heard below before STULL, J. *Affirmed.*

John Gagnon, J. E. Leyda, Reavis & Reavis and *Smyth & Smith,* for appellants.

Reavis & Reavis: The bridge is not a part of the railroad line, but is a separate and independent structure, authorized by congress and not by the state. The *Cass County Case,* 25 Nebr., 348, is decisive of this one.

J. W. Deweese and *Frank E. Bishop, contra:*

The railroad is an entirety. The bridge is a part of the road. *Union P. R. Co. v. Hall,* 91 U. S., 352; *Brooks v. Railway Co.,* 101 U. S., 451.

NORVAL, C. J.

In 1895 the township assessor of Rulo, in Richardson county, assessed at the sum of $42,500 the west half of the railroad bridge of the Chicago, Burlington & Quincy Railroad Company which spans the Missouri river at the village of Rulo. Taxes for said year were levied on said valuation for state, county, village, township and school district purposes. This suit was to enjoin the collection of certain of the taxes so imposed on various grounds, among others, that the bridge in question is a part of plaintiff's line of railroad, and no part of the bridge is assessable by the local assessors, but is assessable only by the state board of equalization. The district court perpetually enjoined the collection of the taxes in controversy, and the defendants appeal.

It is conceded by defendants that the bridge over the Missouri river at Rulo, on the west half of which the taxes in dispute were levied, is owned and used by plaintiff as a part of its continuous line of track. The principal question in the case, and the only one to which we shall advert, is whether the state board of equalization or the local assessors have the right to assess for taxation

the railroad bridge at Rulo. The defendants claim that the bridge is no part of the railroad line, but is a separate and independent structure, and, therefore, is assessable for taxation by the local assessor. This contention is not without authority to sustain it. In *Cass County v. Chicago, B. & Q. R. Co.*, 25 Nebr., 348, it was decided that the railroad bridge of plaintiff over and across the Missouri river at Plattsmouth was assessable locally. If that decision is followed, the judgment of the court below in the present case can not be sustained. The opinion in that case is directly assailed as unsound, and we are asked to take up and decide the question anew, which we shall at once proceed to do.

Sections 39 and 40, article 1, chapter 77, Compiled Statutes, 1895, relate to the assessment of railroad and telegraph property, which we here reproduce:

"Sec. 39. The president, secretary, superintendent, or other principal accounting officer within this state of every railroad or telegraph company, whether incorporated by any law of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this state, viz: the number of miles of such railroad and telegraph line in each organized county in this state and the total number of miles in the state, including the roadbed, right of way, and superstructures thereon, main and side tracks, depot buildings, and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs, or successful operation of such railroad and telegraph lines; *Provided, however*, That all machine and repair shops, general office buildings, store houses, and also all real and personal property, outside of said right of way and depot grounds as

aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property.

"Sec. 40. The return to the auditor of public accounts herein provided shall be made on or before the fifth day of April annually. If the return aforesaid be not received by said auditor by the tenth day of April, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that purpose may address a written communication to the corporation or to some officers of the corporation who has failed to make the return aforesaid. As soon as practicable after the auditor has received the said return, or procured the information required to be set forth in said return, a meeting of the state board of equalization, consisting of the governor, state treasurer and auditor, shall be held at the office of said auditor, and the said board shall then value and assess the property of said corporation at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. In making up such valuation or assessment the said board shall examine and consider the return herein required to be made, or the information procured by the auditor in default of such return, together with such other reliable information relative thereto as they may be able to procure; said board shall not assess the value of any machine or repair shop or general office building, store houses, or any real or personal property situated outside of the right of way or depot grounds of such company. On or before the fifteenth day of May, or so soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assess-

ment, the auditor shall certify to the county clerks of the several counties in which the property of the aforesaid corporation, or any part thereof, may be situated, the assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties. All such property shall, for the purpose of taxation, be deemed 'personal property,' and be placed on the tax list as hereinafter provided."

From a reading of the foregoing sections it will be seen that all machine and repair shops, general office buildings, storehouses and all real and personal property of a railroad company outside its right of way are required to be assessed by the local assessors; and all other property of a railroad company is required to be valued for taxation by the state board of equalization. It needs no argument to show that the railroad bridge at Rulo is neither a machine shop, a general office building or a storehouse; and if this bridge, within the meaning of the statute, is neither real or personal property outside the right of way of plaintiff, it is not to be assessed by the local assessor, but is taxable only by the state board of equalization. There is no claim that it is exempt from taxation, the only controversy being as to the jurisdiction of the taxing powers. If it is inside—*i. e.*, a part of—the right of way, as the term is employed in the act, then it must be assessed by the state board, otherwise not. The meaning of the term "right of way," as employed by the statute, is important, indeed, decisive of the question. Counsel for defendants insist that as the right to construct this bridge over the river, the boundary between two states, could not be conferred upon the corporation by the legislature, but by congress only, it should be taxed by the local authorities. Why should the question of whether the legislature had power to confer upon the corporation the right of eminent domain in this instance control in deciding as to the right of taxation? What was the purpose of the legislature in requiring the right of way, road-bed and superstructure of a railway

to be assessed as a unit. A clear understanding of this purpose and intent should enable us to dispose of the question with little difficulty, and clear up the inconsistencies that now appear in former adjudications of this court upon the point. The common-sense view of the subject would seem to be that such purpose was to enable the proper authorities to distribute the avails of such taxation equitably among all the municipal subdivisions through which a road may pass, in the ratio which the number of miles within each subdivision bears to the total number of miles of road within the state, treating each mile as equal in value to every other mile, and regardless of whence came the power under which any particular portion of the road is constructed. A railroad might have vast terminals at one point, worth as much as the remainder of the line, though it extended through a dozen counties. The subdivision in which these terminals are located is not, under this law, permitted to reap an advantage over other localities, by reason of the mere accident of location; but must share its advantages with these others *pro rata*. That evidently is the reason behind and under this legislation. How a franchise has been acquired, or whether a particular portion of a line is more expensive to construct than others, is unimportant in determining whether the property should be taxed locally or otherwise. As a matter of fact, this inequality of value was the principal motive for the legislation, which sought to obviate the evils attendant upon such a state of facts. Without such inequality, no legislation would have been necessary, the general laws being in that event adequate for the purpose.

It is also decidedly fallacious to argue that either the nature of the tenure or the manner of its acquisition can be a criterion in determining the point in question. There are three legal modes of acquiring right of way: by purchase, by grant or by the exercise of eminent domain. How can any of these means of acquisition assist us in determining whether they should be taxed in one locality

or in another? Suppose a right of way to have been acquired in none of these legal ways, but that the corporation is a trespasser from one terminus to the other, that it has not the legal right to a single foot of its right of way; is not its right of way nevertheless taxable in the same manner and by the same officials as it would be, had its acquisition been attended with every legal formality? It is not denied that it is the intention of the legislature in this act to assess and tax railroads as units. Is a railroad any less a unit because perchance one part of its route may have been acquired by grant, another by eminent domain, another by purchase, and that to still another part it has no title, being a mere trespasser? Though the nature of the tenure may differ, the line itself is a continuous whole, a unit, so far as its operation and management are concerned, and so far as fitted the purpose of the legislature in adopting the legislation mentioned. In *Cass County v. Chicago, B. & Q. R. Co.*, 25 Nebr., 348, we placed a different construction upon this statute, holding that a bridge like the one in controversy was not assessable by the state board. A review of the question convinces us that our decision in that case was wrong, and we accordingly overrule it. In the opinion in that case it is argued that if it was the intention of the legislature that such structures were to be assessed as a continuation of the line of road, some additional report as to value or cost would have been required by it. We fail to see the force of the reasoning. The state board has imposed upon it, by section 40, *supra*, the duty of ascertaining the value of every mile of such road, and of all articles enumerated in section 39, or included in the generic terms therein employed. Is it any less difficult to ascertain the value of rolling stock, tunnels, viaducts, and other property of like nature than the value of a bridge? It is the duty of this board to inquire and ascertain the value of all the items therein enumerated, or implied from the terms employed; there is no requirement that the railroad corporation shall give the value

of a single article. In section 40 it is provided that the board shall ascertain and assess the value. "In making up such valuation or assessment the said board shall examine and consider the return herein required to be made, or the information procured by the auditor in default of such return, together with such other reliable information relative thereto as they may be able to procure." The argument that the failure of the legislature to require an additional report relative to bridges is indicative that it was not the intention that such structures should be assessed by the state board, would prevent it from assessing many other items enumerated. No specifications of the items which constitute a "superstructure" are present in the act. Must it then be inferred that the rails, cross-ties and fastenings are to be assessed by the local authorities? Neither is the term "road-bed" defined. Must the embankments, fills, tunnels, culverts, trestles, bridges and viaducts be given over to localities, as things not included in or part of the right of way? The argument to establish these propositions is as conclusive as is the one from which is adduced the conclusion that bridges across navigable streams are not part of, or "included in," the right of way of a railroad company. Nor does there seem any more conclusiveness in the argument that, as it is shown that the railroad company, in the *Cass County Case*, charged more by the mile to passengers who traveled over the bridge than was allowed by statute for transporting passengers within the state, it must follow that such bridge was not treated by the railroad company as a part of its line, and that, therefore, it is not subject to taxation by the state board. The fact remains that, so far as the operation of and physical condition of the road is concerned, there is no difference whatever between this portion of the road and any other, except that at this point the road crosses a bridge, while at other points it may pass over soil, trestles, culverts, viaducts, or through tunnels. If the law relative to the legal sums permitted to be exacted from passengers is

violated, it is a matter for the cognizance of the proper authorities; but such violation is no test to be employed in ascertaining the legal question as to the manner in which taxes shall be imposed for public uses.

The conclusion reached is not only sustained by reason, but is supported by an unbroken line of decisions by the highest courts in the land. In New Jersey there was a statute providing that "the main stem or road-bed and track" of all railroads should be exempt from township and municipal taxation.

In *Central Railroad Co. v. Mutchler*, 41 N. J. Law, 96, the court, in construing this statute, ruled that a railroad bridge across the Delaware river was exempt from township and municipal taxation, since the bridge was a part of the main stem or road-bed and track of the railroad.

A statute of Missouri provided that railroad companies, on or before a certain date, should return to the auditor a verified statement "setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or side tracks, with depots, water tanks and turn-tables; * * * the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used, or leased by them" (Revised Statutes [Mo.], 1879, sec. 6866); and that the "state board" should assess all such property and the valuation be apportioned among the various counties, etc., of the state. The statute also declared (sec. 6876) that "all property, real, personal or mixed, including lands, machine and workshops, round-houses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, * * * wherein such property is located, under the general revenue laws of the

state." This statute was under consideration in *State v. Hannibal & St. J. R. Co.*, 10 S. W. Rep. [Mo.], 436, and the court held that a bridge of the railway company spanning the Missouri river at Kansas City, over which bridge the railway company had laid its tracks, and was operating its trains, was a part of the railroad company's road and was assessable only by the state board, notwithstanding the fact that the railroad company had planked the bridge and permitted wagons, carriages, etc., to cross the river thereon and collected tolls therefor, and that other railroad companies ran their engines and cars over and across the bridge, paying toll therefor.

The statute of the state of Illinois relating to the assessment of railroad property provided that "such right of way, including the superstructures of main, side or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purpose of taxation and denominated 'railroad track,' and shall be so listed and valued." Revised Statutes [Ill.], 1874, ch. 120, sec. 42. The statute likewise made it the duty of the state board of equalization to assess all railroad property denominated in the act as "railroad track." Under this statute, in *Anderson v. Chicago, B. & Q. R. Co.*, 117 Ill., 26, it was held that the railroad bridge owned by the Burlington road across the Mississippi river at Burlington, Iowa, was assessable by the state board of equalization and was not assessable by the local assessor of the county in which a portion of the bridge was located.

In *Virginia & T. R. Co. v. Washington County*, 30 Gratt. [Va.], 471, 481, the court observe: "If the commissioners of the revenue, or the assessors in the different counties, should make an assessment of the railroad track, or other property within their limits, such assessment would constitute no just basis of taxation. A part of a railroad running through one county may be of little value, but if taken in connection with the whole it may be as valuable as any other part. As was said by the supreme

court of Kentucky [*Applegate v. Ernst*, 3 Bush [Ky.], 648]: 'A railroad, from one end to the other, is an entirety. Fragmentary taxation or sales might be unjustly vexatious and injurious to the owners, prevent the destination of the road, and disturb the public use and interest. To avoid such evils and absurdities the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs.' "

In *St. Louis R. Co. v. Williams*, 53 Ark., 58, 63, the court in its opinion says: "The requirement as to railways is that every corporation or other person owning or operating a railway shall return its road to the state board for taxation; and in estimating the value the board is required to take into consideration everything on the right of way and appurtenant to the railroad which adds value to it as an entire thing. Bridges which are on the line of the railway and are railway property are therefore to be assessed as an integral part of the railway. They fall within the exclusive jurisdiction of the state board, and the increased revenue which is derived from the road on account of them is apportioned to the several counties through which the road runs. This comes from the legislative policy of taxing each road as a unit."

The supreme court of the United States in *Union P. R. Co. v. Hall*, 91 U. S., 343, 352, decided that the railroad bridge of said company across the Missouri river at Omaha was a part of their railroad and required to be so operated.

In *Gulf R. Co. v. Morris*, 7 Kan., 210, 222, the supreme court of Kansas used this apposite language: "A railroad is an entire thing, and should be assessed as a whole. It would be almost as easy and as reasonable to divide a house or a locomotive into portions, and assess each portion separately, as to divide a railroad into portions, and assess each portion of it separately. A portion of

a railroad, running through one township only, would be worth but little, if any thing, while that same portion, in connection with the balance of the road, might be invaluable."

The conclusion is irresistible that the bridge in question is a part of the plaintiff's railroad, and as such is assessable only by the state board of equalization; the local assessor was without jurisdiction to assess said bridge and the tax in question is, therefore, void. The conclusion reached makes the examination of other questions argued by counsel unnecessary.

The decree of the court below is right, and it is accordingly

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. ANTHONY YOST.

FILED MARCH 20, 1901. No. 11,400.

1. **Contributory Negligence: DUTY OF PERSON CROSSING RAILWAY TRACK.** It is the duty of one who is about to step upon a railroad track to look in each direction to ascertain whether a train is coming, and if his failure so to do results in his injury, he can not recover therefor.
2. **Res Adjudicata.** Questions decided on a former review become the law of the case.
3. **Reversal of Cause: DISCRETION OF APPELLATE COURT.** On reversing a cause, it is within the discretion of the appellate court to either render such judgment as should have been rendered by the lower court, or to remand the cause for a new trial, or with instructions to enter judgment without a second trial.

ERROR from the district court for York county. Tried below before GOOD, J. *Reversed.*

J. W. Deweese, Frank E. Bishop and *F. C. Power*, for plaintiff in error:

This case has been before this court before (56 Nebr., 439), and the judgment was reversed for the reason that

the testimony of the defendant in error showed contributory negligence on his part. Upon the trial, resulting in the verdict which we now seek to reverse, the judgment rests on substantially the same evidence.

Merton Meeker, George B. France and *Bates & Kirkpatrick, contra:*

Upon the former hearing this case was not reversed because the plaintiff's own evidence showed that he was guilty of contributory negligence, but because of the uncontradicted testimony that the accident happened in the daytime when the weather was clear and the wind was blowing from the south, and whatever dust was made by the passing train was blown to the north side of the track, while Yost was on the south side and by reason of the conditions had an unobstructed view for 700 feet in the direction from which the train was coming.

It is true as a principle of law that if the evidence on the second trial is the same as on the first, and this is made to appear, then the decision should be the same. But this can not appear from the record, unless the bill of exceptions on the former trial is introduced in evidence on the second. *Missouri P. R. Co. v. Fox*, 60 Nebr., 531.

NORVAL, C. J.

This cause was before us at a prior term, and an opinion reversing the judgment and remanding the cause is reported in 56 Nebr., 439. On the second trial plaintiff again recovered judgment, which is before us for review. The former judgment was reversed for the reason that the evidence of plaintiff conclusively showed that he was guilty of contributory negligence, which was the proximate cause of the injury. On the second trial the evidence was more definite and explicit regarding several matters discussed in the former opinion. For instance, there is now a conflict of evidence as to whether at the

time of the accident the wind was blowing from a northerly or a southerly direction. On the first trial the evidence was not conflicting, but was to the effect that it was from the south. This was discussed at some length by the commissioner who wrote the opinion as bearing upon the question of whether it was possible for the plaintiff to have seen the approaching engine which caused his injury in time to have avoided it. The evidence on the last trial was also more explicit regarding his actions from the time immediately after the gravel train passed him to the instant of time at which he received his injuries. It is now quite clear that at the moment the gravel train passed him he was standing at the bottom of the fill, which at this point is about six feet high, and was distant some twelve feet from the track. He testifies that immediately after the gravel train passed him, going to the west, he looked toward the east, but saw nothing approaching him from that direction. At that instant he started to ascend the fill for the purpose of returning to his work upon the track at the top of the fill. From the time he started to return to his work he did not again look east, and was struck by the switch engine, which came from that direction. The engine struck him immediately after he reached the track. He had approached the track from the south. He says that as he ascended the inclined plane which made the side of the fill he did not look to the east, but, to use his own language, was "looking where I was stepping going up to my work," and did not look to the east after he reached the top of the fill. There is also disclosed by the evidence the fact that immediately east of the point where he was injured there was a "wing fence," which crossed the right of way on the south side of the track and extended to the south end of the ties, where there is a cattle guard usual at railroad crossings. This fence was about six feet high and consisted of fencing boards nailed upon posts, the intervening cracks between the boards being about six inches wide. About five feet be-

fore this fence reached the track its top slanted down to the end of the ties, or edge of the cattle guard. He testifies that this fence, with the accompanying smoke and dust of the train which had just passed, and the embankment and curve of the track, prevented him from seeing the approaching engine, when he looked while standing at the bottom of the fill. It is clear, however, that, after he reached the top of the fill and before he went upon the track, his head was above the level of the fence, which at that point slopes down, as before explained; also, that, unless the dust and smoke interfered, he had an unobstructed view of the track to the east from 100 to 575 feet. There is nothing in the evidence that would justify any reasonable man in believing that the dust and smoke could possibly have prevented him from seeing an approaching engine over the whole of that distance had he looked to the east after he climbed the grade and reached the level of the track. He did not, therefore, on the second trial place himself in any better position than on the first. Regarding the latter, this court held that, while he testified that he looked to the east before he went upon the track and saw nothing, the evidence and surrounding circumstances were conclusive that if he did look, he failed to use his sense of sight. On the second trial he merely shows that at the time he looked it was impossible, owing to the existence of the wing fence, the dust and smoke of the passing train and the contour of the ground immediately east of him, for him to see the approaching engine. But the evidence is clear that, had he looked to the east after he ascended the embankment, he would have encountered no obstacle to his vision, short of the curve 100 to 575 feet distant, which could possibly have prevented him from seeing the engine which injured him. This evidence then, obviously, strengthens the former opinion of this court, for it discloses the reason why plaintiff did not see the approaching engine when he looked. It shows conclusively that he had ample opportunity to see it, had he exercised or-

dinary care in looking, when his eyesight would have availed him to see his danger in time to avoid it. The former opinion being the law of the case (*Mead v. Tzschuck*, 57 Nebr., 615; *Wittenberg v. Mollyneaux*, 59 Nebr., 203; *Hayden v. Frederickson*, 59 Nebr., 141; *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150), it is necessary to again reverse the judgment and remand the cause for further proceedings.

Counsel insist that it is the duty of the court to render judgment for defendant under section 594 of the Code of Civil Procedure, where it is permitted to this court, on reversal of a cause, in its discretion to proceed to render such judgment as the court below should have entered, or to remand it for such judgment. As this is a cause for the particular cognizance of a jury, and as we are unable to foresee what further evidence may be adduced on another trial, we are inclined to the belief that the ends of justice will be more surely accomplished by awarding a new trial. *Porter v. Sherman County Banking Co.*, 40 Nebr., 274. The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

J. WARNER GARDNER, APPELLANT, V. THOMAS BURKE, APPELLEE.

FILED MARCH 20, 1901. No. 11,547.

1. **Election of Disqualified Person by Legal Votes Void.** Where a plurality of legal votes is cast for a person for a public office who is ineligible thereto, the election is void, and the one who receives the next highest number of votes is not entitled to the office or the emoluments thereof.
2. **Agreement Between Electors.** The agreement of electors set out in the opinion did not render their votes illegal.

APPEAL from the district court for Blaine county. Heard below before MUNN, J. *Affirmed.*

John S. Kirkpatrick, for appellant.

E. H. Riggs and *A. S. Moon, contra.*

NORVAL, C. J.

This is a contest over the office of county attorney of Blaine county. Plaintiff and defendant were candidates for said office at the general election held November 7, 1899, the former receiving thirty-four votes and the latter eighty-three votes. The defendant was declared elected, but failed to qualify. Defendant contends that as he was at the time ineligible to be elected to said office, the election was void. Plaintiff insists that eighty of the votes that were cast for the defendant were illegal and void, and that, therefore, plaintiff received the highest number of legal votes cast for the office and was accordingly elected thereto. The averments of the petition presenting this point, which are by the answer admitted to be true, are as follows:

"That on or before the 7th day of November, 1899, in said Blaine county an unlawful agreement and undertaking was entered into by the leading persons hereinafter mentioned for the purpose and object of defeating an election of an eligible person to fill the office of county attorney and for the purpose and object of defeating the plaintiff's election to said office, said persons agreed among themselves that no county attorney was needed in said county and the employment of one was a needless expense to the county and that to prevent the election of a person eligible to said office, and especially to prevent the election of this plaintiff, they would nominate and elect a person who was ineligible to said office and thereby and by that means prevent the election of an eligible person and especially of this plaintiff, and in pursuance of said unlawful agreement and fully knowing that the defendant was ineligible to said office, said persons, to-wit: (the names of eighty voters of the county

are here set out in the petition) all of Blaine county aforesaid did vote at said election for said T. Burke for said office of county attorney meaning and intending thereby to give him the defendant a sufficient number of votes to deprive this plaintiff of the election and to prevent the election of anyone to fill said office and to cause a vacancy in said office.

"Plaintiff further says that the votes cast for him, the said plaintiff, were cast in good faith, and with the honest intention of electing him to said office, and with the honest intention of filling said office according to law, and that the votes cast for the defendant were not cast with the intention of filling said office, but were cast with the dishonest and illegal intention of preventing an election in said office and with the unlawful intention to defeat this plaintiff and prevent the filling of said office, wherefore plaintiff says that said votes so cast for him were legal votes and that said votes so cast for the defendant were illegal and void, and therefore plaintiff prays," etc.

Section 97, chapter 26, Compiled Statutes, declare that "when the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void." Under this provision, when a plurality of votes is cast for a person for a public office, who is ineligible thereto, the election is void. *State v. Boyd*, 31 Nebr., 682. It therefore being admitted by the pleadings that the defendant was ineligible to the office of county attorney of Blaine county on the date of the election, the election as to such office was void, in case a majority of the legal votes was cast for him. The argument of counsel for plaintiff is that the matters pleaded in the petition already quoted rendered eighty of these votes received by defendant illegal and void, consequently plaintiff re-

ceived a majority of the legal votes cast for the office of county attorney. The argument, while novel, is untenable. Whether an agreement of that character entered into by the voters makes their votes illegal and void may be well doubted; but we are persuaded that no such agreement could have had that effect, where the person for whom such electors cast their votes is not a party to such agreement. In this case it is not disclosed by the record that Thomas Burke was, directly or indirectly, a participant in said agreement, or was consulted with reference thereto. These eighty persons, who, it is claimed, entered into the arrangement in question, were legal, qualified voters, and had a right to cast their votes for whomsoever they chose. Their votes were not illegal, within the meaning of the statute, by reason of their having participated in said agreement. Plaintiff, therefore, did not receive the highest number of the legal votes cast for the office of county attorney. That defendant was ineligible to said office, and that plaintiff received the next highest number of votes therefor does not entitle the latter to the office or the emoluments thereof. This is the plain meaning of the statute. The judgment is

AFFIRMED.

LYDIA T. MORRIS, APPELLEE, V. PHEBE R. E. E. LINTON ET AL., APPELLANTS.

FILED MARCH 20, 1901. No. 9,317.

1. **Consul:** DEFINITION. Under section 6, chapter 73, Compiled Statutes, 1899, the word "consul" means any person invested by the national government with the functions of consul-general, vice consul-general, consul or vice-consul.

2. **Irregularity Does Not Invalidate Acknowledgment.** A mere irregularity in taking an acknowledgment does not invalidate it.

3. **Certificate:** IMPEACHMENT: IRREGULARITY. The certificate of an officer having authority to take acknowledgments, can not be impeached by showing merely that such officer's duty was irregularly performed.

4. **Power of Attorney:** EXECUTION: ACKNOWLEDGMENT. A power of attorney, properly executed, is valid though not acknowledged, except to the extent that it may authorize the conveyance of a family homestead.

5. **Contract:** REALTY: LEX REI SITÆ. The validity of a contract affecting real property is to be determined by the law of the place where the property is situate and not by the law of the place where the contract was made.

6. **Married Woman May Convey and Incumber Land.** A married woman may, through the act of a duly authorized agent, incumber or convey her lands in this state in the same manner and with like effect as if she were single.

7. **Power of Attorney:** AUTHORITY. Power of attorney examined, and found to authorize the agent to mortgage the land of his principal.

8. **Evidence Supports Finding.** Evidence examined, and found to support a finding that there was a consideration for the instrument in suit.

9. **Personal Liability of Mortgagor Does Not Arise on Appeal.** Whether a mortgagor is personally liable for the debt secured by the mortgage, is a question that does not arise on an appeal from a decree of foreclosure.

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

John T. Cathers, W. A. Redick and *E. W. Simeral,* for appellants.

George B. Lake and *Hamilton & Maxwell, contra.*

SULLIVAN, J.

This is an appeal from a decree foreclosing a mortgage upon two fractional lots in the city of Omaha. Mrs. Linton, who resides with her husband in England, is the fee owner of the property. In 1891 she gave to John Borland Finlay a power of attorney authorizing him to sell, exchange, lease or mortgage any real estate owned by her in this country or elsewhere. Acting under this authority, Finlay executed, on behalf of his principal, the mortgage now in question. The answer admits the ex-

ecution of the power of attorney, but alleges that it was not acknowledged according to law. The acknowledgment was made before Hon. John C. New, consul-general of the United States residing in London, and was, in our opinion, clearly valid. The word "consul," as used in section 6, chapter 73, Compiled Statutes, 1899, is understood to mean any person invested by the national government with the functions of consul-general, vice consul-general, consul or vice-consul. *In re Baiz*, 135 U. S., 403; *Mott v. Smith*, 16 Cal., 552; *Evans v. Lee*, 11 Nev., 194; *Moore v. Miller*, 147 Pa. St., 378. The allegation that the power of attorney was not acknowledged according to law is nothing more than a denial of the legal sufficiency of the acknowledgment; it is the statement of a legal conclusion and raises no issue. *South Platte Land Co. v. City of Crete*, 11 Nebr., 344; *Miller v. Hurford*, 13 Nebr., 13. A mere irregularity in taking an acknowledgment does not invalidate it (*Council Bluffs Sav. Bank v. Smith*, 59 Nebr., 90); and this certainly should be the rule where the party whose acknowledgment has been irregularly taken, afterwards delivers the instrument acknowledged as a complete and perfect instrument. Mrs. Linton appeared at the American consulate and signified a wish to acknowledge the power of attorney; the consul-general had power to take her acknowledgment; he certified that he did take it; the instrument was then returned to her and afterwards delivered by her to Finlay. Under these circumstances she could not impeach the certificate of acknowledgment by the evidence offered for that purpose.

But if there had been no attempt to acknowledge the power of attorney, it would not be, therefore, void. It would not in such case prove itself, nor be entitled to registry, but it would confer the same actual authority without an acknowledgment as with one. *Burbank v. Ellis*, 7 Nebr., 156; *Horbach v. Tyrrell*, 48 Nebr., 514; *Linton v. Cooper*, 53 Nebr., 400; *Delano v. Jacoby*, 96 Cal., 275. There is no merit in the contention that the power of

attorney was invalid because not executed in accordance with the laws of England. The validity of a contract affecting real property is to be determined by the law of the place where the property is situate, and not by the law of the place where the contract was made. Story, Conflict of Laws, 424; *Baum v. Birchall*, 150 Pa. St., 164; *Richardson v. De Giverville*, 107 Mo., 422; *Swank v. Hufnagle*, 111 Ind., 453; *Sell v. Miller*, 11 O. St., 331; *Post v. First Nat. Bank*, 138 Ill., 559. Section 42, chapter 73, Compiled Statutes, 1889, declares: "Any real estate belonging to a married woman, may be managed, controlled, leased, devised, or conveyed by her by deed, or by will, in the same manner and with like effect as if she were single." A single woman may, of course, incumber or convey her lands in this state by the act of a duly authorized agent; and so, under the statute quoted, may a married woman. *Benschoter v. Lalk*, 24 Nebr., 251; *Benschoter v. Atkins*, 25 Nebr., 645.

It is contended that the power of attorney did not authorize Finlay to make the mortgage which the district court adjudged to be a lien on Mrs. Linton's property. We think it did in terms as explicit as it was possible to employ. The instrument (in the execution of which Mr. Linton joined his wife) is in part as follows: "Know all men by these presents: That we, Adolphus Frederic Linton and Phebe Rebecca Elizabeth Elwina Linton, his wife, of Brighton, England, have made, constituted and appointed, and by these presents do make, constitute and appoint John Borland Finlay, of the commonwealth of Pennsylvania, in the United States of America, our true and lawful attorney for us, or either of us, and in our or either of our names, places and steads, to grant, bargain and sell, convey, exchange, assign, transfer, lease, mortgage or confirm, any or all tracts, pieces or parcels, or lots of real estate, as well as of coal, ore, petroleum, or other valuable minerals, claims, rights, interests, or hereditaments, which have descended to or been, or may be acquired by, or for the said Phebe, or

either of us, by gift, grant, demise, purchase, exchange or otherwise, in any of the states, districts, commonwealths or territories of the said United States of America or elsewhere." The claim that there was no consideration for the mortgage is not sustained by the record. There is in the instrument itself a distinct acknowledgment that it was given for money actually loaned, and there is no evidence whatever tending to show that the fact thus admitted is not true.

The acknowledgment of the mortgage is assailed as not being in conformity with the law; but the point need not be considered, since the entire absence of an acknowledgment would not affect in any way the rights of the parties to this litigation.

Whether the Lintons are personally liable for the money which the mortgage was given to secure is a question which is not properly before us at this time. It can only arise in this court after a deficiency judgment has been rendered against them. *Parmele v. Schroeder*, 59 Nebr., 553, affirmed on rehearing at present sitting.

The decree of foreclosure is right, and is

AFFIRMED.

E. O. GARRETT V. REPUBLICAN PUBLISHING COMPANY ET AL.

FILED MARCH 20, 1901. No. 9,384.

1. **Written Contract:** CREATION OF PARTNERSHIP: INTENTION OF PARTIES. Whether a written contract creates a partnership is to be determined by ascertaining the intention of the parties from their language.
2. **Partnership:** ESTOPPEL: INTENTION. Where no question of estoppel is involved persons can not be held to be partners despite their intention not to form that relation.
3. **Partnership Profits:** PARTICIPATION: INTENTION. The right of participation in the profits of a business indicates the existence of a partnership, but actual intention is the decisive test.
4. **Partnership Contract:** RENT. A contract, by the terms of which

the owner transfers to another the exclusive use and control of property and is to receive as rent therefor a portion of the profits arising from such use, is not a partnership contract.

ERROR from the district court for Custer county. Tried below before GRIMES, J. *Affirmed.*

Taylor Flick, for plaintiff in error.

C. L. Gutterson, *A. R. Humphrey* and *C. H. Holcomb*, *contra.*

SULLIVAN, J.

This was an action by E. O. Garrett to recover damages for an alleged libel printed April 30, 1896, in *The Custer County Republican*, a weekly newspaper published in the city of Broken Bow. The defendants, the Republican Publishing Company, a corporation, and J. H. Chapman, filed separate answers, the former denying and the latter admitting responsibility for the defamatory article. The court held that the evidence given at the trial was insufficient to warrant a verdict against the publishing company, and sustained a motion to dismiss the case so far as it was concerned. This is the only ruling of which the plaintiff complains.

It appears from the record that the newspaper in which the libelous article appeared was at the time under the control and direction of Chapman, whose rights and authority in the premises were derived from a contract with his co-defendant, the owner of the plant. Since the case turns upon the construction of this contract, its material provisions are here set out:

"This indenture, made this 1st day of October, 1895, between Republican Publishing Company of Broken Bow, Nebraska, party of the first part, and J. H. Chapman, party of the second part,

"Witnesseth, That the said party of the first part, in consideration of the covenants of the party of the second part, hereinafter set forth, do by these presents, lease to

the said party of the second part, the following described property, to-wit:

"All the complete publishing outfit belonging to said first party consisting of engine, presses, type, job printing outfit, and all appurtenances thereunto belonging, together with the subscription list and good-will of the Broken Bow Republican; to have and to hold the same to the said party of the second part from the 7th day of October, 1895, to the 1st day of November, 1896. And the said party of the second part, in consideration of the leasing of the premises as above set forth, covenants and agrees with the party of the first part to pay the said party of the first part, as rent for the same, —— dollars, as follows, to-wit: The said second party is to take full and complete charge of said publishing outfit, to edit and manage the paper in the best manner possible for best interest of all parties; to pay all expenses of every nature, in connection with the management of the same, including labor; to employ only such help as may be actually necessary for the best interest of the parties hereto in conducting such business, and to retain for his services the first $900.00 of the net profits derived from said business, and the next $200.00 to be paid to said first party, and all further profits to be divided one-third to said first party and two-thirds to said second party.

"The said party of the second part further covenants with the said party of the first part, that at the expiration of the time mentioned in this lease, peaceable possession of the said premises shall be given to the said party of the first part, in as good condition as they now are, the usual wear, inevitable accidents, and loss by fire excepted; and that upon the non-payment of the whole or any portion of the said rent at the time when the same is above promised to be paid, the said party of the first part may, at its election, either distrain for said rent due, or declare this lease at an end, and recover possession as if the same was held by forcible detainer; the said party of the second part hereby waiving any notice of such

election, or any demand for the possession of said premises.

"And it is further covenanted and agreed, between the parties aforesaid, that the subscription list and good-will of said newspaper plant is to at all times be and remain the property of said first party, and is to be returned to said first party at the expiration of this lease, and all prepaid subscriptions to be either offset by prepaid subscriptions at commencement of this lease or paid in cash by said second party in proportion to amount paid for year that time has run."

This agreement, the plaintiff contends, made the defendants partners and rendered the publishing company liable for the defamatory article published by Chapman. We think otherwise. Whether a contract creates a partnership depends upon the intention of the contracting parties. Where no question of estoppel is involved persons can not be held to be partners despite their intention not to form that relation. Sharing the profits of a business is not conclusive evidence of the existence of a partnership. *Whitney v. Gretna State Bank*, 50 Nebr., 438. This question was very fully considered in the case of *Waggoner v. First Nat. Bank of Creighton*, 43 Nebr., 84, where it is said by RAGAN, C., speaking for the court: "Community of interests in profits, not by way of compensation for services rendered or capital loaned, but profits as such, and community of interests in the property the subject of the venture, and community of power of management of such property are correct tests of copartnership." In Bates on Partnership (vol. 1, sec. 45) it is said that "an indefinite compensation out of profits for the use of property, real or personal, and dependent on the success of the business, is in lieu of rent and does not constitute the owner a partner *inter se*." The adjudged cases cited by the author fully sustain his conclusion. They establish beyond doubt the proposition that while the right of participation in profits indicates the existence of a partnership, actual intention is the

decisive test. Looking now at the contract quoted, it is quite evident that the parties did not intend to become partners in the publishing business. In the first place, it does not appear that the corporation had authority to form so incongruous a relation. 1 Morawetz, Private Corporations, 421; Angell & Ames, Corporations, sec. 272; 7 Am. & Eng. Ency. Law [2d ed.], 794. But if it had the power, its purpose not to take upon itself the obligations of a partner is manifest. The compensation which it was to receive for the use of its property was expressly declared to be rent; it had neither control of the business nor right of participation therein. It had no present right to even enter upon the premises where the business was conducted or to make any agreement that would be binding upon Chapman. The only warrantable inference from the evidence is that the defendants did not intend to become partners. The decision of the trial court is the result of a correct interpretation of the contract, and it is

AFFIRMED.

HOLCOMB, J., did not participate in the decision.

STATE OF NEBRASKA V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED MARCH 20, 1901. No. 11,270.

1. **Injunction by United States Court Can Not Restrain Attorney General from Collecting Penalty Under Maximum Freight Law.** An injunction issued by the circuit court of the United States can not lawfully forbid the attorney general from suing for penalties claimed by the state under section 9 of the Maximum Freight Law. Compiled Statutes, 1899, ch. 72, art. 12.

2. **Party Not Concluded by Judgment to Which He Was Not a Party.** It is a maxim of general jurisprudence that a party is not concluded by a judgment or decree rendered in an action to which he was not a party.

3. **Judicial Power of United States Does Not Extend to Action by Private Parties Against State.** The judicial power of the United States does not extend to actions brought by individuals or corporations against a state.

4. **Injunction Does Not Release from Obligation to Third Parti s.** A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation.

ORIGINAL jurisdiction. Proceeding to recover penalties under section 9, article 12, chapter 72, Compiled Statutes, 1899. Motion for judgment on the pleadings. *Motion denicd.*

Frank N. Prout, Attorney General, in reply to a request by the court for further argument upon the five points which are set out in his brief, said:

Upon the motion of the defendant the Chicago, Rock Island & Pacific Railway Company, for judgment on the pleadings, the court has expressed a desire to hear argument upon the following questions: 1. Does the injunction bind the attorney general in his official capacity, or only as a member of the board of transportation? 2. Does it bind his successor? 3. Does the injunction affect the state? 4. Can it affect the state? 5. Is an injunction against the attorney general in effect against the state?

1. In my judgment, the injunction of the federal court binds the attorney general, both in his primary official capacity and in his capacity *ex officio,* as member of the board of transportation. It is directed against George H. Hastings, attorney general, and the other members of the board *nominatim;* and it was enjoined: "That the said attorney be in like manner enjoined from bringing, or aiding in bringing or causing or advising to be brought, any proceedings by way of injunction, mandatory or other prosecution or civil action or indictment against said company for or on account of any act or omission, or on their part commanded or forbidden by House Roll 33."

2. In my judgment, it binds his successor. The incumbent of the office stands in the relation of privity with his predecessor. *Holsworth v. O'Chander*, 49 Nebr., 42; *New Orleans v. Citizens Bank*, 167 U. S., 371.

3, 4. There can be no question that the judgment can and does affect the government of the state. *Poindexter v. Greenhow*, 114 U. S., 270; *Smyth v. Ames*, 169 U. S., 466.

5. While I do not think an injunction against the attorney general is in effect an injunction against the state, still it has the effect of preventing that officer from attempting to enforce a law which the courts hold invalid.

It is with great diffidence that I present this brief to the court, as I would very much rather have been able to say to the court that the motion of the defendants should be overruled and to present reasons and authorities therefor. But I do not conceive it to be the duty of the attorney general to argue or contend for propositions which he is convinced are untenable; but rather, as an officer of the court, he should assist the court, to the best of his ability, to reach a right conclusion.

M. A. Low, W. F. Evans and *Woolworth & McHugh, contra.*

SULLIVAN, J.

This is an action instituted in this court by the state to recover of the defendant company certain penalties claimed to be due under the act of 1893, known as the Maximum Freight Law. The defendant answered, alleging that the attorney general had been enjoined by the circuit court of the United States for the district of Nebraska, from commencing or prosecuting any action under the provisions of said law. This allegation was constructively admitted, and thereupon the defendant moved for judgment on the pleadings. The motion was submitted on the 5th instant and taken under advisement. We have given the question in controversy considerable attention, and we are all of opinion that the application

for judgment should be denied. The preliminary order of the federal court is binding only on the parties to the action in which it was issued. To the extent that it assumes to forbid the institution and prosecution of actions like the present one, it is utterly and absolutely null. The judicial power of the United States does not extend to any suit in law or equity brought either by a natural person or a corporation against a state. The circuit court was, therefore, without power or authority to enjoin the state, either directly or indirectly, from suing in its corporate capacity to recover a sum of money claimed to be due it as penalties under the Maximum Freight Law. It is not only an unquestioned rule of the common law, but a maxim of general jurisprudence, that no one is concluded by a judgment or decree rendered in a case to which he was not a party. The state in its corporate character had no interest whatever in the suit in the federal court, and consequently the provisional injunction was ineffectual as to it, and equally ineffectual as to the attorney general and other officers or agents through which it must necessarily act in asserting its rights in courts of justice. The attorney general was not enjoined on the theory that he was acting as the agent of the state, but on the theory that he was acting without lawful authority from any source—that in attempting to enforce for the benefit of the general public the schedule of charges prescribed by the act of 1893 he was proceeding under color of an unconstitutional law, and was, therefore, individually liable as a wrong-doer. The writ operated upon him personally and not upon him as an organ of the state. The eleventh amendment to the federal constitution would be effectually emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions. Restraint or coercion of the agent would be, in everything but form, restraint or coercion of the principal. That the state is entitled to prosecute this action to judgment is a proposition abundantly supported by decisions of the supreme

court of the United States; and it is almost needless to add that the right to sue includes the right to act through the attorney general. *Louisiana v. Jumel*, 107 U. S., 711; *Cunningham v. Macon & B. R. Co.*, 109 U. S., 446; *Hagood v. Southern*, 117 U. S., 52; *In re Ayers*, 123 U. S., 445; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Harkrader v. Wadley*, 172 U. S., 148; *Fitts v. McGhee*, 172 U. S., 516. See, also, *M'Whorter v. Pensacola & A. R. Co.*, 5 So. Rep. [Fla.], 129, and *Marshall v. Clark*, 22 Tex., 23.

The fact that the defendant has submitted to the injunction issued against it is, of course, no defense. If it has been rightfully enjoined, then the state can not succeed in this action, and no harm will be done; but if the injunction was wrongfully issued, the company must pay the penalties that have accrued to the state and look to the injunction bond for indemnity. A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation.

There may be another reason why the injunction against the attorney general is not valid. It was issued by the United States district judge in 1893, and it does not appear that it has been continued in force by the circuit court. It is our understanding that an order of this kind does not possess such extraordinary vitality; but as the point was not at all discussed by counsel at the bar or in the briefs, we do not make it to any extent the basis of our decision.

The motion for judgment is denied.

MOTION DENIED.

NOTE.—A state can not be sued by a private plaintiff. *Florida v. Georg'a*, 17 How. [U. S.], 520. A state can not act as a collecting agent for its own citizens, and thus aid them to do indirectly what they can not do directly. *New Hampshire v. Louisiana, New York v. Louisiana*, 108 U. S., 76.—REPORTER.

THOMAS MCCARTY V. J. H. HOPKINS.

FILED MARCH 20, 1901. No. 11,853.

1. **Regularity of Criminal Proceeding, Where Court Has Jurisdiction Can Not Be Questioned in Habeas Corpus.** The regularity of the proceedings leading up to the sentence in a criminal case can not be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and authority to try the charge against him, its action can be assailed only in a direct proceeding.
2. **Judge in Chambers May Receive Plea of Guilty.** A judge of the district court, sitting at chambers within his judicial district, may, upon reasonable notice to the prosecuting attorney, receive a plea of guilty from a person charged with a felony and pass sentence upon him.
3. **Plea May Be Received and Sentence Pronounced in Another County.** Such plea may be received and sentence pronounced by such judge at chambers in a county of the judicial district other than the one in which the prosecution was initiated.
4. **Judicial Confession Waives Constitutional Right.** A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article 1 of the constitution.

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

F. C. O'Halloren and *W. A. Foster*, for plaintiff in error:

If the constitutional restriction prohibits the legislature from extending the criminal jurisdiction of district courts beyond county lines, the legislature can not, to obtain the same object, authorize a district judge to accept a plea of guilty and pass sentence in another county. *Hurlbut v. State*, 52 Nebr., 428.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra:*

The right of trial within the county is a mere personal privilege. It is not conferred from any consideration of public policy; hence it may be waived. Bishop, Criminal Procedure, 50; *State v. Potter*, 16 Kan., 80.

SULLIVAN, J.

This proceeding in error brings up for review a judgment of the district court of Douglas county denying the application of Thomas McCarty for a writ of habeas corpus directed to the warden of the penitentiary in whose custody the petitioner is held under a sentence pronounced against him by one of the judges of the fourth judicial district sitting at chambers in the city of Omaha. The cause was submitted upon a stipulation of facts, from which it appears that McCarty was charged in due form in the district court of Sarpy county with the commission of a felony; that he was arraigned and pleaded not guilty; that he afterwards appeared before George W. Ambrose, one of the judges of the fourth judicial district, sitting at chambers in Douglas county and, after withdrawing his plea of not guilty, confessed the charge upon which he had been arraigned, and was thereupon sentenced by said judge to imprisonment in the penitentiary for a term of fifteen years. Upon these facts we are of opinion that the prisoner is not unlawfully deprived of his liberty, and that the application for the writ was properly denied.

The only question for decision pertains to the jurisdiction of Judge Ambrose. If he possessed the power which he assumed to exercise, the trial court could not go behind the sentence and inquire into the regularity of prior proceedings. *In re Ream*, 54 Nebr., 667; *In re McVey*, 50 Nebr., 481; *In re Havlik*, 45 Nebr., 747; *In re Betts*, 36 Nebr., 282; *Ex parte Parks*, 93 U. S., 18; *Ex parte Yarbrough*, 110 U. S., 651. The county in which the prosecution was commenced and the one in which sentence was passed are in the same judicial district. By section 23, article 6, of the constitution it is provided: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." Under the authority of this section the legislature enacted in 1881 what is now known as section 57, chapter 19, Compiled

Statutes, 1899. It is as follows: "That any judge of the district court may sit at chambers, at any time and place within his judicial district, and while so sitting shall have the power—1. To grant, dissolve, or modify temporary injunctions. 2. To discharge attachments. 3. To hear and determine application for writ of mandamus, and applications for writ of habeas corpus. 4. To discharge such other duties or to exercise such other powers as may be conferred upon a judge in contradistinction to a court. 5. To receive a plea of 'guilty' from any person charged with a felony and passing sentence thereon, upon reasonable notice to the prosecuting attorney." This legislation would seem to be clearly enough within the authority conferred by the section of the constitution above quoted; but its validity is challenged on the ground that it violates that provision of the bill of rights which guaranties to every person accused of crime "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The right of an accused person to be tried by a jury drawn from the county or district in which the prosecution was initiated, is a mere personal privilege and, like the other rights conferred by section 11, article 1, of the constitution, may be waived. Even the right to a trial, anywhere or under any conditions, may be waived, and in practice is waived when the accused makes a judicial confession of his guilt. When no issue is raised; when the prisoner pleads guilty to the information or indictment, there is nothing to try; the right to a jury is waived and with it, of course, the constitutional guaranties with respect to the conduct of criminal prosecutions. The defendant in a criminal case is entitled to defend by counsel, to have a copy of the accusation, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf and to a speedy public trial by an impartial jury composed of persons who are presumably acquainted with his good repute; but these rights are not inalienable; they were not conferred upon him from any

consideration of public policy, and he may, therefore, insist upon them or abandon them at pleasure. *Olive v. State*, 11 Nebr., 1; *State v. Crinklaw*, 40 Nebr., 759; *State v. Potter*, 16 Kan., 80.

The respondent having shown adequate legal cause for the detention of McCarty, the judgment denying the writ is

AFFIRMED.

CALVIN H. PARMELE, APPELLEE, V. EMMA C. M. SCHROEDER ET AL., APPELLEES, IMPLEADED WITH JOHN LINDER ET AL., APPELLANTS.

FILED MARCH 20, 1901. No. 9,084.

1. **Foreclosure:** DEFICIENCY JUDGMENT. In an ordinary action of foreclosure appellants were made parties, and it was sought to charge them personally for any deficiency which might remain after the sale of the mortgaged premises. In the decree of foreclosure the appellants were found personally liable for the mortgage indebtedness, and in the decree it was adjudged that if the money arising from the sale of the property shall be insufficient to satisfy the amount found due, the sheriff shall specify the amount of such deficiency, and, upon confirmation of such report, the mortgagee, upon application, is entitled to a judgment for deficiency against appellants, and to execution for the amount of the deficiency found due. *Held*, That the decree was not final and appealable as to appellants.

2. ———: ———. A deficiency judgment in an action to foreclose a real estate mortgage, under the provisions of our Code of Civil Procedure, as it existed prior to the amendment of 1897, could not be rendered until the coming in of the report of the sale of the mortgaged property. *Devries v. Squire*, 55 Nebr., 438.

3. **Final Decree:** DEFINITION. A decree is not final and appealable until the court has finally determined and disposed of the entire controversy between the parties, so that nothing remains to be done except to ministerially execute its provisions in the court in which it is rendered.

4. **Finding:** DEFICIENCY: JUDICIAL FUNCTION. The finding of a trial court of the amount of a deficiency on the incoming of the report of the sale of the mortgaged premises, and rendition of a judgment therefor, are judicial functions.

5. **Former Opinion.** Former opinion, *Parmele v. Schroeder*, 59 Nebr., 553, adhered to.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. Rehearing of case reported in 59 Nebr., 553. *Judgment of dismissal adhered to.*

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

Beeson & Root, R. B. Windham, Byron Clark, C. A. Rawls, and *A. N. Sullivan, contra.*

HOLCOMB, J.

We have heretofore decided that the appeal taken in this action should be dismissed because the decree as against the appellants was not final and, therefore, not appealable. *Parmele v. Schroeder*, 59 Nebr., 553. A motion for a rehearing, accompanied by a very able brief, led us to the conclusion that there was sufficient merit in the contention of appellants' counsel to justify a reexamination of the question. We have taken pains to quite fully examine the authorities to which our attention has been called by counsel on both sides of the controversy, and after a careful consideration of the subject in the light of all the information obtainable, we are more firmly convinced that the conclusions reached and announced in the first opinion are sound, well grounded in principle and should be adhered to.

The suit was an ordinary action in equity for the foreclosure of a real estate mortgage, the sale of the premises mortgaged to satisfy the amount found due and to charge the appellants personally with any deficiency that might remain after the sale of the mortgaged property and the application of the proceeds to pay the mortgage debt. The court found the appellants personally liable for the mortgage indebtedness, and in the decree it was adjudged that if the money arising from the sale of the property shall be insufficient to satisfy the amount found due, the

sheriff shall specify the amount of such deficiency, and that, upon confirmation of such report, the mortgagee, upon application, is entitled to a judgment for deficiency against appellants and entitled to execution for the amount of the deficiency found due. By section 847 of the Code, as it existed prior to the amendment of 1897, it is provided: "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 sale the court shall have 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"; and in section 849 provisions are made for bringing in other persons than the mortgagor, who may be obligated to pay the debt for the satisfaction of which the proceedings are instituted, and in the same manner to decree payment of any deficiency as to such other persons. While the appellants' counsel endeavor to make a distinction between the procedure under the two sections referred to, we are disposed to the view that the latter should be construed with reference to and in connection with the former, which is controlling as to the authority of the trial court to render a personal judgment in such proceedings. As to a judgment for a deficiency, it seems quite clear under these provisions that it can not be determined or rendered until after a report of the sale of the mortgaged premises, a confirmation thereof and a judicial determination by the trial court as to the amount for which the judgment may be rendered. In the proceedings and decree of foreclosure no judgment is in fact rendered against appellants. No amount of recovery is mentioned, nor is it sought to be determined. At most, the decree finds that a personal liability exists

against them, and decrees or declares that upon certain contingencies, which may or may not arise, a judgment may be applied for and obtained on the incoming of the report of the officer of the sale of the mortgaged property. It can not, we think, be said that this is a final decree; that as to the issues between the appellants and the mortgagees, it disposes of the controversy between them, and leaves nothing to be done save to carry out and enforce the decree by those acting only in a ministerial capacity. It is only an interlocutory decree, litigating to a certain point the issues in controversy, where the litigation is suspended and leaves yet another and future judicial order and action to be taken before their rights are ultimately and finally adjudicated and determined. It has only the force and effect of a special finding or order that the appellants are liable upon the indebtedness for a judgment *in personam* if after the report of the sale of the property a deficiency exists. It lacks an essential element to make it a judgment or final decree in fact, and other and subsequent action by the court in the exercise of its judicial functions is absolutely necessary before there is a final adjudication concluding the rights of the parties and giving to it the character of a final order, decree or judgment, from which an appeal will lie. The decree does not purport to award any personal judgment against appellants. They can in no way be injured or damnified until something further is done of a judicial character upon which a process can issue. No sum of money is awarded appellees upon which a general execution will rest, and no execution can issue. Nor can the decree as to appellants be enforced by ministerial acts to carry it into execution in the future. Further exercise of the power of the court acting judicially must be resorted to before the rights of the parties are effectually and finally determined with respect to a judgment *in personam* for any deficiency that may exist after the exhaustion of the security pledged for the payment of the debt.

This court is committed to the doctrine that no decree or judgment for a deficiency in a foreclosure suit can be rendered until after the report of the sale of the mortgaged premises and the application of the proceeds to the satisfaction of the mortgaged debt. In the case at bar the wording of the decree can not, we think, be construed as a finality in decreeing or adjudging any recovery whatever against appellants. It only purports to decree that on the incoming of the report of the sale of the mortgaged premises, if the money arising therefrom be insufficient to satisfy the amount found due, the deficiency shall be specified, and upon application the mortgagee is entitled to a judgment for the deficiency and to execution for the same.

In *Clapp v. Maxwell*, 13 Nebr., 542, it is held in the second and third paragraphs of the syllabus: "By a decree of foreclosure of a mortgage upon real estate, a court possesses no power to give a lien upon, or to affect any other property of the mortgagor until that included in the mortgage is exhausted"; and, "a general execution cannot be issued on a decree of foreclosure, except by order of the court, made on the report of sale, and for a deficiency ascertained after the mortgaged property is exhausted." In that case the decree adjudged and decreed that the mortgagee should have and recover of the mortgagor the amount of the debt found due, and yet the court held that as to any personal judgment attempted to be rendered, it was a mere nullity, and that such judgment could not be rendered until after report of the sale of the property mortgaged. Says Mr. Chief Justice LAKE in the opinion: "The decision of the question of the plaintiffs' right to the injunction sought, independently of the incidental question of homestead, depends entirely upon the effect that must be given to the judgment in the foreclosure suit. If, as its form in part might indicate, it is really a judgment *in personam*, and effective as such, then it follows that the execution was properly issued, and the plaintiffs' right to relief is

contingent upon the possibility of the property levied upon being found to have been exempt from forced sale when they purchased it from the said Lucretia Altaffer." And after discussing the same provisions of the statute now under consideration, on page 546 he says: "Taking the entire decree together, we find that the court, after considering that 'the said plaintiffs recover,' etc., went on and provided minutely just how it should be done, but it was not by means of an ordinary execution. The decree provides that payment shall be made from the proceeds of a sale of the mortgaged premises, after the satisfaction of a prior lien. No provision is made for a deficiency, nor could there properly have been at that time. It is only 'on the coming in of the report of sale' that a deficiency can be ascertained and provided for. Therefore, taking the whole decree together, we are of opinion that, although in its wording somewhat informal, in effect it conforms substantially to the statute governing the foreclosure of mortgages, was not a lien upon property not embraced in the mortgage, and did not authorize the issue of the execution complained of."

In *Devries v. Squire*, 55 Nebr., 438, it is held: "A deficiency judgment in an action to foreclose a real estate mortgage under the provisions of our Code of Civil Procedure, as it existed prior to the legislative session of 1897 (see Code of Civil Procedure, sec. 847, Compiled Statutes, 1895), could not be rendered until the 'coming in of the report of the sale' of the mortgaged property."

In *Brown v. Johnson*, 58 Nebr., 222, it is said by NORVAL, present C. J.: "The litigation of the liability for a deficiency could be as appropriately and satisfactorily carried on, and the question adjudicated, after the sale, as prior to the rendition of the decree. The usual and better practice is not to determine the liability of a defendant in a foreclosure for a deficiency judgment until after the report of the sale, when, for the first time, it can be definitely ascertained that a deficiency actually exists."

The case of *Millard v. Parsell*, 57 Nebr., 178, cited in the first opinion under the issues formed and the decree rendered, is quite analogous to the one at bar, and it was there held: "An order that after exhausting the remedy against the principal debtor the creditor may apply for and obtain a judgment against a guarantor of collection is not final, and therefore not appealable." Says Mr. Commissioner IRVINE, who wrote the opinion: "The court did not give judgment against the Ballous, but ordered that should there still remain a deficiency after subjecting the land in controversy to the payment of the Parsell judgment, plaintiff might then apply for and obtain judgment against the Ballous. The Ballous undertake to appeal from this part of the decree, but their appeal is premature. The two causes of action are entirely distinct, and the decree, so far as it affects the Ballous, is not final. There is no judgment against them yet; *non constat* that there will ever be. If there should be, they may then have it reviewed."

In *Parr v. Lindler*, 18 S. E. Rep. [S. Car.], 636, under a statute substantially the same as ours, it is held that a personal judgment for a deficiency in a foreclosure proceeding can not be rendered until after the sale and a report thereof has been made, and that a personal judgment rendered in a decree of foreclosure is utterly null and void. Says McIver, J., in a concurring opinion: "If, then, as is most conclusively shown in the opinion of Mr. Justice McGowan, no personal judgment can be rendered for any deficiency until after the sale of the mortgaged premises, when alone the amount of such deficiency can be ascertained, it follows, necessarily, as it seems to me, that anything purporting to be a judgment for such deficiency, rendered before the amount thereof could possibly be ascertained, would be a mere nullity, and would afford no basis for an execution to enforce it. Indeed, it is utterly incomprehensible to me how a judgment for the payment of money could be rendered before the amount thereof had been, or could possibly be, ascer-

tained. Again, it seems to me that, after a sale of the mortgaged premises has been made, the question, whether there is any deficiency, and if so, the amount thereof, is a judicial question, upon which the mortgagor has a right to be heard, as grave and difficult questions might be presented as to the application of the proceeds of the sale of the mortgaged premises, which surely ought not to be left to the decision of a mere ministerial officer who makes the sale, but which should be determined by the court."

In Pingrey on Mortgages (vol. 2, sec. 2029) the same doctrine is announced as to the rendition of a judgment for a deficiency.

The proper deductions from the foregoing are that a final decree or judgment for a deficiency in foreclosure proceedings can not be rendered until after the incoming of the report of the sale of the mortgaged property, and that if in form a judgment is in fact rendered, it is a mere nullity, which does not conclude the rights of the parties thereto, or upon which execution may issue.

In *Keystone Iron Co. v. Martin*, 132 U. S., 91, the question as to what is a final decree or order which is appealable has received very careful and thorough consideration, and many cases are cited in support of the proposition that the decree is not final until the court has finally determined and disposed of the entire controversy between the parties, so that nothing remains to be done except to ministerially execute its provisions in the court in which it is rendered. Chief Justice Waite, in *Bostwick v. Brinkerhoff*, 106 U. S., 3, states the principle as follows: "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." To the

same effect is *Dainese v. Kendall*, 119 U. S., 53, cited in the former opinion in the present case.

In any view of the question the rule seems to be that the decree, to be final, must be definite, certain and capable of immediate enforcement, and that the subsequent proceedings are only means of executing the decree.

In *Longworth v. Sturges*, 6 Ohio St., 143, 154, it is said that in order that a decree shall be final, there must be a disposal of the whole merits of the cause and the suitors out of court, before a decree can acquire that character of finality which subjects it to review.

In *McGourkey v. Toledo & O. C. R. Co.*, 146 U. S., 536, 545, it is said by Mr. Justice Brown: "If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold, ascertained and defined, it is not final, [citing *Railroad Co. v. Swasey*, 23 Wall. [U. S.], 405, and *Grant v. Phœnix Ins. Co.*, 106 U. S., 429]. A like result follows if it merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report." And further on in the opinion it is observed: "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final"; citing *Craighead v. Wilson*, 18 How. [U. S.], 199, and *Beebe v. Russell*, 19 How. [U. S.], 283.

It can hardly be said, we think, that it is not required, before the decree sought to be appealed from can be effective, or determine finally the rights of the parties, that a further order or entry, judicial in its nature, is required

to be made, determining and fixing the amount of the deficiency and rendering judgment therefor.

We are referred to decisions by the supreme court of Wisconsin in support of the views contended for by counsel for appellants, but upon examination we find that the procedure in that state is regulated by statute, and that an order directing a personal judgment against a defendant or any deficiency after sale of the mortgaged premises is appealable, as it "involves the merits of the action," which fact determines the right of appeal, regardless of its finality.

The decisions of the supreme court of Michigan are also appealed to as sustaining appellants' position, but upon examination we find that in that state, while the practice is different, a decree of personal liability is held not to be final, but to be contingent and declaratory only of the future order, upon which a personal judgment may be rendered, and can fix no rights; that the jurisdiction of the court is to be exercised, and the trial of liability had on a new hearing, after the deficiency is reported. *Prentis v. Richardson's Estate*, 76 N. W. Rep. [Mich.], 381; *Shelden v. Erskine*, 44 N. W. Rep. [Mich.], 146.

Without further citations of authorities, of which there are many, we are firmly of the opinion that the decree sought to be appealed from, as to appellants, is interlocutory in character only, and before it can be made effective and final, further judicial action is required of the court in which the proceedings are pending, which fact must be held to be decisive of the question of finality.

The judgment of dismissal heretofore rendered is adhered to.

APPEAL DISMISSED.

JOHN F. COAD V. TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

FILED MARCH 20, 1901. No. 9,313.

1. **Accident Insurance:** PROVISION OF POLICY FOR TOTAL DISABILITY: NO RECOVERY FOR PARTIAL DISABILITY. In a policy of accident insurance, wherein it is provided for indemnity when the injury resulting from an accident shall "wholly disable him from transacting any and every kind of business pertaining to his occupation," a partial disability only in conducting the business pertaining to the occupation given will not justify a recovery under the provisions of the policy.

2. **Phrase "Wholly Disabled" Should Be Given Reasonable Construction.** The phrase "wholly disabled" should be given a reasonable and practical constructon, so as to carry out the intention of the parties, and give to the assured the protection contracted for.

3. **Total Disability:** DEFINITION. If an injury received by the assured renders him less capable of performing the duties required in the conduct of his business, but notwithstanding the same he is able to devote substantially all of his time to the business, and to do practically all kinds of work, and perform all necessary acts for the prosecution thereof and accomplish, substantially, results of the same character as before the injury, he would not be wholly disabled from transacting "any and every kind of business pertaining to his occupation," within the meaning of the contract of insurance.

4. ———: ———. Where there are different branches of the business pertaining to the occupation in which a party is insured, the prosecution of one of which might be prevented by an injury, and yet the other engaged in, prosecuted and carried on, the injury would not then be regarded as preventing the assured from performing "any and every kind of business pertaining to his occupation," within the meaning of the policy.

5. ———: ———: EVIDENCE. Evidence examined, and, when most favorably construed towards the plaintiff, *held* the jury would not be warranted in inferring a total disability, within the meaning of the contract, entitling the plaintiff to recover, and that a peremptory instruction to return a verdict for the defendant was proper.

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

Constantine J. Smyth and *J. J. O'Connor*, for plaintiff in error.

Charles Offutt and *W. W. Morsman, contra.*

HOLCOMB, J.

A policy of accident insurance was issued to plaintiff in error, also plaintiff below, by the defendant insurance company, in which it was provided that the insurance was "against loss of time not exceeding 26 consecutive weeks resulting from bodily injuries effected during the term of this insurance, through external, violent and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation." In the policy the occupation was given as a capitalist, it being a preferred classification of risks. The plaintiff, according to the allegations of the petition, received, during the continuance of the policy, a personal injury by the bursting of a bottle, cutting his left hand, the cut being, it is alleged, "quite deep, severing several of the tendons of the fingers and damaging others; and he thereby became totally disabled from attending to any business, said hand being totally disabled." After issues were joined and a trial to a jury, the court, on the request of the defendant, peremptorily instructed the jury that "Under the pleadings and the proof in this case the plaintiff cannot recover and the jury will therefore return a verdict for the defendant." An exception to the instruction was duly taken, and upon a motion for a new trial being overruled and judgment entered on the verdict, error proceeding was begun in this court to secure a reversal of the judgment.

The sole question presented and argued is whether, under the evidence, the question of total disability of the plaintiff from the effects of the injury sustained and pleaded in the petition should have been submitted to

the jury as a question of fact for their determination; or, to state the proposition in another way, would the evidence support a verdict for the plaintiff had the jury so found? The injury occurred September 17, 1893. It is described by the physician called to dress it as "a slight laceration, as I remember it now, over the back of his left hand * * * an inch and a half back of the knuckle of the first finger. * * * I think it was probably about a quarter of an inch [across]. * * * It went through the skin and, as I remember it, through the outside of this tendon [of the first finger]. I removed a small piece of glass from the wound and then I dressed the wound." On February 5, "as I recollect, there was a slight elevation at the seat of the original injury, and on pressure I felt confident that I detected a piece of glass. I opened it, made a slight opening and extracted a small piece of glass that I had failed to discover on the 18th of September, 1893." The witness had seen the wound professionally several times between the time when the injury occurred and February 5, when the second piece of glass was removed, and once afterwards. In describing the injury further he says: "His hand was quite tender in that location and there was inability to—that is what causes him pain—to extend or flex these fingers of his left hand. * * * This tendon that supports and controls the first finger was very much lacerated."

The following, aside from the foregoing, may be regarded as a fair epitome of the testimony of the case regarding the plaintiff's ability to conduct, oversee and attend to his business. He went to his office the day following the injury, which occurred on Sunday, and was not at any time subsequently prevented, by reason of the injury, from going to his office and directing the management of his business affairs. He visited the World's Fair at Chicago for a week the latter part of the same month the injury was received. He was able to attend meetings of the board of directors of banks in which he had an interest in both Omaha and South Omaha. He wrote a

letter, dictated others and signed checks. He was at his office to look after his business interests every day, unless called elsewhere on other business matters or when visiting the World's Fair. He was unable to button his collar, tie his shoes, or divide his food at meals. He experienced a great deal of pain in consequence of the accident. He had interests in different parts of the state, in California and Texas, which he claims he did not and could not personally visit and look after during the time mentioned and when the injury is claimed to have totally disabled him from attending to his business. While the plaintiff testifies to his disabilities from the accident, he does not testify to facts upon which to base an inference that he was prevented from performing any of the more important duties or work pertaining to his business or occupation as a capitalist. It is not, we think, shown that he was unable to do any usual and ordinary work, pertaining to his occupation, with the possible exception of letter writing, and he says on this point that his correspondence was limited, that he dictated some of it, and also that he could write by holding his left hand up, which position it appears was necessary to avoid severe pain from the injury.

The policy indemnified him against loss of time, when, independent of all other causes, he was wholly disabled by accident "from transacting any and every kind of business pertaining to his occupation." Will the evidence sustain a recovery under these provisions? What are the just deductions to be made with reference to the ability of the plaintiff to attend to and carry on his business notwithstanding the injury received? We think the only just inference warranted is that the conduct of his own business was substantially carried on by him after the injury the same as before. He attended to his business at all times. He employed no substitute during any portion of the time. At no time was he prevented from leaving his home, attending his office, directing his business, or taking part in the deliberations of the boards of di-

rectors of the banks in which he was interested. The injury was of the left hand and doubtless a very painful one, but it does not appear that the pain, notwithstanding its severity, incapacitated him from the management and direction of his various business enterprises in which he was engaged or had an interest. He was required to exercise his mind and business judgment rather than employ any member of his body in prosecuting his work. His correspondence is perhaps an exception, and yet from his testimony it is quite clear that this branch of his business affairs suffered no substantial impairment by reason of the injury, and his letter-writing and check-signing were performed substantially as before the injury. It may be conceded that he was unable, during the time of the injury, to visit and personally inspect his business enterprises in other states; and yet this could only be regarded as a minor part of his general business, and especially in view of the fact that the management of such enterprises was generally by proxy and through correspondence. The injury at most deferred for a short time a personal visit, but did not prevent the management of the business in the usual way.

To sum up, it appears from the record that plaintiff's business matters were attended to, looked after and directed by him during the period for which a recovery is sought, much in the same manner, speaking generally, and substantially in all important particulars as he was accustomed to do before the accident. It is true, as we view the evidence, that during most of the period mentioned he was greatly inconvenienced in the prosecution of his business by reason of the injury, and especially because of its painful character, and that he was not able to devote himself to his work with the close application, energy and attention in the performance of details that he otherwise would. His ability to concentrate his mind, and exercise cool, deliberate and calculating judgment regarding business affairs may have been more or less impaired by reason of the injury. But these mat-

ters can only be regarded in the light of a partial disability, for which no recovery was contemplated or can be had. The evident intention of the parties, as disclosed by the contract of indemnity, is that the assured shall be "wholly disabled," the phrase, of course, to be given a reasonable and practical construction, so as to carry out the intent of the parties and to give to the assured the protection contracted for. It is, however, not contemplated by the parties that a recovery can be had for a disability that is partial only. The parties contracted for an indemnity for a total disability, and upon which the consideration required to be paid by the assured was based. Without discussing the reason or practical wisdom for such provisions in this character of insurance, we conceive a fair construction of the contract to require that where the disability is partial only, no liability attaches to the insurer under the terms of the policy. If the injury received by the assured renders him less capable of performing the duties required in the conduct of his business, but, notwithstanding the same, he is able to devote substantially all of his time to the business, and to do practically all kinds of work and perform all the necessary acts for the prosecution thereof, and accomplish, substantially, results of the same character as before the injury, he would not be "wholly disabled from transacting any and every kind of business pertaining to his occupation," within the meaning of the contract of insurance.

In *Turner v. Fidelity & Casualty Co.*, 112 Mich., 425, under a policy of similar terms as in the case at bar, it is held that an injury from dislocation of a shoulder of a real estate broker is not partial only, so as to deprive him of the right to recover, when, although he goes to his office every day, he is practically unable to do any kind of work. This statement appears to be sound; but we think a difference exists as to the facts, it appearing in the present case that plaintiff was able to practically perform all important duties devolving on him in the

conduct of his business as a capitalist. In the opinion in the case just cited it is said: "We find nothing in the record which shows or tends to show from the testimony of the plaintiff or his attending physician, that the plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation." We do not think the same can be said of the record in the case at bar.

A rule of construction relative to contracts of indemnity of the kind under consideration, which appeals to us as being grounded in wisdom and sound reasoning, is found in the case of *Young v. Travelers Ins. Co.*, 80 Me., 244, where it is stated by the judge writing the opinion: "A contract of insurance is to receive a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt it is to be liberally construed in favor of the insured that in all proper cases he may receive the indemnity contracted for. At the same time, legal effect should be given to all the language used for the purpose of guarding the company against fraud and imposture. The object to be accomplished by this contract was, indemnity to the plaintiff for loss of time from being wholly disabled from prosecuting his business by an injury received as specified in the policy. He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was unable to do and perform one only, he was as effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation."

It is not to be doubted that if in the prosecution of a business several necessary acts are to be performed to accomplish the work engaged in, and one is disabled from performing one or more of the necessary acts, such disability would render him totally disabled from prose-

cuting such business. A distinction, however, is to be made between the prosecution of a business such as that just spoken of and one where there are several branches, the prosecution of one of which might be prevented by an injury, and yet other branches of his business might be engaged in, prosecuted and carried on, and the injury, therefore, would not be regarded as a total disability, preventing the assured from performing "any and every kind of business pertaining to his occupation," under the provisions for indemnity of the kind quoted, entitling the party thus injured for loss sustained by reason thereof. Thus it is observed by Mitchell, J., in writing the opinion of the court in *Lobdill v. Laboring Men's Mutual Aid Ass'n*, 69 Minn., 14: "Under the particular terms of this policy, to-wit, 'from transacting any and every kind of business pertaining to the occupation above stated' (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. For example, the occupation of a retail country merchant, (as plaintiff was) embraces various departments or kinds of business, such as keeping the books, making out accounts, and settling with customers; waiting on customers, and doing up their purchases in packages; also the handling and arranging of goods in the store. If an injury disabled the insured merchant from transacting one or more of these branches of the business, but left him able to transact others with due regard to his health, he would not be totally disabled within the meaning of this policy."

Of the same general tenor and purport as the cases heretofore cited are the following: *Thayer v. Standard Life & Accident Ins. Co.*, 41 Atl. Rep. [N. H.], 182; *Wolcott v. United Life & Accident Ass'n.*, 55 Hun [N. Y.], 98; *Neafie v. Manufacturers Accident Indemnity Co.*, 55 Hun [N. Y.], 111; *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. [Exch.], 545; *Sawyer v. United States Casualty Co.*, 1 Bigelow, Life & Accident Ins. Rep., 289.

Our judgment is that, from all the evidence most favorably construed toward the plaintiff, the jury would not be warranted in inferring a total disability, within the meaning of the contract, resulting from the injury, which would entitle plaintiff to recover, and that the peremptory instruction to return a verdict for the defendant was, therefore, proper. The judgment should be affirmed, which is accordingly done.

AFFIRMED.

UNION STATE BANK V. GEORGE HUTTON ET AL.

FILED MARCH 20, 1901. No. 9,434.

1. **Chattel Mortgage:** DESCRIPTION VOID FOR UNCERTAINTY. A mortgage of chattels, where the property is described as "twenty-five (25) cattle, consisting of ten cows, seven steers, and eight heifers. The above described chattels are now in my possession, are owned by me," etc., and the parties mortgaging the same had in their possession at the time a larger number of the same kind and description, and there is no separation, designation or means of identification by which those mortgaged could be distinguished from the remainder of the herd, is void for uncertainty.

2. ———: ———: IDENTIFICATION. The description of property in a chattel mortgage will, as a rule, be held sufficient, where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property. *Buck v. Davenport Savings Bank*, 29 Nebr., 407.

3. **Evidence.** Evidence examined, and *held* to be insufficient to support the verdict of the jury.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Reversed.*

Thomas H. Matters, for plaintiff in error.

John C. Stevens, contra.

HOLCOMB, J.

The plaintiff in error, also plaintiff below, brought an action in replevin for the possession of certain per-

sonal property consisting of two horses and a number of cattle of all ages and both sexes, in which it claimed a special ownership by virtue of a chattel mortgage executed by defendant George Hutton to secure the payment of a promissory note for $430 and interest, which, it was alleged, was past due and unpaid. Under the writ of replevin the plaintiff obtained possession of the property in controversy. On the trial of the case, the intervener, Charles C. Hurd, filed a petition in intervention, claiming the right of possession of the same property, and alleging a special ownership therein by virtue of a chattel mortgage alleged to have been executed by the same party to the intervener, to secure the payment of a note for $563.61 and interest, which, it was alleged, was past due and unpaid. On the trial of the case the ownership of the property mortgaged was in dispute, the defendant, Margaret Hutton, the wife of the mortgagor, claiming to be the owner thereof, and that the defendant, George Hutton, had no legal right or authority to create a lien thereon in favor of the plaintiff under and by virtue of the mortgage he had executed. She testified to her ownership of the property, and that the mortgage to the plaintiff was given without any knowledge on her part, or consent or authority from her; but that the mortgage to the intervener, Hurd, which was executed by her husband in his own name, was by her authority and with her consent. Hutton also testified that he did not own the property, that it belonged to his wife, and that he so advised the plaintiff when he executed the mortgage in its favor; and also testified to substantially the same facts as his wife as to ownership and the circumstances of giving the mortgage to the intervener. The jury in their verdict found for the intervener as to all the cattle in controversy save three calves, the right of possession of which they found to be in Mrs. Hutton, finding the value of the calves to be $18; and also one bull, the right of possession of which they found to be in the defendant, George Hutton, finding the value

of the animal to be $20. As to the two horses replevied, one claimed by Mrs. Hutton and one by a son, the jury found in favor of plaintiff under its claim by virtue of its mortgage.

It is contended by plaintiff in error that the finding of the jury as to the disputed ownership of the property was that it belonged to the defendant, George Hutton, while the defendants in error insist that it should be construed as finding that Mrs. Hutton owned the property and as against the plaintiff in error on that issue. We confess the finding is something of an enigma, and in irreconcilable conflict with itself. What the finding really is with relation to the disputed ownership of the property is undeterminable from the verdict itself. It is not a logical result of the evidence under the issues joined.

The question of ownership becomes material in another aspect of the case. It is argued by the plaintiff in error that the mortgage in favor of the intervener is void for uncertainty, leaving as a valid lien on the property its own mortgage, which is subsequent in time. The description of the property in the mortgage of the intervener is as follows: "Twenty-five (25) cattle, consisting of ten cows, seven steers, and eight heifers. The above described chattels are now in my possession, are owned by me," etc. From the evidence it appears that at the time of the execution of the mortgage the defendants Hutton had in their possession some forty or more head of cattle answering to the same description. While it is possible that the mortgage on the cows mentioned, aided by inquiries which are suggested by the mortgage itself, might lead to an identification of the property, it is entirely clear that, as to the remainder of the mortgaged property, it is wholly uncertain and indefinite, and void for that reason. The description, "steers" and "heifers," applies to any of a large number of the same description which defendants had in their possession at the time, and of which

it is impossible to identify the particular animals and number included in the mortgage, because no separation or designation was made at the time, by which those mortgaged could be distinguished from the remainder of the herd by any means whatsoever. The description as to this portion of the mortgaged property, at least, comes clearly within the rule laid down in *Price v. McComas*, 21 Nebr., 195. It is there said: "The description of the property intended to be mortgaged should be such as to distinguish it from other chattels, or should contain some hint to direct such parties as may examine the mortgage to any source of information beyond the words of the same. The description should be such as to enable third parties to identify the property, aided by inquiries which the mortgage itself indicates and directs" citing *Elder v. Miller*, 60 Me., 118; *Skowhegan Bank v. Farrar*, 46 Me., 293; *Chapin v. Cram*, 40 Me., 561; Herman, Chattel Mortgages, sec. 73. In *Buck v. Davenport Savings Bank*, 29 Nebr., 407, it is said: "The description of property in a chattel mortgage will, as a rule, be held sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property." Under the description given of that portion of the property referred to, it is wholly impossible to identify those covered by the mortgage, or distinguish them from others of like kind kept on the farm, and there being a failure of proof in this respect, we must hold the mortgage as to such property void for uncertainty. The rule announced is also sustained in *Lafayette County Bank v. Metcalf*, 29 Mo. App., 384; *Caldwell v. Trowbridge*, 26 N. W. Rep. [Ia.], 49; *Stonebraker v. Ford*, 81 Mo., 532; *Commercial State Bank v. Elevator Co.*, 85 N. W. Rep. [S. Dak.], 219.

The verdict, wherein it finds the right of possession of certain of the property in the defendant, George Hutton, and the right of possession of certain other of the property in Mrs. Hutton, without finding the value of such possession, or that they had the right of property,

is complained of. Whether the verdict will support a judgment in their favor for a return of the property, or, in case a return can not be had, for its value as found by the jury, need not be determined in view of the conclusion reached as to the void description of the property in the mortgage of the intervener. The verdict does not fully correspond to the requirements of the statute. Another verdict, however, would not probably be subject to the same objections. We observe no other error in the record. For the reasons given, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, V. JOHANNA GROSSHANS ET AL., APPELLANTS.

FILED MARCH 20, 1901. No. 11,618.

1. **Appeal in Equity**: REVERSAL: TRIAL DE NOVO: RES ADJUDICATA. Where, on an appeal in an action in equity, the decree rendered is reversed and remanded for want of sufficient evidence to sustain it, and on a second trial *de novo* additional and material evidence is introduced and an appeal again taken, the second appeal is to be considered on the record then presented, uninfluenced by the prior decision on the question of the sufficiency of the evidence.

2. **Plea of Fraud**: CONCLUSION. An allegation in an answer "that if any such deed as is described in plaintiff's petition is in existence and executed by her as grantor therein, or one of the grantors, that such execution was obtained by fraud, either by the plaintiff, the said M. L. Luebben or some person in their interest," *held* to be pleading a conclusion only, and that the facts relied on to constitute fraud, to be available, must be specifically pleaded and proven.

3. **Finding of Fact**: SUFFICIENT EVIDENCE. A finding of fact by the trial court will not, on appeal, be disturbed, unless unsupported by sufficient competent evidence.

4. ———: ———. Evidence examined, and *held* to support the findings and decree rendered by the trial court.

5. **Party:** COMPLAINT: PREJUDICE. A party who is not prejudiced by the ruling complained of has no legal ground of complaint.

6. **National Bank:** REAL ESTATE SECURITY: BORROWER CAN NOT BE HEARD TO PLEAD U. S. STATUTE PROHIBITING SUCH SECURITY. A party who has secured a loan from a national bank, and given real estate security therefor, can not be heard to deny the right of the bank to enforce the provisions of the mortgage because of the section of the United States statutes prohibiting the taking of real estate security for a loan negotiated by a national bank.

7. **Real Estate Security:** CONTEMPORANEOUS LOAN: ENFORCEMENT. Where security on real estate has been taken by a national bank on a contemporaneous loan, the same may be enforced, notwithstanding the provisions of the United States statute prohibiting that character of security.

8. **Plea in Abatement:** PENDING ACTION: ABEYANCE BY STIPULATION. Where a suit is begun, and prior suits in another county are pending on the same cause of action, and the parties stipulate that the prior suits shall rest in abeyance during the pendency and until the final disposition of the suit last begun, and that thereupon the same judgment and decree shall be rendered as is rendered in the action tried, such stipulation *held* to be a waiver of any right to file a plea in abatement because of the pendency of the prior actions.

APPEAL from the district court for Clay county. Heard below before STUBBS, J. *Affirmed.*

Thomas Ryan and *L. P. Crouch,* for appellants.

Thomas H. Matters, contra.

HOLCOMB, J.

The appellee, as plaintiff, began an action in equity in the district court for Clay county, the object and purpose of which were to foreclose a lien which it claimed upon certain property, a portion of which is situate in the county in which the action was brought and a portion in the adjoining counties of York and Hamilton. Such lien arose by virtue of a quitclaim deed, alleged to have been executed by appellants Grosshans, conveying the interest of Johanna Grosshans, the wife of William Grosshans, in the real estate of her deceased father. It

is alleged that the instrument was executed for the purpose of securing the payment of a note of $800, given by the Grosshans to one Peter Griess, and by him discounted with the plaintiff bank. The action has once before been tried in the district court, and from the decree finding in favor of the plaintiff and directing a sale of the interest of the grantor in the real estate mentioned for the satisfaction of the debt found due, an appeal was taken to this court, and the decree thus rendered was reversed for want of sufficient evidence to support the same. *First Nat. Bank of Sutton v. Grosshans*, 54 Nebr., 773. A statement of the case is found in the opinion, in which it is observed by HARRISON, C. J., writing the same: "A careful examination of the evidence convinces us that it is wholly insufficient to sustain the finding to the extent it involves and applies to Johanna Grosshans, that she executed the deed as a mortgage to aid in the negotiation or sale of the note to the bank, or to secure the payment of the note to Peter Griess, or to establish that the deed was executed by her as or for other than was disclosed by its face." The case was remanded, and after another trial *de novo*, in which was introduced additional testimony, the trial court again found in favor of the plaintiff upon the issues joined, and entered a decree of foreclosure in conformity with the prayer in the petition. An appeal is again prosecuted in this court.

It is urged by the appellants that the opinion on the first appeal is decisive of the question, and that the decree should again be reversed. This contention would probably be correct if the testimony in both cases were the same. While we are not now advised as to the state of the evidence upon which the first appeal was reviewed, we find from an inspection of the present record that a great deal of additional and material evidence was introduced on the second hearing, and because thereof, we are to consider the present appeal upon the record now before us, uninfluenced by the prior decision.

It is said in the second paragraph of the syllabus in

Missouri P. R. Co. v. Fox, 60 Nebr., 531: "In such cases, the decision as to the sufficiency of testimony on a particular feature of the case, as disclosed by the record on the first trial, is not binding in a subsequent trial where the testimony is, or may be presumed to be, materially different, in the investigation of which a reviewing court is to be controlled by the record then before it, uninfluenced by such prior decision." The rule announced in the *Fox Case* is but following that stated in *Hiatt v. Brooks*, 17 Nebr., 33. It is quite apparent, upon a reading of the opinion on the first appeal, that while the evidence was deemed insufficient to support the finding of the trial court, the decree was reversed and the case remanded for the purpose of permitting the plaintiff to supply the deficiency in the evidence, if able to procure the same, and we are now to determine whether this has been done under the evidence as presented on the second trial.

By its petition the plaintiff's right to the relief prayed for is based upon substantially the following allegations: That appellants Grosshans were indebted to one Peter Griess in the sum of $800, evidenced by their promissory note in his favor; that the payee, desiring to discount the note with the appellee bank, the same was effectuated by the payee guaranteeing its payment, and the payors executing a quitclaim deed to the interest of Johanna Grosshans in her deceased father's real estate described therein, which, while the form was that of a deed of conveyance, was in fact intended to be and was taken as security for the note mentioned; whereupon, and in consideration of which, the note was discounted with the appellee bank, who paid to the payee the proceeds arising therefrom; default in the payment of the note with prayer for equitable relief.

In answer to the petition, as we construe it, the appellant, Johanna Grosshans, pleaded a defect of parties, and a misjoinder of causes of action; an admission that she signed the note, alleging that it was as surety only; a denial of some of the formal allegations of the petition,

and an admission as to others; also, alleging the pendency of prior suits involving the same subject matter. As to the allegation of the execution and delivery of the quitclaim deed pleaded in the petition, the ninth paragraph of the answer is as follows: "This defendant alleges that the deed described in the petition she never heard of, and had no knowledge of its existence until this suit was commenced; that she has not to this day ever seen it; that she has never knowingly nor intentionally nor voluntarily signed said deed, that she never acknowledged the execution of it in the presence of any officer authorized by law to take the acknowledgment of deed; and that she never executed it in the presence of any such officer; that if any such deed as is described in plaintiff's petition is in existence and executed by her as grantor therein or one of the grantors that such execution was obtained by fraud, either by the plaintiff the said M. L. Luebben or some person in their interest." We conceive the legal effect of this paragraph of the answer to be a substantial admission of the execution of the instrument referred to, leaving no issue with respect thereto, unless raised by the statement in the latter part thereof with reference to the conveyance being procured by fraud. *Dinsmore & Co. v. Stimbert*, 12 Nebr., 433. *State v. Hill*, 47 Nebr., 456. The allegation that if the deed is in existence, its execution was obtained by fraud, either by the plaintiff or by some other person, is too general to be construed as an allegation of fact upon which fraud may be predicated, and is only a conclusion, upon which no finding of the procurement of the execution of the instrument to have been by fraud could be based; hence, the statement must be disregarded under the well-known rule that facts relied on to constitute fraud, to be available, must be specifically pleaded and proven. *Arnold v. Baker*, 6 Nebr., 134; *Aultman v. Steinan*, 8 Nebr., 109, 113; *Hamilton v. Ross*, 23 Nebr., 630; *Tepoel v. Saunders County Nat. Bank*, 24 Nebr., 815; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Nebr., 137; *Crosby v.*

Ritchey, 47 Nebr., 924. The appellant, Mrs. Grosshans, admits the signature to the quitclaim deed to be hers, but denies that she thereby intended to pledge her separate estate for the payment of the note. If the deed was executed and delivered for any purpose, no other construction can be put on the acts of the parties under the evidence, than that it was for the purpose of securing the debt as alleged by the plaintiff.

The evidence, as adduced on the trial, tends to prove that the Grosshans were indebted to the bank in the sum of $1,590, upon which the Peter Griess mentioned was liable as surety; that to indemnify the surety there was a transfer of certain property owned by the Grosshans in the city of Harvard, and occupied by them as a homestead; that on this homestead was procured a loan of $1,000, the proceeds of which, or some portion thereof, were applied to the reduction of the $1,590 indebtedness, the transaction when completed leaving a claim to the amount involved in this controversy yet due. As evidence of this indebtedness, a new note for that amount by the Grosshans was executed with Griess as surety, and as further security the appellant, Johanna Grosshans, executed in Griess's favor what was termed a release of her interest in the estate of her father, who was then deceased. The release, while informal, appears to have been executed as security to Griess because of his liability for the indebtedness of Grosshans. As a part of the same transaction, Griess reconveyed the homestead to Johanna Grosshans, which had before been held as security by him. After these arrangements had continued for about a year, the transactions forming the basis of this action were entered into, a new note being given to Griess, discounted to the bank, and the formal quitclaim deed executed by the Grosshans and Peter Griess and wife for the interest in the estate, as before mentioned. While the evidence is not entirely satisfactory as to the object and purpose for which the quitclaim deed was executed, we are disposed to the view

that it is sufficient to sustain the finding and decree of the trial court, this being the second trial resulting in the same finding. The trial court having the advantage of hearing the witnesses testify, noting their demeanor and other circumstances affecting their credibility, is in a favorable position to make proper deductions from the evidence, and unless the finding is unsupported by sufficient competent evidence, it will not be disturbed on appeal. *Zarrs v. Keck*, 40 Nebr., 456; *Davidson v. Crosby*, 49 Nebr., 60.

It is urged by appellants that under the will of the deceased the property went to his executors, in whom the legal title was vested, and not to his heirs, and for that reason no title vested in them which could be mortgaged or made the subject of sale under foreclosure proceedings. Without determining this question, we only need to say that if such be the case, the appellants are not prejudiced, and, therefore, have no ground for complaint. *Pinkham v. Pinkham*, 61 Nebr., 336.

It is also argued that appellee bank, being a national bank, is prohibited from taking real estate as security for a concurrent loan, and we are cited to the Revised Statutes of the United States, section 5137, in support of the same. The rule regarding such transactions, as we understand it, is, first, that the parties thereto can not be heard to deny the right of the bank to enforce the provisions of the mortgage (*State Nat. Bank v. Flathers*, 12 So. Rep. [La.], 243), and that the violation of the statute mentioned is a matter purely for the United States government; and where security on a contemporaneous loan has been taken, the same may be enforced, notwithstanding the provisions of the statute cited. *National Bank v. Matthews*, 98 U. S., 621; *National Bank v. Whitney*, 103 U. S., 99; *Swope v. Leffingwell*, 105 U. S., 3.

A plea in abatement of prior suits pending in York and Hamilton counties on the same cause of action was interposed, and the action of the trial court in proceeding to trial irrespective of the proof of the pendency of

such actions is urged as a ground of reversal. We find, however, in the record a stipulation of the parties, wherein it is provided that the suits pending, to which reference has been made, shall rest in abeyance during the pendency and until final disposition of the action in Clay county, and thereupon the same judgments and decrees should be rendered in these suits as might be rendered on such trial in Clay county. This stipulation is clearly a waiver of any right to file a plea in abatement, and the action of the trial court in proceeding with the trial, according to the agreement of the parties under the stipulation mentioned, was entirely proper. No error was committed by the trial court with respect to the plea of abatement.

The decree of the district court should be affirmed, which is accordingly done.

AFFIRMED.

ANHEUSER-BUSCH BREWING ASSOCIATION V. FREDERICK HIER.

FILED APRIL 10, 1901. NO. 11,875.

Former Decision Herein Res Judicata. The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated.

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

Abbott & Abbott, for plaintiff in error.

F. I. Foss and *B. V. Kohout, contra.*

PER CURIAM.

This action was brought by Frederick Hier against the Anheuser-Busch Brewing Association to enforce restitution of money obtained by executing a judgment which

was afterwards reversed. The trial court found the issues in favor of the plaintiff and gave judgment accordingly. The questions discussed by counsel in the briefs have been squarely decided by this court in this case (*Hier v. Anheuser-Busch Brewing Ass'n*, 60 Nebr., 320), and we have now neither the power nor disposition to alter or modify, in any way, the conclusions heretofore announced. The judgment is

AFFIRMED.

ELKHORN VALLEY BANK V. MARY MARLEY.

FILED APRIL 10, 1901. No. 9,389.

1. **Assignment of Error: BRIEF: WAIVER.** Assignments of error not argued in the brief are deemed waived.
2. **———: DAMAGES: BILL OF EXCEPTIONS.** An assignment that the damages are excessive can not be considered in the absence of a bill of exceptions.
3. **Instructions: EXCEPTIONS: REVIEW.** Instructions will not be reviewed where they were not excepted to in the trial court.

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

Michael F. Harrington and *J. J. Harrington*, for plaintiff in error.

H. M. Uttley, contra.

NORVAL, C. J.

This was an action in replevin by the Elkhorn Valley Bank to recover possession of a number of cattle which it claimed a special property in by virtue of a chattel mortgage executed by one John Marley. The defendant answered the petition, denying the averments therein, pleaded ownership of the property in other parties and right to possession in herself, and prayed a return of the cattle. Upon the trial a verdict was returned finding the

right of possession of the property in controversy at the time of the commencement of the action in defendant, and assessing such right of possession at $443, and the damages for the wrongful detention at $190. Plaintiff prosecutes error from the judgment entered on the verdict.

The petition in error contains fifteen assignments of error, and a majority of them not having been argued in the brief are waived. *Johnson v. Gulick*, 46 Nebr., 817; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Nebr., 397; *Gill v. Lydick*, 40 Nebr., 508.

It is insisted that the amount of damages awarded by the jury is excessive. This point can not be considered, since there is no bill of exceptions in the case, the same having been quashed at a prior term. For the same reason the assignment that the verdict is contrary to the evidence can not be considered.

Another contention is that the verdict is contrary to law, in that it did not determine the right of property in the cattle. The answer merely tendered the issue of right of possession of the property, and the verdict fully responded to this issue.

Complaint is made of the giving of certain instructions. There were no exceptions taken to the instructions in the court below; hence they can not be reviewed.

The judgment is

AFFIRMED.

ALEXANDER DOBSON V. STATE OF NEBRASKA.

FILED APRIL 10, 1901. No. 11,471.

1. **Erroneous Instruction:** OMISSION OF ESSENTIAL ELEMENT: NOT CURED BY CORRECTIVE ONE. An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous and is not cured by another instruction which covers the point.

2. **Larceny:** FELONIOUS INTENT. To constitute larceny there must have existed a felonious intent at the time of the taking.

ERROR from the district court for Cherry county. Tried below before WESTOVER, J. *Reversed.*

Hamer & Hamer and *J. Wesley Tucker*, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *Michael F. Harrington, contra.*

M. F. Harrington: The question of whether a person charged with an infamous crime before a state court can be tried upon information is no longer an open question. *Bolln v. Nebraska*, 176 U. S., 83.

NORVAL, C. J.

Alexander Dobson was prosecuted in the district court of Cherry county for stealing a calf. The judgment of conviction is here for review.

Among the numerous errors assigned is one relating to the giving of the fifth instruction, a copy of which follows: "You are instructed that in this case if you are convinced by the evidence beyond a reasonable doubt that the defendant on or about the 30th day of November, 1899, in Cherry county, Nebraska, took the calf described in the information from the range or prairie at or near his home in Cherry county, Nebraska, into his possession, and on or about said time sold and delivered the same to one Jerry Kelley with the intention then and there to convert said calf to his own use, and to permanently deprive the owner thereof of his said property, then you are instructed that such action on his part would constitute a larceny of said calf within the meaning of the laws of this state." By this instruction the court attempted to cover the whole case. If it omitted an essential element of larceny, the giving it was error. *Barnes v. State*, 40 Nebr., 545; *McAleer v. State*, 46 Nebr., 116; *Runge v. Brown*, 23 Nebr., 817; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Nebr., 194; *Bowie v. Spaids*, 26 Nebr., 635; *Thompson v.*

People, 4 Nebr., 524; *Baldwin v. State*, 12 Nebr., 61. This is true, even though another instruction may include the element omitted in the one by which the court attempts to state to the jury the essential ingredients of the crime. *Richardson v. Halstead*, 44 Nebr., 606; *Carson v. Stevens*, 40 Nebr., 112; *First Nat. Bank of Denver v. Lowrey*, 36 Nebr., 290; *Barr v. State*, 45 Nebr., 458; *Metz v. State*, 46 Nebr., 547. By this instruction the jury were told that it was their duty to find the defendant guilty if the facts therein set forth were proved. The instruction omits one essential element of the crime of larceny, a felonious intent. It is true that it is not necessary that the words "felonious" or "feloniously" be used by the court, provided words of like import or meaning are employed. *Philamalee v. State*, 58 Nebr., 320. In the instruction complained of not even the words "wrongful" or "unlawful" appear. The jury were instructed merely that if he took the calf and delivered it to Kelley with the intention to convert it to his own use and permanently deprive its owner of his property, the crime had been proved. This would have been his intent had he purchased the calf of its owner, or had the latter given it to him. Hence, there were no words in the instruction which imported that a felonious intent in the taking was necessary. It was, therefore, erroneous, and for that reason defendant is entitled to a new trial.

Numerous other errors are alleged in the petition in error and urged in the brief of defendant. We do not deem it necessary to discuss them. Many are trivial, others not likely to appear on another trial.

The judgment of the lower court is

REVERSED.

ANNETTE C. CARTER v. DIME SAVINGS BANK ET AL.

FILED APRIL 10, 1901. No. 11,705.

1. **Granting Injunction:** APPOINTMENT OF RECEIVER: BAR: RULE. The rule that the granting of an injunction is equivalent to the appointment of a receiver, and bars a subsequent suit brought in another court wherein the appointment of a receiver is sought, does not apply when the parties are not the same in both cases.

2. **Order of Court:** OBEDIENCE: TURNING OVER ASSETS TO RECEIVER. Where one, in obedience to an order of a court of competent jurisdiction, has turned over to a receiver appointed by it assets in his hands belonging to an insolvent, he can not be compelled in a suit in another court, between different parties, to account therefor.

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

John T. Cathers and *J. O. Detweiler*, for plaintiff in error.

Duffie, Gaines, Kelby & Storey, Charles A. Goss, Winfield S. Strawn and *W. A. Saunders, contra.*

NORVAL, C. J.

In 1894 the Dime Savings Bank of Omaha found itself unable to meet the demands of its depositors, and its directors concluded to, and did, close such bank so far as related to the receipt of deposits and the carrying on of general business. Under an agreement entered into between it, though its directors, and one John G. Cortelyou, its acting cashier, the assets of the bank were turned over to the latter, he agreeing to meet all demands of its depositors out of the assets of the bank; or, if necessary, out of money by him to be advanced on its behalf out of his private funds. About April 5, 1895, Annette C. Carter commenced suit in the district court of Douglas county against said bank, its officers and Cortelyou to recover certain sums by her deposited in said bank, and obtained a temporary injunction, afterwards made

perpetual, against Cortelyou, restraining him from turning over to any other person or in anywise disposing of said assets. In that suit she afterwards obtained judgment against the bank, which was on appeal affirmed by this court. Later, execution issued on the judgment, which execution was by the sheriff duly returned unsatisfied, the officer having failed to find property with which to satisfy the same. Carter then filed a motion, praying for an order directing Cortelyou to turn into court these assets, out of which to satisfy said judgment. This motion Cortelyou answered, alleging, first, that the court was without jurisdiction to make the order demanded; second, that, after the temporary injunction was issued in the case, suit was commenced in the United States circuit court against said bank by another party; that in such suit a receiver was appointed for the assets of the bank, and Cortelyou was ordered to turn said assets over to such receiver, which order he obeyed, and that from that time he had no assets of said bank in his possession. On hearing, said order was denied, from which Carter prosecutes error.

While several questions of law are argued, the pivotal one is that presented by Cortelyou's answer, wherein it is alleged that he had, in obedience to the order of the federal court, turned these assets over to its receiver, as the conclusion to which we have come relative thereto is decisive of the case. By the injunction Cortelyou was inhibited from turning over to any third person or in any way disposing of these assets. It is claimed that he had not the power to deliver them to said receiver; or if he did, it was in disobedience of the order of the state court. We think not. The record is conclusive that their delivery to the receiver was involuntary, and on the order of the federal court, after Cortelyou had presented to it the fact that he had been enjoined from disposing of them. It is manifest that his action was involuntary, and was in conformity to his duty in the premises. It is urged, however, that the issuance of an injunction by the state court

was equivalent to the appointment of a receiver, and that, as the state court first acquired jurisdiction, it is a bar to the suit in the federal court wherein said receiver was appointed. The answer to this argument is that the parties in the two cases are not the same, Carter not being a party to both suits. The rule contended for, if it is a rule of law, can obtain only where the parties in each court are the same. High, Receivers, sec. 49, wherein it is stated that "the granting of an injunction by a court of competent jurisdiction is a bar to appointing a receiver in a subsequent proceeding between the same parties in another court." It was undoubtedly the duty of Cortelyou to deliver to the receiver these assets. There was ample evidence from which the court was justified in finding that such suit was not instituted, nor said order issued through any connivance on his part. The delivery of the assets was, therefore, involuntary, and not in disobedience of the injunction of the district court. For that reason the order was properly refused.

It is further contended that the record shows that he in fact received from the receiver money upon which this judgment is a lien, and that he should have been directed to turn this into court. The evidence was sufficient to sustain the court in holding that this money was merely property of Cortelyou, being money advanced by him out of his private funds to satisfy certain creditors of the bank, and in no sense assets of the latter.

There is no error in the proceeding, and the order of the district court is

AFFIRMED.

ROWLAND P. HILLS V. STATE OF NEBRASKA.

FILED APRIL 10, 1901. No. 11,721.

1. **Prosecution for Bigamy:** TESTIMONY OF WIFE. A wife is a competent witness against her husband in a prosecution for bigamy.

2. **Information:** ALLEGATION OF MARRIAGE: PRESUMED LEGAL. The

mere allegation or averment of a marriage as a fact implies that the marriage was legal.

3. **Privileged Communication:** MINISTER OR PRIEST: NOT MADE IN CONFIDENCE OF RELATION. A communication to a minister of the gospel, or priest, is not privileged, where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret.

4. **Voluntary Confession.** A confession of a prisoner voluntarily made, is admissible when not prompted by any inducement of hope or of fear.

5. **Void Marriage:** PRIOR AGREEMENT. A marriage solemnized in good faith is not void merely because the contracting parties may at some prior time have entered into an agreement or understanding that the marriage should be invalid.

6. **Foreign Marriage.** A marriage legal where solemnized is valid everywhere.

ERROR from the district court for Washington county. Tried below before BAXTER, J. *Affirmed.*

Martin H. Leamy and *Brome & Burnett*, for plaintiff in error:

A complaint must be verified by one who is a competent witness. 1 Bishop, New Criminal Procedure [4th ed.], secs. 232, 719, and authorities therein cited; *People v. Quanstrom*, 93 Mich., 254; Greenleaf, Evidence [Lewis's ed., 1896], sec. 374 *et seq.; Perez v. State*, 10 Tex. App., 327.

The witness who verified the complaint claimed to be the wife of the accused. The wife is not a competent witness against the husband in a criminal case. The statute makes an exception in a prosecution for an offense by the husband against the wife. But the weight of authority is against bigamy being one of this class of cases. *People v. Quanstrom, supra; Hiler v. People*, 156 Ill., 511; Underhill, Criminal Evidence [1898 ed.], sec. 400; 1 Bishop, New Criminal Procedure [4th ed., 1895], sec. 1153; Wharton, Criminal Evidence [8th ed.], sec. 397; 3 Greenleaf, Evidence [Lewis's ed.], sec. 206; *State v. Armstrong*,

4 Minn., 335, Gilfillan's ed., 251; *Compton v. State*, 13 Tex. App., 274; *Bassett v. United States*, 137 U. S., 496.

The complaint was defective, in that it did not charge that the first marriage was lawful. *King v. State*, 40 Ga., 244.

The communication to the Rev. Mr. Young was privileged. *Dehler v. State*, 53 N. E. Rep. [Ind.], 850.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra:*

The wife was a competent witness. *State v. Bennett*, 3 Ia., 24; *State v. Hazen*, 39 Ia., 648; *State v. Sloan*, 55 Ia., 219.

The information was substantially in the language of the statute, and was sufficient. *Whitman v. State*, 17 Nebr., 224; *Hodgkins v. State*, 36 Nebr., 160.

On the theory that Exhibit 9 was not received by the witness Young as a priest of the church under the pledge of secrecy, and that it was a voluntary statement not prompted by a hope of reward, a theory abundantly supported by the record, it was clearly admissible. *Langtry v. State*, 30 Ala., 536; *Halbrook v. State*, 34 Ark., 511; *State v. Johnson*, 12 Minn., 476, Gillfillan's ed., 378; *State v. Sanders*, 30 Ia., 582; *Wolverton v. State*, 16 Ohio, 173; *Squire v. State*, 46 Ind., 459.

NORVAL, C. J.

This was a prosecution for bigamy. A verdict of guilty was returned, and the defendant was sentenced to the penitentiary for the term of four years. The complaint before the examining magistrate was signed and sworn to by Eliza C. Hills, the first wife of the defendant. His counsel filed a plea in abatement to the complaint, on the ground that Eliza C. Hills was not a competent witness against accused, which was overruled, and the magistrate finding probable cause to believe that defendant was guilty of the crime of bigamy as charged, held the accused to the district court, where the county attorney

filed an information charging the offense substantially in the language of the complaint. The defendant presented to the district court a plea in abatement based on the same ground as that incorporated in the one filed before the examining magistrate. A demurrer by the state to this plea was sustained, and a general demurrer to the information was overruled. On the trial Mrs. Eliza C. Hills, over the objection of the defendant, was examined and testified as a witness on behalf of the state.

The first contention of counsel for defendant is that the court below erred in sustaining the demurrer to the plea in abatement, since the information was based on a complaint verified by the first wife of the accused. The argument is that Mrs. Hills was an incompetent witness against her husband in a prosecution for bigamy, and, therefore, was disqualified from swearing to the complaint. Section 331 of the Code of Civil Procedure declares that "the husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." This provision was under consideration in *Lord v. State*, 17 Nebr., 526, where it was distinctly ruled that a wife was a competent witness against her husband on an indictment for adultery, since that was a crime committed by the latter against the former. This holding was cited with approval in *Owens v. State*, 32 Nebr., 174. See *State v. Bennett*, 31 Ia., 24; *State v. Hazen*, 39 Ia., 648; *State v. Sloan*, 55 Ia., 217; *State v. Hughes*, 11 N. W. Rep. [Ia.], 706. There are authorities, some of which are cited in the brief of counsel for defendant, which affirm the doctrine that a statutory provision like our section 331 quoted above is merely declaratory of the common law, and that neither a husband nor a wife is a competent witness in a criminal cause against the other, except in cases of personal violence, the one upon the other. To this latter view we are unable to assent. The statute in question

was not simply declaratory of what the law would be without section 331. To so hold would be to impute to the legislature a useless purpose, since the common law was then in force, except where modified by statute. The lawmaking body evidently, by this section, intended to establish a new rule, and make the husband and wife competent witnesses one against the other in any criminal action for a crime committed by one against the other, whether by the infliction of personal violence or not. The wife is a competent witness against the husband in a criminal prosecution for bigamy or adultery, inasmuch as these are crimes specially against her and not merely against the relation.

It is strenuously insisted that reversible error was committed in overruling the demurrer to the information. The argument is that the information did not charge a crime, because it did not allege that the first marriage was a lawful one. The information avers that "Rowland P. Hills on the 11th day of September, 1885, in the county of York, England, then and there being, did then and there marry one Eliza Cook Adsetts, spinster, and her the said Eliza Cook Adsetts, then and there had for his wife, and the said Rowland P. Hills being so married to the said Eliza Cook Adsetts, afterwards, and during the life of the said Eliza Cook Adsetts, his wife (who had not been continually and willfully absent from the said Rowland P. Hills and unheard from by him for five years, together next before the 11th day of March, 1899) did, on the 11th day of March, 1899, in the county of Washington and state of Nebraska, then and there, and then and there being, unlawfully, willfully and feloniously marry one Dollie Powell, the said Eliza Cook Adsetts, his former wife, being then alive," etc. The infirmity imputed to the information is lacking of merit. It is averred that the defendant was married at a specified time to a certain woman in England. This implies that the marriage was a lawful one. If unlawful, then there was no marriage. *State v. Hughes, supra.*

Rev. A. T. Young, the rector of the Episcopal church at Blair, was called and examined as a witness for the prosecution. His evidence reveals that almost immediately after the arrest of the defendant the latter sent for Rev. Young, who called upon him in the county jail. Hills's object in requesting his presence was to have the rector intercede with his first wife for a settlement of the criminal proceedings. Hills wrote a letter to the county attorney somewhat along the same line, which, at the defendant's request, was delivered to the prosecuting attorney by Young. The latter was also prevailed upon by defendant to carry his wishes to his first wife, the prosecuting witness. At the time Hills wrote out a synopsis of what he wanted Rev. Young to say to Mrs. Hills No. 1, which follows:

"1. Months to stay as prosecuting witness, with several trials.

"2. Promise of immediate divorce, which will free her in a few weeks.

"3. Payment of some of her expenses.

"4. The fact that she has severely punished me already, to carry it further might change public feeling and be thought vindictive."

This paper was put in evidence by the state, and its admission is assigned for error. The first objection to the paper in question is that it was received in evidence in violation of section 333 of the Code of Civil Procedure, which provides that "no practicing attorney, * * * minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

To render a communication to a minister of the gospel or priest privileged it must have been received in confidence. By this we do not mean that it must be made under the express promise of secrecy, but rather that the

communication was in confidence, and with the understanding, express or implied, that it should not be revealed to any one. The mere fact that a communication is made to a person who is a lawyer, a doctor or a priest, does not of itself make such communication privileged. To have that effect, it must have been made in confidence of the relation and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser. In the case at bar there was adduced evidence tending to show that the paper was not committed to Rev. Young as a secret or in confidence. On the other hand, he was enjoined by the defendant, as is shown by the evidence, to make the contents thereof fully known to Mrs. Hills, the first wife of the defendant. Had the defendant requested Rev. Young to call a public meeting of the citizens of Blair in the interest of the former, and to address the same upon the subjects included in the paper in question, handed to the godly man as the subjects of his discourse, it would hardly have been questioned by any one that the paper would not be privileged. In principle there is no distinction between the supposed case and the one with which we have been dealing. It is plain that Rev. Young betrayed no confidence of the prisoner in revealing the contents of this paper or writing.

It is also urged that this paper was inadmissible as a confession, because it was prompted by an inducement of hope or of fear. The evidence on behalf of the state discloses that it was voluntarily written and delivered by defendant to Rev. Young without any suggestion on the part of the latter that the accused would in the least be benefited thereby, or that it was given on any promise of reward or threat of punishment.

After the state had made out its case in chief, the defendant moved, *ore tenus*, to strike from the record all the evidence and certain exhibits adduced by the prosecution relating to the marriage ceremony between the accused and the first Mrs. Hills, in England, in Septem-

ber, 1885, for the reason that the evidence on the part of the state did not prove, or tend to prove, that the marriage was valid. In passing upon the motion the court, in the hearing and presence of the jury, stated "there was evidence in the record tending to show cohabitation in the larger sense." Exception was taken to this remark, and its utterance is urged as a ground of reversal. It is true, as contended, that it was for the jury to determine whether the accused and Mrs. Hills No. 1 were lawfully married and cohabited as husband and wife. The remark of the court did not take this issue from the consideration of the triers of fact. The remarks of the court were elicited by the motion of the defendant, and in passing thereon the court gave its reason for denying the motion, and as there was some evidence in the record upon which the remark could properly be predicated, the criticism upon this particular action of the trial court is overruled. The mere overruling of the motion by the court without giving any reasons therefor would be an expression of the opinion that there was sufficient evidence to establish the marriage of Hills in England. The language of the court was not prejudicially erroneous.

The court, at the request of the state, gave this instruction:

"4. You are instructed that in this case, so far as the validity or invalidity of the alleged first marriage is concerned, it makes no difference whether or not the defendant Hills or the witness Eliza Cook Hills, or either of them, resided or had their usual place of abode or residence in the parish of Sheffield, England, before obtaining the license, or before the marriage ceremony, and you will therefore disregard all evidence received upon the trial of this case on the subject of said residence and places of abode, prior to the marriage ceremony on September 11, 1885, in so far as the question of the validity or invalidity of the license and marriage ceremony are concerned."

It is in evidence that the license under which the de-

fendant was married to his first wife was obtained by her in the parish of Sheffield, England, and in which parish the marriage ceremony was pronounced. In the affidavit upon which the license was issued the contracting lady stated that she had been a resident in the parish of Sheffield, England, for the fifteen days immediately prior thereto, and there was introduced evidence conducing to show that neither Mr. Hills nor his intended wife had ever been a resident of said parish. Chapter 76, Statutes George IV., relating to the solemnization of marriages in England, was introduced on the trial in evidence. Section 10 of said chapter provides that no license shall be issued to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of the parish or chapelry within which the usual place of abode of one of the parties to be married shall have been for the space of fifteen days immediately before the granting of such license. Section 14 of the same statute provides, *inter alia*, in substance that the applicant for license shall make affidavit that one of the contracting parties has had a usual place of abode in such parish or chapelry within which the marriage is to be solemnized for fifteen days prior to the date of the license. Section 22 declares that if any person "shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same, first had and obtained, * * * the marriages of such persons shall be null and void to all intents and purposes whatsoever." Section 26 provides "that after the solemnization of any marriage * * * where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage."

The English decisions rendered under the foregoing

provisions, some of which were introduced on the trial and incorporated in the bill of exceptions, affirm the doctrine that a marriage is not void merely because neither of the contracting parties was at the time a resident of the parish wherein the marriage ceremony occurred, and that the residence or place of abode of the parties does not affect the validity of the marriage. Manifestly, these adjudications are sound. No other interpretation can properly be placed on section 26 already quoted. But it is urged that that said section is not applicable here, for the reason that it declares a rule of evidence, relating to the remedy only, and that it can be given no extra-territorial effect. A ready answer to this is that a marriage legal where solemnized is valid everywhere. 1 Bishop, Marriage & Divorce [6th ed.], secs. 371-389. Therefore, section 26 can be considered for the purpose of ascertaining whether the first marriage of the defendant was valid in England. The validity of a marriage is to be determined by the law of the place where the same was solemnized, and section 26 was a part of the law of England when the first marriage took place. Under the authorities we have no doubt of its validity; and being binding upon the parties there, its validity can not be successfully assailed here. The instruction was, therefore, not inappropriate or erroneous.

The final contention of counsel for accused is that the court below erred in instructing the jury to the effect that the validity of the alleged first marriage of Hills was not affected by any agreement or understanding of the parties entered into before such alleged marriage that the same should not be considered as a valid or binding marriage. We quite agree with the learned counsel for the prisoner, that there can be no valid marriage without an agreement and consent of the parties to become husband and wife. The instruction criticised is not in conflict with the principle just stated. The instruction did not tell the jury that if at the time of the alleged first marriage of defendant there was an agreement that the

marriage ceremony was to be regarded as a sham, and to be of no binding force, and in pursuance of such understanding of the parties the marriage ceremony was pronounced, the marriage was not to be affected thereby. The purport of the charge was that any understanding or agreement between the contracting parties before marriage would not invalidate the marriage subsequently solemnized. This was undoubtedly sound, especially when the marriage was not solemnized in conformity with such prior agreement. The criticism of defendant's counsel upon this instruction is ably met by the brief of the attorney general, wherein it is stated: "An agreement to be married and an agreement that the marriage contract shall not be binding on either party, are inconsistent and contradictory. If the nullifying agreement is to receive the sanction of courts then the marriage contract can be dissolved by the parties themselves. All that would be necessary to dissolve or annul the marriage would be, not a decree of a court, but a simple agreement prior to the ceremony that the marriage would not be binding on either party. Neither public policy nor public conscience could suffier such a doctrine to live. We confess our inability to find where any court has ever before been asked to sustain this new and novel doctrine.

"In this case a valid first marriage was sought to be proven. There was record evidence of the ceremony. The wife testified to it, the defendant on the witness stand admitted the ceremony and his participation therein; admitted the authority of the Rev. Blakeney, vicar of the parish church, to issue license; admitted the authority of the Rev. Charles Knight to solemnize the marriage; did not deny the paternity of the child born eighteen months after marriage; introduced the woman as his wife to relatives and others; admits he signed the marriage register kept in the church where the ceremony was performed. Is he to be permitted now to claim this marriage was void because of an ante-nuptial agreement that it should not be binding? Where there is a pretense

of marriage for some other and ulterior purposes, mutually and jointly beneficial and agreeable to both parties, then there is no marriage. It is a pretense and in law ends there. This is the rule so elaborately sustained by counsel's citations.

"In the case at bar there was no pretense; there was a marriage contract and a marriage ceremony. The agreement to keep it secret was not a pretense, and could not avoid or invalidate it. Any agreement that it should not be binding and valid, before it was made, could not affect its validity after the ceremony was performed."

The defendant is a clergyman, "a teacher of high and noble precepts," and yet the record before us discloses that he has violated one of the Ten Commandments and the teachings of Holy Writ. The jury have found him guilty, and the verdict is manifestly right.

The judgment is accordingly

AFFIRMED.

O. G. SOFIELD V. STATE OF NEBRASKA.

FILED APRIL 10, 1901. No. 11,735.

1. **Information:** NAME OF PERSON OTHER THAN ACCUSED: RULE WHERE UNKNOWN. The rule requiring the name of a person other than the accused to be set forth in an information is subject to the qualification that if the name is unknown, that fact may be so alleged.

2. ———: NEGATIVE ALLEGATIONS: DESCRIPTIO DELICTI. An information need not negative the exceptions of a statute, which are not descriptive of the offense.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

S. Cameron, C. L. Gutterson, J. R. Dean and *John S. Kirkpatrick*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

NORVAL, C. J.

O. G. Sofield was convicted in the court below of the crime of practicing medicine without a license, or certificate so to do.

It is insisted that the information on which the defendant was tried is fatally defective, because it does not state upon whom he practiced the healing art, and the case of *O'Connor v. State*, 46 Nebr., 157, is cited in support of the contention. It is true the information in the case at bar omits to state the name or names of the persons upon whom Sofield practiced his profession, but this does not render the information defective in substance, since it is therein specifically alleged that defendant "did unlawfully practice medicine to divers and sundry persons, whose names are to the county attorney unknown." This averment was sufficient. Of course, the county attorney was not required to set out in the information the names of the persons the defendant treated, when such persons were unknown to such officer, and he so pleaded in the information. 1 Bishop, New Criminal Procedure, secs. 546-553; 10 Ency. Pl. & Pr., 508; *Coffin v. United States*, 156 U. S., 432. The case of *O'Connor v. State, supra*, is distinguishable. There the information omitted the names of the persons treated and failed to allege that their names were unknown to the county attorney.

The information is assailed on the ground that it failed to contain any negative averment relative to the exceptions contained in section 17, chapter 55, Compiled Statutes. Such a negative averment was wholly unnecessary. *O'Connor v. State, supra.*

The evidence was ample to sustain the verdict, and no reversible error appearing in the record, the judgment is

AFFIRMED.

F. C. FAULKNER V. CYRUS P. GILBERT.*

FILED APRIL 10, 1901. No. 11,775.

1. **Pleading:** ANSWER: ADMISSION: REVIEW OF EVIDENCE. Where the answer admits the execution of the contract sued on, it is prejudicial error to receive evidence on the trial tending to show that such contract did not exist at the time the answer admits defendant executed it, or for some years thereafter.
2. **Witness:** TRUTH AND VERACITY: REPUTATION. Evidence of the reputation of a witness for truth and veracity must relate to such reputation at the place of his residence at the time he testifies. Evidence of such reputation in a community several years after he has ceased to reside there is irrelevant.
3. **Written Contract:** PAROL AGREEMENT: EVIDENCE EXCLUDED. Evidence of a prior or contemporaneous parol agreement between the parties to a written contract which varies or contradicts the terms of the latter is inadmissible, the execution thereof being admitted.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Reversed.*

S. L. Geisthardt, for plaintiff in error.

A. N. Sullivan, Byron Clark and *C. A. Rawls, contra.*

NORVAL, C. J.

This case has been here before. *Faulkner v. Gilbert,* 57 Nebr., 544, wherein it was held that an instruction was erroneous, because it ignored the proposition that a consideration of a contract of guaranty need not move to the promisor, and that a disadvantage to the promisee is a sufficient consideration, although the promisor derives no benefit therefrom; and the court further pointed out that the extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger of the payment of the new obligation. After being remanded, the case was again tried, resulting in a verdict and judgment adverse to plaintiff, who comes to this court therefrom on error. The answer in effect admitted

*Rehearing denied. See Vol. 62, p. 126.

that defendant executed the contract of guaranty. On trial, evidence was introduced tending to show that some years after this contract of guaranty was entered into, as admitted by the answer, no such guaranty appeared upon the note. This evidence could not be relevant, and was prejudicial, for in effect it submitted to the jury the question of whether a contract of guaranty had ever been entered into, when that fact was admitted by the answer. Hence, such evidence was both erroneous and prejudicial.

One of plaintiff's witnesses was one B. A. Gibson, who testified by deposition. The record shows that Gibson had been absent from Cass county, his place of residence at the time the contract was made, several years prior to the time of trial. Yet evidence was permitted on behalf of defendant tending to impeach his reputation for truth and veracity in that county. This court has held, and properly, that evidence of the general reputation of a witness for truth and veracity must have reference to such reputation at his present place of residence. Evidence as to reputation in a community in which he has not resided for several years is not revelant, for since removing from his former place of residence he may have reformed his life; and the law does not presume that a bad reputation will always subsist, but the contrary, in the absence of evidence tending to show the continuation thereof. *Sun Fire Office v. Ayerst*, 37 Nebr., 184; *Long v. State*, 23 Nebr., 33; *Marion v. State*, 20 Nebr., 233, 242. The admission of the evidence was erroneous, and prejudicial to plaintiff.

The court also erred in admitting evidence of defendant relative to transactions between himself and the promisee in the contract of guaranty which led up to said contract. The following question was asked him: "You may state what proposition he (being the agent of the promisee) made to you in any conversation about how you could be released from that indebtedness." The question referred to the indebtedness represented by the

contract guaranteed. To this plaintiff objected as incompetent and an attempt to contradict a written instrument by parol evidence. This objection was overruled, and the witness was permitted to testify that the payee told him before he executed the guaranty that if he would get the payor of the note to secure the note by a mortgage on a house and lot that he would release him, the guarantor, from liability on the debt, and that he procured such mortgage, but that the payee of the note then refused to release him, but insisted upon his signing the guaranty, which he then did. This evidence was incompetent, for the reason that it was an attempt, by parol evidence, to contradict and vary the terms of a written contract, and its admission by the court was error. *Kaserman v. Fries*, 33 Nebr., 427; *Van Etten v. Howell*, 40 Nebr., 850; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Nebr., 545; *Gerner v. Church*, 43 Nebr., 690.

For these errors the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

DANIEL J. TRIMBLE ET AL. V. STATE OF NEBRASKA.

FILED APRIL 10, 1901. No. 11,836.

1. **Plea of Not Guilty:** STANDING MUTE: MOTION TO QUASH: WAIVER. A plea of "not guilty," whether made by the accused or entered by the court for him when on arraignment he stands mute, is a waiver of all defects in an information that can be reached by a motion to quash.
2. **"Prosecuting Attorney" in Statute Means County Attorney.** The words "prosecuting attorney" in sections 579 and 580, Code of Criminal Procedure, construed to mean county attorney.
3. **Information:** MADE AND VERIFIED BY COUNTY ATTORNEY. Informations for crimes must be by the county attorney of the proper county and be verified by his oath.
4. **Clerk of District Court May Take Verification.** The clerk of the district court may properly take verifications of informations.

5. **Clerk:** JUDICIAL NOTICE. A court will take judicial notice of its clerk.

6. **Additional Witness:** INDORSEMENT ON INFORMATION. The name of an additional witness discovered after the filing of an information may be indorsed thereon before trial.

7. **Robbery:** TESTIMONY OF PROSECUTOR: NEGATIVES CONSENT. In a prosecution for robbery from the person it is not necessary to a conviction that the prosecuting witness testify in so many words that he did not consent to the taking of the property, if his whole testimony discloses his non-consent.

ERROR from the district court for Merrick county. Tried below before HOLLENBECK, J. *Affirmed.*

W. T. Thompson and *Jno. C. Martin,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

NORVAL, C. J.

Daniel J. Trimble and George W. Wilson were convicted of the crime of robbery from the person of one William Ferguson and sentenced to a term of imprisonment in the penitentiary. The defendants, together with John Shea and William Hurley, were jointly charged in the information with the commission of the crime. Shea and Hurley were granted trials separate and apart from the other two. When Trimble and Wilson were arraigned, they stood mute, and refused to plead to the information. Thereupon the court entered for them a plea of not guilty. On the day of the trial they filed a motion to quash the information, which the court ordered stricken from the files, and this ruling is the first error of which complaint is here made.

This order of the court was clearly right. The motion to quash was filed without leave of court, while the plea of not guilty was upon the records. Section 444 of the Criminal Code declares that "the accused shall be taken to have waived all defects which may be excepted to by

a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue," A plea of not guilty is a waiver of any defect in the information that can be reached by a motion to quash. It is, however, argued that said section 444 does not apply to this class of cases, since the defendants when arraigned on the information remained mute, and the court, under the Criminal Code, entered a plea of not guilty for each of them. Such action of the court was for the benefit of defendants, and they knew such a plea would be entered on the records for them, if they made no plea themselves, and when so entered it became their plea, which they could have withdrawn at any time, by leave of court, precisely the same as if they had made the plea in the first instance. We have no doubt that the provisions of the section quoted are applicable to this case. Moreover, the motion to quash was without substantial merit. It was based upon the following grounds: (1.) The information was not filed by, or verified by the oath of, the prosecuting attorney. (2.) The information was not sworn to before a magistrate or other judicial officer authorized to administer oaths.

The information in the case at bar was filed in the district court of Merrick county, by the county attorney of that county, and it was verified by his oath. It is true that section 579 of the Criminal Code provides that all informations shall be filed "by the prosecuting attorney of the proper county," and likewise that section 580 of the same Code requires all informations to be "verified by the oath of the prosecuting attorney." The words "prosecuting attorney" in said section mean county attorney. Compiled Statutes, ch. 7, sec. 26. The information was filed by and verified under the oath of the proper officer. *Dinsmore v. State*, 61 Nebr., 418.

The information before us was sworn to before the clerk of the district court, who has authority to take verifications of informations in criminal cases. *State v. Lauver*, 26 Nebr., 757; *Sharp v. State*, 61 Nebr., 187. The

jurat to the verification was signed "J. C. Jeffers, Clerk." This was sufficient. The court below took judicial notice of its clerk.

After filing the information, and before trial, the county attorney indorsed thereon the name of Elmer Maurer, who testified on behalf of the state, over the objections of defendant. By section 579 of the Criminal Code the county attorney is required to indorse on the information "the names of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." In pursuance of this statute the district court of Merrick county adopted the following rule, which was in force at the time of the trial: "In criminal cases, pending upon information the prosecuting attorney may at any time before the trial thereof indorse on the information the names of such witnesses as shall then for the first time become known to him, upon his filing with the clerk of the court his affidavit setting forth that the materiality of such witnesses' testimony has just come to his knowledge and that they were not known to him to be material witnesses at the time of filing the information. After the trial has been commenced the prosecuting attorney, in such cases, upon making a satisfactory showing to the court that he was not before the trial commenced apprised that the persons named were material witnesses for the prosecution, and that this has just become known to him before the trial, may by leave of the court indorse the names of such witnesses upon the information." In accordance with this rule, the county attorney filed the necessary affidavit to entitle him to indorse the name of Maurer upon the information. The attention of the attorneys for the defense was called to the affidavit by the county attorney. If defendants were taken by surprise by the indorsement of said name, they should have asked for a postponement of the trial. This they did not do.

No prejudice was shown. *Stevens v. State*, 19 Nebr., 647; *Parks v. State*, 20 Nebr., 515; *Miller v. State*, 29 Nebr., 437.

The final contention is that the verdict is not sustained by sufficient evidence, for two reasons: First, it was not shown that the property was taken from the complaining witness without his consent; second, there was no sufficient identification of the defendants as participants in the commission of the crime. In a prosecution for larceny or burglary it must appear that the property was taken without the consent of the owner, and where he is a witness on the trial, it must be established by his testimony. It is not essential that the owner of the property should testify in so many words that he did not consent to the taking, but if his evidence as a whole reveals that no consent was obtained from him, and that the taking was wrongful and felonious, the requirements of the law are satisfied. *Rema v. State*, 52 Nebr., 375. In the present case, while the complaining witness did not state that the property was taken from his person without his consent, his testimony shows unequivocally that he did not consent, but that the property was taken from him at the muzzle of a gun. The evidence is ample to sustain the finding that the defendants were perpetrators of the crime.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. WILLIAM S. WILLIAMS ET AL.

FILED APRIL 10, 1901. No. 9,392.

1. **Common Carrier: RAILROAD COMPANY: LIVE STOCK: SUITABLE CARS: DUE CARE.** A railroad company acts in the capacity of a common carrier of live stock which it receives for transportation; and as such carrier it is bound to provide cars fit and suitable under existing conditions, and exercise due care to carry safely.

2. **Where Shipper Does Not Agree to Furnish Caretaker, Company Liable for Loss Through Negligence.** Where the shipper of live

stock does not agree to furnish caretaker, and some of the animals die or are injured for want of proper care and protection while in transit, the carrier is liable and must bear the loss.

3. **Where Shipper Agrees to Furnish Caretaker but Fails.** Where a shipper of live stock agrees to furnish a caretaker and fails to do so, the carrier, if it has knowledge of such failure and proceeds under the shipping contract, is liable for any loss resulting from its failure to provide the stock with proper care and protection.

4. **Denial Without Plea of Justification:** EVIDENCE. Where the defendant denies the commission of a wrongful act with which he is charged and pleads nothing by way of justification, evidence of justification responds to no issue and is immaterial.

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

ERROR from the district court for Seward county. Tried below before BATES, J. *Affirmed.*

J. W. Deweese, Richard S. Norval and *Frank E. Bishop,* for plaintiff in error.

D. C. McKillip, contra.

SULLIVAN, J.

This action was brought by William S. Williams and others against the Chicago, Burlington & Quincy Railroad Company to recover the value of a saddle-bred stallion which it is claimed became sick and died in consequence of long exposure and want of care while being transported over defendant's line of road from Kansas City, Missouri, to Seward, in this state. The jury found a verdict against the company, and judgment was rendered thereon. It appears from the record that the horse was shipped from Gainesville, Texas; that he was safely transported by the initial carrier, the Gulf, Colorado & Santa Fe Railway Company, to Kansas City and there tendered to the defendant, a connecting carrier, on or about May 2, 1892; that the defendant company at first declined to receive the animal because there was no one in charge of him either as a caretaker or with authority

to contract for his transportation; that there were afterwards some negotiations with Williams at Seward which eventuated in the defendant receding from its position and receiving the horse for shipment; that the animal was thereupon put into an ordinary stock car, hitched in such wise that he could not lie down, and sent upon his journey; that he received neither feed nor water from the time he was loaded at Kansas City until he reached Seward. How long that was does not clearly appear, but the inference is justifiable that it was between twenty-four and forty-eight hours. At this time the weather was chilly; rain was falling and the floor of the car was covered with slush. When he arrived at his destination the horse was in the first stages of pneumonia, from which disease he afterwards died. These and other facts submitted to the jury tended strongly to convict the defendant of negligence in the transportation of plaintiffs' property. The evidence, in our judgment, was quite sufficient to authorize and support the verdict rendered. The company undertook for a consideration to transport the stallion from Kansas City to Seward; it was a common carrier of freight and as such was bound to provide a car fit and suitable under existing conditions, and to exercise due care to carry the animal safely. *Black v. Chicago, B. & Q. R. Co.*, 30 Nebr., 197; *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn., 85; *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill., 504; *Evans v. Fitchburg R. Co.*, 111 Mass., 142; Hutchinson, Carriers, sec. 218 *et seq.* There are, of course, exceptions to the general rule of liability for damages to property injured while being transported by a common carrier, but this case is obviously within the rule and unaffected by the exceptions. If the horse died for want of care and protection while being transported from Kansas City to Seward, the defendant is liable and must bear the loss, unless the plaintiffs' wrongful act or omission proximately contributed thereto. Counsel for the company insisted at the trial and contend here that the plaintiffs were in fault, and

that the damage which they have sustained was the direct result of their own negligence. It is said that they agreed to furnish an attendant for the stallion, and that he would have reached his destination in sound health if an attendant had been furnished. One answer to this argument is that no such agreement was ever made; another is that the breach of such a contract would not, under the circumstances here disclosed, exempt the defendant from liability. It was well understood by the parties to this action that the horse was to be transported over the defendant's road without an attendant. The company knew that the plaintiffs did not intend or expect to furnish a caretaker; it knew that they did not consider themselves under any obligation to do so; it knew that no caretaker would be furnished and that the animal would be in its exclusive charge while in transit. It was proven, and proven conclusively, that the minds of the parties met upon the distinct proposition that the company would receive and transport the plaintiffs' stallion from Kansas City to Seward without an attendant. But if the fact were otherwise; if there had been an agreement for a caretaker and a breach of it by the plaintiffs, that would not exonerate the company; it would not warrant it in proceeding under the contract in a negligent manner. In such case the antecedent fault of one party would not excuse the subsequent negligence of the other. 2 Jaggard, Torts, 977; 17 Am. & Eng. Ency. Law [2d ed.], 1071.

The contention of counsel for the defendant upon this branch of the case is not supported by *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind., 129, or by any other decision so far as we know. The rule is not doubted that where the owner is in charge of live stock in transit the burden is on him to show a loss caused by the carrier's negligence. This is the point decided in the Indiana case. Other cases to which we have been referred deny a recovery where the shipper of animals, having agreed to furnish a caretaker, failed to do so and loss resulted from

the negligence of the carrier and the breach of the shipper's contract. Those cases are not precedents here, even on defendant's theory, because in each of them it appears that the carrier did not know that the shipper had failed to keep his agreement.

Some of the instructions are excepted to, but we think the only criticism to which they are fairly subject is that they are too favorable to the defendant. The refusal of the company to receive the stallion when he was first offered for shipment was denied by the answer; no justification was pleaded and the evidence in relation thereto did not respond to any issue and was altogether immaterial. The real questions in dispute at the trial were whether the defendant was guilty of negligence in transporting the horse, and whether the plaintiffs were guilty of contributory negligence in failing to furnish an attendant. These questions having been, under proper instructions, resolved against the company, the judgment should be, and is,

AFFIRMED.

LOUIS LESIEUR V. CUSTER COUNTY.

FILED APRIL 10, 1901. No. 9,431.

1. **Public Proof:** DAMAGES: CONDEMNATION: PHYSICAL APPROPRIATION: BURDEN OF PROOF. In an action to recover damages resulting from the location of a public road, the burden is on the plaintiff to show that his land has been regularly condemned, or at least that it has been physically appropriated to the use of the public by the county authorities.

2. **Filing Petition:** NOTICE: CONDITIONS PRECEDENT. The filing of a petition in accordance with section 4 of the road law (Compiled Statutes, 1899, ch. 78), and the giving of notice in compliance with section 18 of said law, are conditions precedent to the making of an order by the county board establishing a public road.

3. **Deed:** EVIDENCE OF TITLE. A deed, unaided by other proof, is not ordinarily evidence of title to land described therein.

ERROR from the district court for Custer county. Tried below before GREENE, J. *Affirmed.*

H. J. Shinn and *Nathan T. Gadd,* for plaintiff in error.

J. R. Dean, contra.

SULLIVAN, J.

Louis Lesieur, the plaintiff in error, appealed from an adverse decision of the county board of Custer county upon a claim for damages filed under the provisions of the road law. In his petition in the district court he alleged that he was the owner of a quarter section of land in Custer county; that a petition had been filed in the office of the county clerk of said county signed by J. T. Ripley, W. W. Thompson, A. N. Copsey, "and others, praying for the location of a public highway across the premises of this plaintiff," and that the board of supervisors "acted upon said petition and located said highway." It was also alleged in the petition that the plaintiff sustained damages to the amount of $200 by reason of the location of said road. The answer of the county was in substance a general denial. A jury impaneled to try the cause found, in obedience to a peremptory instruction, that the plaintiff had no cause of action, and judgment was thereupon rendered in favor of the defendant. We are of opinion that the trial court reached a right conclusion and that its decision should be affirmed.

The county having denied the existence of a road across the premises described in the petition, the burden was on the plaintiff to show that his land had been regularly condemned, or at least that it had been physically appropriated to the use of the public by the action of the county authorities. There is nothing whatever in the record from which it may be legitimately inferred that the petition contemplated by section 4 of the act on the subject of roads (Compiled Statutes, 1899, ch. 78) was ever filed in the office of the county clerk, or that the notice mentioned in section 18 of the same act was ever given. That the filing of a petition in accordance with section 4, and the giving of notice in compliance with

section 18, are conditions precedent to the making of an order by the county board establishing a public road has been long settled in this state. *Sioux City & P. R. Co. v. Washington County*, 3 Nebr., 30; *Robinson v. Mathwick*, 5 Nebr., 252; *Doody v. Vaughn*, 7 Nebr., 28; *State v. Otoe County*, 6 Nebr., 129; *Beatty v. Beethe*, 23 Nebr., 210. In *Robinson v. Mathwick, supra*, at page 255, it is said: "The board of county commissioners is a tribunal possessed of but a very limited jurisdiction, which is clearly defined by the statutes; and it is essential that all the facts necessary under the statute to authorize their action in any given case, be affirmatively shown. In the location of a county road, the commissioners have no jurisdiction, unless the petition mentioned above be presented after due notice thereof has been given. If they presume to act without an observance of these plain statutory requirements, it would be without authority; and whatever they might do would be merely void." Under the doctrine of the cases cited it is entirely clear that the plaintiff did not show that the county board had jurisdiction or authority to make a valid order establishing a road across the land described in the petition. In other words, he failed to prove that the land had been condemned. And he made no attempt to show that the road had been actually opened, worked, improved or in any way recognized by the county authorities as a *de facto* thoroughfare. There being no evidence that Lesieur had been either legally or actually deprived of his property by any action of the authorities of Custer county, the trial court did not err in directing a verdict for the defendant.

There is another reason why the instruction complained of was properly given. There is no competent evidence that plaintiff was the owner of the land for which he claims damages. He was not in possession, and the only proof of ownership offered was a deed from a man named James A. Vandeventer. This was, of course, no evidence of title.

The judgment is

AFFIRMED.

GUY W. SECORD, PLAINTIFF IN ERROR AND APPELLANT, V. M. LOUISA POWERS, DEFENDANT IN ERROR AND APPELLEE.

FILED APRIL 10, 1901. NOS. 9,433, AND 10,033.

1. **Judgment by Fraud or Perjury:** VACATION. Under section 602 of the Code of Civil Procedure, a judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on the application of the unsuccessful party and a showing of due diligence, be vacated and set aside.

2. ——: ——. The intentional production, by a litigant, of false testimony to establish a cause of action or defense will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony.

3. **Trial:** PROCEDURE: ASSUMPTION AS TO ADVERSARY. A party should, in preparing his case for trial, proceed on the assumption that his adversary will produce evidence to make good the averments of his pleading.

4. **Action to Vacate Judgment:** PLEADING AND PROOF. In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence.

ERROR from the district court for Clay county. Consolidated with Guy W. Secord, appellant, v. M. Louisa Powers, appellee, No. 10,033. Tried below before HASTINGS, J. *Affirmed.*

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd and *S. W. Christy, contra.*

SULLIVAN, J.

The fundamental question involved in this litigation is the ownership of certain cattle, hogs and other chattels, seized by Guy W. Secord, sheriff of Clay county, under an order of attachment issued out of the district court in an action brought by the Sutton National Bank against

Thomas Powers to recover a money judgment. M. Louisa Powers, wife of Thomas Powers, asserted title to the property, and at her instance, or at least for her benefit, a motion was made to discharge the attachment. In support of this motion, which seems to have been eventually overruled, Mrs. Powers filed, not later than June 1, 1896, an affidavit containing a detailed statement of her means and the sources from which they were derived, together with a circumstantial account of the transactions through which she acquired the possession and ownership of the attached property. She afterwards instituted in the district court an action of replevin against Secord, which was tried in April, 1897, and resulted in a verdict and judgment confirming her claim to the cattle and hogs. After the adjournment of the term at which the replevin action was tried, Secord filed a petition under section 602 of the Code of Civil Procedure, alleging that the verdict against him had been obtained by perjury and asking that the judgment in favor of Powers be set aside and a new trial awarded. Upon this petition there was a trial, which resulted in a decision denying the application to vacate the judgment. The record in each of the cases is now before us for review.

The only question discussed by counsel, and, therefore, the only one which we shall consider, is whether the evidence is of such a character as to justify the conclusions reached by the district court. We are fully satisfied that the evidence in the replevin action was sufficient to take the case to the jury, and that the finding in favor of the plaintiff, ratified as it is by the trial judge, should be approved and permitted to stand. And we are equally well satisfied with the decision in the equity case.

Secord was not under the necessity of relying entirely, in the replevin suit, upon the candor and integrity of Mrs. Powers. Her affidavit in the attachment case advised him of all the transactions that she had with the principal witnesses produced at the second trial. It was

quite as easy for him to secure the attendance, or obtain the depositions, of these witnesses for the first trial as for the second. It seems, however, that he did not even take the trouble to consult them. He knew that the plaintiff would undertake to establish her claim of title, and he knew of the witnesses who might, perhaps, refute her claim; but he did not question them either in court or out of court. Evidently he made no adequate preparation for trial; he did not become diligent until after he heard from the jury. The fourth subdivision of section 602 aforesaid creates no new right; it is merely declaratory of the equity doctrine that a judgment clearly shown to have been obtained by fraud, and which it would be against conscience to enforce, will, on the application of the unsuccessful party and a showing of due diligence, be vacated and set aside. The weight of authority doubtless is that a court of equity will not arrest the execution of a judgment founded upon false testimony which was considered and passed upon by the court or jury in the case in which the judgment assailed was rendered. In this state, however, the rule is that the intentional production of false testimony will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony. *Munro v. Callahan*, 55 Nebr., 75; *Barr v. Post*, 59 Nebr., 361.

But, as was said in *Barr v. Post*, *supra*, it is not the policy of the law to encourage actions of this kind. There must be an end to litigation. A party can not be permitted to experiment with his case at the expense of the public. He is not justified in assuming that his adversary will not produce evidence to make good the averments of his pleading. "Whenever an issue exists in any action or proceeding," says Mr. Freeman in his work on Judgments (vol. 2, 4th ed., sec. 489), "each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter-proofs. Where he has an opportunity to do this, and does not avail himself of it, * * *

he can not, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury."

A statute of the state of Minnesota provides (Minnesota General Statutes, 1878, ch. 66, sec. 285) "that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or representation." Considering this provision, Gilfillan, C. J., in *Hass v. Billings*, 42 Minn., 63, after showing the necessity for a strict construction of the law, continues as follows: "When an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is under any necessity, to depend on the other proving the fact to be as he himself claims it,—and such appears to be this case,—the mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses will not, as we think, bring his case within the meaning of the statute. The statute certainly could not have been intended to excuse a party from exercising proper diligence in preparing for trial. It does not appear by this complaint but that these plaintiffs could, with the least diligence, have ascertained how the fact was, and have produced ample evidence in respect to the character of the note of Sackett & Wiggins and the responsibility of the makers. It cannot be that the statute intended, in giving the action, to make unnecessary the ordinary prudence and reasonable diligence required in cases of application for new trials on the ground of surprise or newly-discovered evidence." In a later case in the same court (*Colby v. Colby*, 59 Minn., 432) it was held that per-

jured testimony given by the plaintiff in support of the allegations of his complaint was not of itself sufficient to entitle the defendant to relief from a judgment procured by such testimony, if the facts testified to were not peculiarly or exclusively within the knowledge of the plaintiff.

From the evidence produced at the second trial it is established beyond doubt that if Secord failed to secure a just decision in the replevin action, the failure was chiefly due to his own carelessness or over-confidence. The trial court was right in refusing to vacate the judgment, not only because Secord did not make a sufficient showing of diligence, but also for the reason that the witness upon whose evidence he mainly relied, was utterly unworthy of credit or confidence. The testimony of this witness seems to have been given by way of compensation and atonement for an affidavit which he had furnished the previous year to the defendant in the attachment suit. He did not testify like a person having any sentimental attachment to truth, but rather like one who felt no moral restraint and was willing and anxious to render both litigants good service. His evidence is so contradictory and irreconcilable upon all material and immaterial points; it clashes with and impinges upon itself so often and in so many ways that no discriminating judge would for a moment think of making it the basis of any judicial action. We do not think the evidence given on both trials, when considered together, shows anything more than a balance of probability against the correctness of the conclusion reached in the replevin case.

Both judgments are

AFFIRMED.

FAON W. SCOTT V. SARAH JANE FLOWERS.

FILED APRIL 10, 1901. No. 9,963.

1. **Repugnant Statute Must Yield to Constitution Only to Extent of Repugnancy.** Where there is a conflict between an act of the legislature and the constitution of the state, the statute must yield to the extent of the repugnancy, but no further.

2. **Unconstitutional Part of Statute:** RESIDUE: INDUCEMENT. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete and capable of execution, it will be upheld and enforced, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder.

3. **State Industrial School:** CHILDREN OVER SIXTEEN: CONVICTION OF CRIME: JURISDICTION OF COURT. The legislature is without power to authorize the commitment to the state industrial school of children over the age of sixteen years who have not been convicted of crime; and the courts are without jurisdiction in such cases.

4. ———: CHILDREN UNDER SIXTEEN: STATUTE: EXTENT OF VALIDITY. Section 5, article 1, chapter 75, Compiled Statutes, 1899, is valid and enforceable to the extent that it authorizes commitment to the state industrial school of children under the age of sixteen years who, for want of proper parental care, are growing up in mendicancy or crime.

5. **County Court Always Court of Record.** The county court is always and under all circumstances a court of record. The county judge, in whatever official capacity he may act, is a judge of a court of record; he is not a justice of the peace even when exercising the ordinary powers and jurisdiction of a justice.

6. **County Court:** FINAL JURISDICTION. The county court has final jurisdiction of complaints filed under section 5 of the reform school law. Compiled Statutes, 1899, ch. 75, art. 1.

7. **Revisory Jurisdiction, Not Original.** The only jurisdiction conferred upon the county court, or the county judge, by section 6 *et seq.* of the reform school law (Compiled Statutes, 1899, ch. 75, art. 1), is a revisory and not an original jurisdiction.

8. **Former Decision Overruled.** The seventh point of the syllabus to *Scott v. Flowers*, 60 Nebr., 675, overruled.

9. **Former Decision Modified.** The opinion in *Scott v. Flowers, supra,* modified and the judgment reversed.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Judgment below reversed.* NORVAL, C. J., dissenting. Rehearing of case reported in 60 Nebr., 675.

Wolfenbarger & Williams, for plaintiff in error:

The complaint filed by Scott contains a sufficient charge of incorrigibility under section 6, article 1, chapter 75, Compiled Statutes of Nebraska.

1. Charging incorrigibility is not charging a crime, and the strict rules governing criminal complaints and prosecutions do not apply thereto in their fullness; furthermore, technicalities in a reform school case should give way to the prime consideration, *i. e.*, what is for the best interest of the infant. Hochheimer, Custody of Infants [3d ed.], pp. 104, 105, sec. 100.

2. The complaint filed by Scott is in the language of the statute. It is held that where a criminal statute is descriptive of the offense, a complaint charging in the language of the statute is sufficient. *State v. Lauver*, 26 Nebr., 757.

3. The only description we have of the offense termed "incorrigibility" is that contained in the statute itself in the section above noted. Incorrigibility is not referred to in any other chapter of the Compiled Statutes of Nebraska, so far as we know, and it was not an offense known to the common law.

4. The adjective "incorrigible" is defined thus: "That can not be corrected or amended. * * * Depraved beyond the possibility of reform; irreclaimable." "Incorrigibleness" (incorrigibility) is defined as "the state or quality of being incorrigible; hopeless error in things or depravity in people." Standard Dictionary. Incorrigibility, therefore, describes a *status*. *Scott v. Flowers*, 60 Nebr., 675. Incorrigibility is not a single act or several individual acts, but a *status* resulting from a multiplicity of prior acts, and it is, from the very nature of the offense, impossible to charge it otherwise than by directly alleging that the infant is "incorrigible."

Halleck F. Rose and *Wilmer B. Comstock, contra.*

Halleck F. Rose: The exercise of legislative power attempted with respect to the term of commitment is confined to a single provision. The term being excessive, the act is necessarily void. The objections raised involve the validity of the legislation itself rather than the proceedings had under it. It is imperative that the legislative act be so framed as to conform to the constitutional requirement, and this duty rests upon the legislature and can not be performed by the court. The court's highest duty is to preserve the fundamental law inviolate, and in performance of this task it should not be deterred by considerations of convenience, even though it be adjudged necessary to declare the entire act void. *Wynehamer v. People,* 13 N. Y., 378, 459.

SULLIVAN, J.

When this case was before us at the last term (*Scott v. Flowers,* 60 Nebr., 675) we decided that the plaintiff, Sarah Jane Flowers, was arrested and committed to the state industrial school at Geneva without any legal authority whatever, and that the judgment of the district court awarding her damages for false imprisonment should be, therefore, affirmed. This decision was rendered on the theory that section 5 of the act of 1887 (Session Laws, 1887, ch. 74), to the extent that it assumes to authorize the commitment of children of any age who are incorrigible, but who have not been convicted of crime, is unconstitutional and void. The correctness of this conclusion was promptly challenged by the learned counsel for the defendant. They now insist that the valid and invalid parts of the section are severable, and that the law should be upheld to the extent that it is in harmony with the constitution. Further investigation and reflection have convinced us that this view is reasonable, just, logically sound and well sustained by authority. The

general rule upon the subject is that where there is a conflict between an act of the legislature and the constitution of the state, the statute must yield to the extent of the repugnancy, but no further. *State v. Stuht*, 52 Nebr., 209; *Town of East Kingston v. Towle*, 48 N. H., 57; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill., 361; *McPherson v. Blacker*, 92 Mich., 377; *Grimes v. Eddy*, 126 Mo., 168; Cooley, Constitutional Limitations [6th ed.], pp. 210, 211; 23 Am. & Eng. Ency. Law [1st ed.], 225. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by the courts and made effective. In section 5 of the reform school law the legislature has given a clear expression of its will and purpose. It has in plain terms declared that all children under the age of eighteen years who shall be convicted in a court of record, of any crime, except murder or manslaughter, committed before the age of sixteen years, or who, for want of proper parental care, are growing up in mendicancy or vagrancy, or are incorrigible, may, in the discretion of the court, be sent to the state industrial school for education, reformation and safekeeping. The legislature did not, as was shown in the former opinion, possess the power to authorize the commitment of children over the age of sixteen years who have not been convicted of crime, and consequently the courts are without jurisdiction in such cases. The legislature has here clearly expressed its will, but it has gone too far; it has transcended the limits of its authority. It has, in an unmistakable manner, signified its purpose not only to authorize the commitment to the reform school of certain children under the age of sixteen years, but, also, children beyond that age who, although guiltless of

crime, have evinced a criminal tendency and are without proper parental restraint. The legislature having declared its will, and its command to the courts being in part valid and in part void, the decisive question is, shall section 5 be given effect so far as it is in accord and agreement with the paramount law? It seems that both good sense and judicial authority require that the question should receive an affirmative answer.

In providing that certain children under the age of eighteen years should come under the control of the state as *parens patriæ*, the supreme purpose of the legislature was to give protection, education and nurture to every child who for want of proper parental care should be exposed to evil influences and growing up in mendicancy and crime. The intention was not so much to reach all children under the age of eighteen years as to reach all who might need, and be lawfully required to accept, the beneficence and bounty of the state. In view of the fact that sections 6, 7, 8 and 9 of the act of 1887 provide another and different procedure for the commitment of children under the age of sixteen years, there can be no ground whatever for claiming that section 5 would not have been enacted with the age limit fixed in accordance with the requirement of the constitution. The following cases may be cited in support of the doctrine that the grant of a specific power by the legislature is valid and effective so far as it is in harmony with the fundamental law and void only to the extent that it clashes therewith: *State v. Moore*, 37 Nebr., 13; *Dunn v. City of Great Falls*, 13 Mont., 58; *State v. Long*, 21 Mont., 26; *Clark v. Ellis*, 2 Blackf. [Ind.], 8; *State v. Towle*, 48 N. H., 97; *Tiernan v. Rinker*, 102 U. S., 123.

It has been suggested by counsel for defendant that the county court had jurisdiction of the complaint under section 6 of the act of 1887; and there is in the brief of counsel for the plaintiff an intimation that the court did not have jurisdiction under section 5, even if that section be sustained except as to the age limit. Our view of the

matter is that the county court has jurisdiction of complaints filed under section 5, but has no original jurisdiction whatever under section 6 and subsequent sections. The county court, notwithstanding some *dicta* to the contrary, is always and under all circumstances a court of record; and the county judge, in whatever official capacity he may act, is a judge of a court of record; he is never a justice of the peace, although he is invested with the ordinary powers and jurisdiction of a justice. Under the constitution and laws of this state the only courts of record having authority to try and determine criminal cases are the district courts and the county courts. If the jurisdiction given by section 5 was intended to be limited to the district courts it is extremely improbable that they would be described as courts of record, this being an expression which in its ordinary and legal acceptation includes county courts. But the intention of the legislature is distinctly revealed, and entirely freed from doubt, by section 10 of the act, which provides for a review of the proceedings had in the county court. This section also provides that the proceedings before the county judge may be brought to the district court for revision. There is, however, no provision for reviewing the proceedings before justices of the peace or other inferior courts. The conclusion to be deduced from section 10 is that the district court may review the proceedings resulting in an order of commitment made by the county court in the exercise of its original jurisdiction under section 5, and may also review the proceedings resulting in an order of commitment made by the county judge in the exercise of the revisory jurisdiction conferred upon him by sections 6, 7, 8 and 9. The county court having been invested with complete jurisdiction by section 5 of all the matters embraced in section 6, there can be no good reason for supposing that the legislature intended by the latter section to grant an authority which, in ampler measure, was given by the former. It is, of course, conceivable, but almost beyond belief, that the legislature,

having a definite object in view, should, in the adjustment of means to ends, confer upon the county courts complete authority over a certain class of cases and in the very next section confer upon the same courts a limited authority over the same class of cases. How could the court ever know whether it was acting under one section or the other? The provision of section 6 to the effect that the child named in the complaint, together with the papers in the case, shall be sent under the control of an officer, to a judge of a court of record, indicates with reasonable certainty that the legislature did not have in contemplation a case arising in the county court under that section.

In the seventh point of the syllabus to the former opinion it is said: "Error can not be successfully predicated upon the admission of testimony where the same line of testimony has been received in the cause without objection." This, we think, is stating the rule too broadly, and the statement is now recalled and condemned. The point is not at all discussed by counsel, and as it has no material bearing upon the decision, it will not be further considered.

Having reached the conclusion that section 5 of the act of 1887 is valid to the extent that it authorizes the commitment to the reform school of children under the age of sixteen years who are either incorrigible, or, for want of proper parental care, growing up in mendicancy or crime, it follows that the instructions of the trial court can not be approved, and that its judgment must be reversed. The judgment of affirmance heretofore rendered by this court is set aside, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HOLCOMB, J., concurs.

NORVAL, C. J., dissenting.

I dissent, and will briefly state my reasons therefor.

We are all agreed that section 5 of the reform school law (Compiled Statutes, ch. 75, art. 1) is unconstitutional, so far as it authorizes the commitment to the state industrial school of persons over the age of sixteen years. I am unable to agree with my associates that the section is so far valid as that it may authorize the commitment to such school of children under the years stated who, for want of proper parental care, are growing up in mendicancy and crime. It is a familiar principle of law, which this court has frequently stated and applied, that when the valid and unconstitutional parts of a law may be capable of being separated, and the valid portion is a complete act and in no way dependent upon that which is void, the latter alone will be disregarded, and the remainder will, if the invalid part formed no inducement to the passage of the statute, be upheld. But if it is manifest, from an inspection of the law itself, that the invalid part in any way may have influenced the legislature to pass the act, the whole will go down together. *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; *State v. Poynter*, 59 Nebr., 417; *Crawford Co. v. Hathaway*, 60 Nebr., 754.

Judge Cooley, in discussing this same subject in his valuable work on Constitutional Limitations [6th ed.], at page 210, uses the following language: "When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly dis-

tinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." And in a note on page 212 of the same work it is stated: "It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary.

While, therefore, in one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void." *State v. Stewart*, 52 Nebr., 243.

I am of the opinion that the age limit of eighteen years in section 5 of the reform school act is so interwoven and connected with the remainder of the section that if the age limit be stricken out or rejected, the section would be unenforceable. Then it would read, "When a boy or girl of sane mind under the age of —— years, shall," etc. If it were permissible for the court to strike out of the section under consideration the word "eighteen" and insert in lieu thereof the word "sixteen," the age limit designated in section 12, article 8, of the constitution, then said section 5 would be valid. But this we have no power to do. That duty has been conferred upon another branch of the state government. If the age limit of eighteen years in the section should be disregarded, the age limit in section 12, article 8, of the constitution could not supply its place. That section of the fundamental law is not self-executing. This is manifest from a mere inspection. It reads, "The legislature may provide by law," thus indicating that the whole subject is committed to the legislature, except that it is inhibited from providing for the commitment of children to the industrial school over the age of sixteen years. It could fix the age limit at ten years, or any other period less than sixteen years. This, to my mind, conclusively shows that section 5 of the act in question can not be sustained with the age limit eliminated therefrom. Moreover, the eighteen years limit may have influenced the legislature in adopting the section under consideration. Indeed, such argument as may be drawn from the context favors that opinion, rather than the converse, as is argued by the writer of the majority opinion; for the very fact that

in one section the age is fixed at sixteen years (section 6), is strong evidence that, in enacting section 5 the legislature was unwilling that its provisions should apply to those only of sixteen years or under.

We have examined three of the principal cases cited in the opinion of the majority, one being *State v. Moore*, 37 Nebr., 13, wherein it was ruled that, when a general appropriation bill carrying an item of $15,000 for a specific purpose passed both houses, but before it reached the governor was changed to $25,000, and in that form was approved by him,, the bill appropriated $15,000. That case can hardly now be regarded as the law of this state, since the case of *Weis v. Ashley*, 59 Nebr., 494, the opinion being written by Mr. Justice SULLIVAN, wherein it was claimed that an act was wholly invalid where the title was changed after the bill passed the legislature and before the executive approved it. If the governor is part of the lawmaking body, as was ruled in that case, it would seem that he must approve the bill precisely as it passes the legislature, for any portion thereof to become a law.

In *Dunn v. City of Great Falls*, 13 Mont., 58, in the statute involved the legislature had provided that cities of a certain class may incur bonded indebtedness to an amount not exceeding four per cent of the assessed valuation, while the constitution provided for only three per cent, and it was held that the act was valid to the extent of the three per cent limited in the constitution. The case, however, is not well considered, and it cites no authorities in point, and was decided wrongly.

State v. Long, 52 Pac. Rep. [Mont.], 645, was one where a statute considered fixed the term of school trustees at three years, while the term of such office is limited by the constitution to two years. It was held, in a *per curiam* opinion, that the statute was valid to the limit of two years. We quote from the opinion the entire discussion of the subject: "We express no opinion upon the term of office of school trustee pursuant to the provis-

ion of the law under examination. At some future time that question may directly arise. We are satisfied, though, that, even if the term cannot run for three years, but does run for two years only, the whole law cannot be overthrown; but, as the part fixing the term is severable, the law will be upheld as a valid statute providing for the election of trustees for the terms prescribed, not in conflict with the constitution." Not an authority is cited in support of the doctrine of that case. This court, in *State v. Stuht*, 52 Nebr., 209, held invalid the section of the charter of the city of Omaha which prescribed the term of office of police judge at three years, where the constitution fixed such term at two years.

The conclusion of the writer is that section 5 of the reform school law is invalid as an entirety, and that the whole section must fall.

SYLVESTER JOHNSON V. CHARLES S. HESSER.

FILED APRIL 10, 1901. NO. 11,811.

1. **Breach of Covenant:** CONFESSION AND AVOIDANCE. In an action to recover damages for breach of a covenant against incumbrances a statement in the answer to the effect that the plaintiff had retained out of the money due to the defendant a certain sum in settlement and full payment of the incumbrance discharged by the plaintiff is a plea of confession and avoidance.

2. ———: ———: ADMISSION. Such plea is an implied admission of the existence and validity of the incumbrance.

3. ———: STIPULATION: ADMISSION. On the trial of an action grounded on an alleged breach of a covenant against incumbrances a stipulation to the effect that the plaintiff had paid a certain sum to redeem the land from a tax lien, is an admission of the existence and validity of such lien.

4. **Evidence:** VERDICT. Evidence examined, and found to support the verdict.

5. **Statute of Sister State:** PROOF: "HUBBELL'S LEGAL DIRECTORY": EXPERT WITNESS. The written laws of a sister state can not be proved either by "Hubbell's Legal Directory" or the testimony of an expert witness.

6. **Twin Judgments:** EXPUNGING ORDER AT SUBSEQUENT TERM. Where two judgments of the same purport are rendered in the same case at the same term, an order of the court, made at a subsequent term, in the exercise of lawful jurisdiction, expunging the first judgment will bind the parties until set aside in a direct proceeding instituted for that purpose.

7. ———: MERGER. Where two judgments of the same purport are rendered in the same case at the same term of court, it will be presumed that the first judgment merged in the second or was constructively vacated by it.

8. ———: RES ADJUDICATA. And in such case the first judgment will not sustain a plea of *res adjudicata*.

9. **Action on a Covenant:** WRITTEN CONTRACT: STATUTE. An action on a covenant against incumbrances contained in a deed conveying real estate in Colorado is an action on a written contract, within the meaning of section 10 of the limitation law of this state.

ERROR from the district court for York county. Tried below before SEDGWICK, J. *Affirmed.*

George B. France and *T. E. Bennett*, for plaintiff in error.

Harlan & Taylor, *contra.*

SULLIVAN, J.

This action to recover damages for breach of a covenant against incumbrances was commenced by Charles S. Hesser against Sylvester Johnson in the county court of York county and removed thence by appeal to the district court. The land described in the deed executed by the defendant to the plaintiff is situate in Phillips county, Colorado. The petition alleges that it was, at the time of the sale and transfer, subject to a lien for taxes which the plaintiff was compelled to discharge with his own funds. The answer of the defendant, after admitting the execution of the deed, continues as follows: "But defendant alleges that the land mentioned in said conveyance in said petition described, was so conveyed in exchange for the west one-half of the southwest quarter of section No. 19, in township No. 11, north of range No. 2,

west, York county, Nebraska, and for the sum of $125 which plaintiff agreed to pay defendant as difference between said land, $59.50 of which amount plaintiff then and there settled by note, and the balance thereof the sum of $65.50 the plaintiff retained in settlement and full payment of the taxes complained of in the petition herein, and the defendant's part of expenses in making said exchange." The plaintiff in his reply denied that he had agreed to pay the sum of $125 as boot in the exchange of lands, and denied that he had retained from any money due to the defendant the sum of $65.50, or any other sum, on account of the tax lien here in question. The cause was tried to a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff for the full amount of his claim.

The trial court charged the jury that the paragraph of the answer above set out was a plea of confession and avoidance. We think this was a correct construction of the pleading. The allegation that the plaintiff had been permitted to retain out of money due to the defendant a sum sufficient to pay the taxes on the Colorado land, was an implied admission of the existence of the tax lien. *Dinsmore v. Stimbert*, 12 Nebr., 433; *School District v. Holmes*, 16 Nebr., 486; *Adams v. Osgood*, 60 Nebr., 779. On the trial the defendant also admitted the lien in the course of his examination as a witness and by stipulating that the plaintiff had paid $97.05 "to redeem said land from tax sales." Unless there had been a lien there could not have been a redemption. The covenant against incumbrances and the breach of it having been conclusively settled in favor of the plaintiff by the pleadings and evidence, the only question for the jury to pass upon was whether the affirmative defense above mentioned had been established. This question was submitted under proper instructions and was, in our judgment, correctly decided.

There was no error in refusing to permit the defendant to prove the written laws of Colorado by "Hubbell's

Legal Directory" or by the testimony of an expert witness. Better evidence was attainable. Code Civil Procedure, sec. 419; 1 Greenleaf, Evidence, secs. 480, 486, 491; 2 Jones, Evidence, secs. 516, 517; 13 Am. & Eng. Ency. Law [2d ed.], 1064. Besides, as we have already shown, there was, under the pleadings, no issue to which such evidence would be relevant; there was no material averment which it would tend either to establish or disprove.

We concur in the decision of the trial court sustaining a demurrer to the defendant's plea of *res adjudicata*. It appears from the record that at the May, 1895, term of the district court two judgments of the same purport were rendered in this case in favor of the defendant; that the second one was reversed by this court in an appropriate proceeding (*Hesser v. Johnson*, 57 Nebr., 155), and that the one first rendered was at a subsequent term expunged by order of the district court. The order expunging the first judgment was made by the district court in the exercise of a lawful jurisdiction, and whether it is right or wrong it is valid, and will bind the parties until set aside in a direct proceeding instituted for that purpose. It can not be overthrown by a collateral attack. The former adjudication pleaded by the defendant is not a defense because the evidence of it does not now exist. But we are disposed to think the ruling on the demurrer may be sustained on another and a broader ground. The court had complete control of the case during the term at which it was tried. It had authority to vacate its first judgment and enter the second. Both judgments evidenced the conclusion of the court—the decision of the law—upon the merits of the controversy; and it would seem that the first judgment, since there could be no reason for preserving it, should be regarded as merged in the second or constructively vacated by it.

The action being grounded on a contract in writing, it was not barred by the statute of limitations. The fact that under the laws of Colorado the covenant against in-

cumbrances runs with the land and inures to the benefit of every subsequent grantee, does not make it any the less a written contract within the meaning of section 10 of the Code of Civil Procedure, which fixes the period of limitations in such cases at five years from the time the cause of action accrued. *Kern v. Kloke*, 21 Nebr., 529.

The conclusions at which we have arrived upon the points considered lead necessarily to an affirmance of the judgment, and furnish a sufficient reason for not inquiring into the correctness of some other rulings assigned for error and discussed by counsel at the bar and in the briefs. The judgment is

AFFIRMED.

JOHN S. CARMAN, APPELLANT, V. FRED L. HARRIS, APPELLEE, SUBSTITUTED FOR NATHAN S. HARWOOD ET AL., APPELLEES.

FILED APRIL 10, 1901. No. 9,181.

1. **Delinquent Tax Sale:** PURCHASER: RIGHT OF ACTION. A purchaser of real estate for delinquent taxes can not maintain an action at law for the recovery of such taxes against the owner or person in whose name the property is assessed.

2. **Foreclosure of Tax Lien:** PETITION: ALLEGATION OF "NO PROCEEDINGS AT LAW" UNNECESSARY. A petition in equity for the foreclosure of a lien for taxes, paid by the purchaser of real estate sold for delinquent taxes and subsequent taxes paid thereon, is not so fatally defective as to preclude a decree in plaintiff's favor being based thereon, because it does not allege that there have been no proceedings at law had or begun for the recovery of the amount for which a lien is claimed, or any part thereof, such petition containing other proper averments.

3. **Tax Sale:** ASSIGNMENT OF PUBLIC RIGHT. If real estate is liable for taxes and there is a legal tax due and delinquent against the land, and it is sold for delinquent taxes, and the tax purchaser fails to acquire a good title to the real estate because of any violation of the revenue law or the failure of public officers to comply with its provisions, the law declares that the sale shall nevertheless be effective as an assignment of the public's rights and liens against the real estate to the attempted tax purchaser thereat. *Grant v. Bartholomew*, 57 Nebr., 675.

4. **Valid Assessments:** VOID SALE: ENFORCEMENT OF LIEN. Where the assessments and levies of taxes against real estate are valid, the purchaser, even at a void sale, is subrogated to the rights of the public, and may enforce his lien against the property on which the taxes are assessed. *Adams v. Osgood*, 60 Nebr., 779.

5. **County Treasurer:** DELINQUENT TAXES: FAILURE TO CARRY FORWARD. The failure of the county treasurer to carry forward on the tax records delinquent taxes for prior years will not invalidate the sale of real estate for taxes assessed for subsequent years.

6. ———: FAILURE TO ADVERTISE: EFFECT. The failure of the county treasurer to advertise for public sale real estate upon which there are delinquent taxes due, as provided by law, while it would invalidate the sale of such real estate for taxes, it would not affect the purchaser's lien on the property, who could enforce the lien to the same extent that the county could, were it not for the payment of taxes made by him.

7. **Giving Statutory Notice Not Essential:** FAILURE: EFFECT: COSTS. The giving of the notice required by section 123, article 1, chapter 77, general revenue laws, before a tax deed can issue, is not essential where the tax purchaser proceeds in equity to foreclose his tax lien, as provided by statute. The failure to give such notice could do no more than affect the question of costs in case the owner came in and offered to redeem.

8. **Railroad:** RIGHT OF WAY OVER LAND SOLD: NOT NECESSARY PARTY. Where a right of way for a railroad company has been acquired over land sold for delinquent taxes, in proceedings to foreclose the tax lien, where such right of way is excepted in the petition in foreclosure, the railroad company is not a necessary party, and has no interest in the subject-matter of the action.

9. **Assessment of Real Estate:** NAME OF RIGHTFUL OWNER NOT ESSENTIAL. The assessment of real estate in the name of the rightful owner is not absolutely essential to the validity of the tax assessed against such real estate and the lien acquired thereon by the purchaser of such property at tax sale.

10. **Evidence Insufficient and Contrary to Decree and the Law.** Evidence examined, and *held* that the findings and judgment are not supported by the evidence, is contrary thereto and to the law applicable to the case.

APPEAL from the district court for Box Butte county. Heard below before WESTOVER, J. *Reversed.*

Smith P. Tuttle, for appellant.

E. F. Pettis, contra.

HOLCOMB, J.

Appellant, plaintiff below, began an action in equity for the purpose of foreclosing a lien for taxes upon certain real estate, which he alleged existed in his favor by reason of the sale by the county treasurer and purchase by him of the said real estate for delinquent taxes thereon, and payment of subsequent taxes assessed and levied on and against the same property. After joinder of issues and a trial to the court, judgment was rendered in favor of defendants, appellees, dismissing the action, and for costs.

The record does not clearly disclose the grounds upon which the trial court based its conclusions as announced by the judgment rendered; nor do counsel for appellees throw any light upon the subject in their brief, their brief being substantially for an affirmance of the judgment below, not upon the grounds upon which the trial court apparently acted, but because, as argued, the petition will not support a judgment in favor of the plaintiff, and also for the reason that the evidence is insufficient to support a finding and decree in plaintiff's favor. As disclosed by the transcript, it is found by the trial court that the plaintiff, at the commencement of the action, was not entitled to a lien in any sum whatever, or for any cause whatever, upon any of the parcels or tracts of lands upon which he held certificates of tax sales and receipts for payment of subsequent taxes thereon. It is also found that there are irregularities and defects in the levy and assessment of taxes averred by plaintiff in his petition to have been levied and assessed, and that there are irregularities and defects in the sale of the premises, and each and all of them, under and by virtue of which the plaintiff claims to have obtained a lien; and found that, owing to said defects and irregularities, the said plaintiff obtained no interest, right or title in and to the premises mentioned in the petition or any part thereof.

The petition is not at all artistically constructed. The issues raised by the pleadings, however, so far as are necessary to a proper understanding of the case, will appear in the further discussion thereof. A general demurrer was interposed to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. The answer afterwards filed pleaded the insufficiency of the petition, and at the beginning of the trial a demurrer *ore tenus* was also presented, which was likewise overruled.

It is now urged upon us by appellees that, by reason of the alleged insufficiency of the allegations in the petition, no decree in favor of the appellant could be sustained, and that the judgment dismissing the action should be affirmed, irrespective of the reasons given, or the process by which the same was reached by the trial court. We feel disposed to sustain the petition, if the same can be done within any of the recognized rules of pleading liberally construed, in order to prevent a miscarriage of justice. It would be an awkward state of affairs if, after the sufficiency of a petition has been sustained by a trial court, and a trial has resulted in a finding and judgment against the plaintiff, which on appeal is found to rest on erroneous grounds, such erroneous judgment should be sustained because the court erred in holding that the petition stated a good cause of action. This would be making two errors result in a right conclusion.

The petition is assailed because it does not allege that there have been no proceedings at law had or begun for the recovery of the amount for which a lien is claimed, or any part thereof. It is argued that unless such allegation is contained in the petition, it is fatally defective, and a decree in favor of the plaintiff based thereon can not be sustained, and that the decree of the trial court should stand, even though arrived at by a wrong process. It has heretofore been held, and may be regarded as a settled rule of practice in this jurisdiction, that a petition

for the foreclosure of a real estate mortgage given to secure a debt does not state facts sufficient to entitle a plaintiff to relief, unless it is alleged that no proceedings at law have been had for the recovery of the debt or any part thereof, or, if such proceedings at law have been instituted, that the remedy at law has been exhausted. *Bing v. Morse*, 51 Nebr., 842. We are inclined to the view that the reason for the rule announced in the case cited does not apply with equal force to an equitable action of the character under consideration. While it is provided that those having a lien upon any real property for taxes assessed thereon may enforce such lien by an action in the nature of a foreclosure of a mortgage (Compiled Statutes, ch. 77, art. 5, sec. 1), "and may * * * proceed by action * * * to foreclose the same, * * * in all respects as far as practicable, in the same manner and with like effect as though the same were a mortgage executed to the owner of such certificate or certificates," etc. (Compiled Statutes, ch. 77, art. 1, sec. 179), it does not necessarily or logically follow that the material allegations of the petitions in the two classes of actions must in all respects be entirely similar. The reason for the rule in the foreclosure of a real estate mortgage is based solely on the provisions of the Civil Code contained in sections 850 and 851. In the latter section it is provided: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." It is said the manifest intention of these provisions of the Code is to prevent the prosecution of proceedings at law to recover a debt concurrently with proceedings to foreclose a mortgage securing the same debt. *Hargreaves v. Menken*, 45 Nebr., 668.

In *Bing v. Morse, supra*, says RAGAN, C.: "But for the statute, the breach of the mortgagor's contract constituted the mortgagee's cause of action against him. But the legislature has seen fit to enact that if a judgment has been obtained in a suit at law for money secured by real estate mortgage, or for any part thereof, the courts shall then not be authorized to entertain a suit to foreclose such mortgage, unless an execution has been issued upon the judgment at law and returned unsatisfied in whole or in part, and containing the certificate of the officer returning such execution that the judgment defendant has no property except the mortgaged premises out of which to satisfy such execution."

In the present action no proceedings at law can be had for the recovery of the amount due for taxes paid by the appellant. It may be urged that the special proceedings by which a tax deed may be obtained should be regarded as inconsistent with the right to proceed in equity to foreclose a tax lien; but, if so, resort to this proceeding is especially negatived with the reason therefor in the petition. The amount due the plaintiff for such taxes is not a debt recoverable in an action at law against the party in whose name the property is assessed. It is only a charge against and lien upon the real estate assessed, and can be recovered only to the extent of the value of the property by a sale thereof. The action for the recovery of the taxes paid, and enforcement of the lien created, is purely equitable in nature and a proceeding *in rem*, the debt or sum due being incapable of enforcement in an ordinary action at law, as no personal liability exists against the owner of the property assessed. *Grant v. Bartholomew*, 57 Nebr., 673. It is suggested that the redemption of the land by the owner, by the payment of the taxes due to the county treasurer, would support an action at law by the holder of the tax certificates against the county treasurer, and because thereof the necessity arises for an averment that no action at law for the recovery of the debt has been begun.

But this would be an entirely different cause of action against a different party, and for the recovery of money upon entirely different considerations than that for which the equitable action is prosecuted. Furthermore, it is alleged in the petition that the tax which it is sought to have declared a lien has never been paid. This allegation must apply to the defendant, and is equivalent to alleging that the land had never been redeemed from tax sale. There being no reason, statutory or otherwise, for alleging that no proceedings at law have been had for the recovery of the taxes, or any part thereof, it follows that a good petition, with other proper averments may be framed without containing such allegation or averment. The petition, we think, contains every essential averment, if supported by proper proofs, to entitle the plaintiff to a lien on the property, and a sale of the same in satisfaction of the amount due for taxes paid at the time of the purchase at tax sale and the subsequent taxes paid thereon. We conclude, therefore, that the petition states a cause of action, and is not so fatally defective that a decree in favor of the plaintiff can not be sustained.

In entering upon the further discussion of the case with respect to plaintiff's right to the relief demanded, we can not do better than to quote, as an expression of general application, from a paragraph in the syllabus of *Grant v. Bartholomew, supra,* wherein it is said: "The theory of our revenue law is that a purchaser of real estate at a sale made thereof for delinquent taxes shall not lose his money. If no tax was due on the real estate at the time of the sale, then the county is to reimburse the purchaser the money paid. If the land was liable to taxation, and there was a legal tax due and delinquent against the land, then, if the tax purchaser failed to acquire a good title to the real estate because of any violation of the revenue law or the failure of public officers to comply with its provisions, the law declares that the sale shall nevertheless be effective as an assignment of

the public's rights and liens against the real estate to the attempted tax purchaser thereat." If, for any reason, the plaintiff is entitled to no relief for the money he has paid in faith of the legality and regularity of the taxes assessed and levied for general revenue purposes, as these were, he should be advised of the cause which deprives him of relief, and, if the taxes are utterly void, they should be so declared, leaving to the plaintiff his proper remedy. The state, county, and other municipal subdivisions have had the benefit of the payment of the taxes by appellant, and the law is, as we understand it, that if the assessments and levies are valid, then the purchaser, even at a void sale, is subrogated to the rights of the public, and may enforce his lien against the property on which the taxes were assessed. *Adams v. Osgood*, 60 Nebr., 779. We regard the findings and decree of the trial court as to irregularities and defects in the assessment, levy and sale of the property taxed being such as to avoid the tax so levied, and depriving the plaintiff of any interest in the property assessed under his tax certificates and receipts, to be unsupported and contrary to the evidence and the law applicable to the facts in the case. The ruling upon the general demurrer filed in the case, and the one interposed *ore tenus*, with regard to the petition stating a cause of action, make it clear that it regarded the petition as sufficient, and if the material allegations therein are fairly substantiated by the evidence, then the plaintiff was entitled to a decree in his favor, and the action should not have been dismissed.

In the argument of counsel some alleged irregularities in the assessment and levy of the taxes and sale of the property therefor are suggested, which we will briefly notice. It is claimed that at the time of the alleged sale for taxes, when plaintiff purchased in 1893 for the delinquent taxes of 1892, the delinquent taxes for previous years had not been carried forward on the tax lists for that year, as required by law. This is an irregularity that can in nowise affect plaintiff's right to a lien for the

delinquent taxes paid by him. At most, it would only subordinate his lien to that of the lien of the delinquent taxes for the years prior to the one for which he paid the taxes. The defect, if it be such, would not invalidate the sale made at the time plaintiff purchased. There is nothing in the statute, directly or by implication, that would warrant us in holding that, because a county treasurer had failed to carry forward taxes of a previous year, a sale made for delinquent taxes for a subsequent year would thereby be rendered void.

It is also claimed that there is nothing in the record to show that the county treasurer had ever advertised the property for sale for delinquent taxes in the manner and form provided by law. While this contention, if true, might invalidate a sale, it would not affect the purchaser's lien on the property, who, by virtue of the purchase and payment of the subsequent taxes, would be subrogated to the rights of the public, and could enforce the lien to the same extent that the county could were it not for the payments made by him. *Adams v. Osgood, supra.*

It is further contended that there has been a failure on the part of the plaintiff to give the notice to the owner and occupant of the lands assessed, required by section 123, article 1, chapter 77, before a tax deed can issue. The notice thus required is for the purpose only of securing a tax deed, and is not essential where one proceeds in equity to foreclose a tax lien as provided by statute. The failure to give such notice could do no more than affect the question of costs in case the owner came in and offered to redeem. *Bryant v. Estabrook*, 16 Nebr., 217; *Lammers v. Comstock*, 20 Nebr., 341; *Van Etten v. Medland*, 53 Nebr., 569.

We are of the opinion that none of the irregularities, conceding them to be such, will so far avoid the assessments, levies and sale as to deprive the appellant of any relief whatever in his present action. The petition alleged a right of recovery for taxes paid by plaintiff, as-

sessed and levied against a tract of land which had been platted, as an addition to the city of Alliance, in Box Butte county, into blocks and lots. There were some 376 lots, against which as many assessments and levies were had, and for which tax sales were made. It was alleged in the petition, and admitted in the answer, that a right of way deed to the Grand Island & Wyoming Central railroad had been executed by the owners, the defendants in the action, which right of way so granted was especially excepted in the petition from any claim of lien for the taxes so paid. It was also alleged in the petition, and admitted by the answer, that a vacation deed had been executed by the owners of the platted addition after the assessments and levies were all made on the property as lots and blocks, by reason of which it was claimed the tax liens attached to the whole property as one entire tract, the right of way theretofore granted to the said railroad company being excepted. It was urged that the petition shows that the said railroad company had an interest in the property, and was a necessary party defendant, without which no valid decree could be rendered in plaintiff's favor. No effort was made to bring this party in as a defendant under the provisions of the Code specially authorizing such proceedings when necessary parties are omitted. Nor do we think such proceedings required. The railroad had no joint or common interest in the property in controversy. Whatever interest it had was several, and in no way connected with the defendants in the action. The decree, of course, could only bind the parties to the suit, and those claiming under them, and could not affect third parties. The interest of the railroad, however, was only by virtue of its right of way deed, and as to this portion of the land sought to be charged with a lien for the taxes paid, the plaintiff claimed nothing, and the company was, therefore, not even a proper party defendant. It should, perhaps, be noted, that in the assessment rolls introduced in evidence, the name of the railroad company appeared

in the columns, opposite the lots and blocks through which its right of way extended, as the owner of the property assessed, but it was evidently intended, as appeared in other portions of the record, that the name was given to denote that the company owned the right of way through such property, which was excepted from the other property assessed by the local authorities. Whether the property was assessed in the name of the owner or otherwise is not absolutely essential to the validity of the tax. In *Lynam v. Anderson*, 9 Nebr., 367, it is said in the first paragraph of the syllabus: "Lands and lots are required to be listed for taxation in the name of the owner or person liable to pay the tax; but the tax being a lien upon the land, a failure to do so will not render the tax void." Sections 141 and 142 of the revenue laws make such omissions and errors an irregularity only, and not such as would invalidate the tax levy or lien. Black, Tax Titles, sec. 110; *Stilz v. Indianapolis*, 81 Ind., 582; *Landregan v. Peppin*, 86 Cal., 122; *Michigan Dairy Co. v. McKinlay*, 70 Mich., 574; *Union Trust Co. v. Weber*, 96 Ill., 346.

Finally, it is urged that the evidence is insufficient to support a decree in favor of the appellant. We have examined the evidence with some care, and reach a contrary conclusion. The tax books were introduced for the different years for which plaintiff claimed to have paid the taxes, showing a valid assessment of taxes against the property for each of the three years covered by the allegations of the petition. It is true that for one year, the year 1894, it appears the assessor failed to record in the assessment book for the precinct in which the property was assessed the oath prescribed by law. There is nothing to indicate that the assessment was not, in all respects, fair, just and in proportion to all other property assessed for taxes that year. It is especially provided by section 142 of chapter 77, being the general revenue law, that the failure of the assessor to take or subscribe an oath, or attach one to any assessment roll,

shall be taken and deemed to be a mere irregularity, which shall in no manner invalidate the tax levied on any property, or a sale of any real estate when sold for delinquent taxes. No issue is raised as to the failure of the assessor to take an official oath, and the presumption is that he did his duty and qualified by taking the required oath, as provided by law. *Merriam v. Doxey*, 25 Nebr., 618; *Twinting v. Finlay*, 55 Nebr., 152; *Spieth v. Tierney*, 56 Nebr., 514.

The tax records of the office of the county treasurer were offered and received in evidence, showing the several properties assessed, and the taxes levied against each tract or parcel of land for the different years for which a tax lien is claimed, and the person to whom assessed. The public officers charged with the duties of assessing property and levying the taxes required for general revenue purposes are presumed to have done their duty faithfully, and in the manner provided by law, and such records are competent evidence of the levy of the several amounts charged against the different tracts of land, and are sufficient to support a finding that the taxes have been duly levied as therein charged. *Adams v. Osgood*, *supra*, and cases therein cited.

The appellees contend that there is no evidence of any levy of taxes except the certificates of tax sales issued to the appellant, and the receipts of the county treasurer for taxes paid by him. While we agree with counsel that these alone would be insufficient proof of a levy, we find that there is other proof, to which we have adverted, and, therefore, arrive at the conclusion announced as to the sufficiency of the evidence. The tax receipts, of course, are only evidence of the payment of the taxes therein mentioned, but, being issued by a public officer in the discharge of public duties, can properly be admitted in evidence for that purpose.

We conclude, therefore, from an examination of the record, that the petition is not so fatally defective as to preclude a decree in appellant's favor based thereon;

that there is evidence in support of all the material allegations of the petition, entitling plaintiff to relief. Whether or not the sale for delinquent taxes, under which appellant claims, is entirely regular in all respects, we do not decide. But we do hold that he is entitled to relief under the pleadings and the evidence, and for that reason the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

EDGAR M. WESTERVELT, RECEIVER OF THE CITIZENS NATIONAL BANK OF GRAND ISLAND, APPELLANT, V. WILLIAM A. HAGGE ET AL., APPELLEES.

FILED APRIL 10, 1901. No. 9,334.

1. **Attachment Upon Real Estate Fraudulently Alienated Fastens Lien Notwithstanding Record Title is in Stranger to Writ.** Where an attachment is levied on real estate fraudulently alienated by the attachment debtor and grantor, for the purpose of hindering, delaying and defrauding creditors, even though the legal title of record is in another, the attachment creditor acquires thereby a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment.

2. **Where Attached Premises Are Reconveyed Lien Becomes Effective.** Where, after attachment proceedings on land fraudulently alienated, the real estate is reconveyed and restored to the fraudulent grantor, the lien of the attachment becomes thereby effective and enforceable, the same as though the conveyance in the first instance had not been made.

3. **Under Facts Creditor Not Guilty of Laches.** *Held*, Under the facts as disclosed by the record, attachment creditor not guilty of laches in enforcing the lien acquired by virtue of his attachment.

4. **Attachment on Real Estate:** SUBSEQUENT LIEN: NOTICE. Where, pending litigation, after the levy of an attachment on real estate, a lien has been acquired by another on the same property, the person in whose favor the lien is created is charged with notice and takes subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered.

5. ———: SERVICE ON OCCUPANT IS COMPLIANCE WITH STATUTE. Where a copy of an order of attachment is left with the actual occupant of lands attached, having possession of the premises and apparent authority over and control of the same, the act will be a compliance with the provisions of the statute, requiring that "where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order," although such occupant be not the owner or lessee of such premises.

6. ———: CONVEYANCE IN FRAUD OF CREDITORS: RECONVEYANCE AND SUBSEQUENT INCUMBRANCE: LIEN. Where real estate is attached by a creditor of a fraudulent grantee, to whom the legal title has been conveyed in fraud of the rights of the creditors of the fraudulent grantor, and who has no actual interests therein, and who restores and reconveys the real estate to the fraudulent grantor, who voluntarily incumbers the same for the benefit of his creditors, such attachment creditor thereby acquires no valid lien on the property as against such creditors of the grantor under their liens thus acquired.

7. **Attachment Lien: EQUITIES.** An attachment lien on land, the legal title to which is in the attachment debtor, is subject to every equity which exists against the debtor at the time of the levy of the attachment, and courts of equity will limit the lien to the actual interest of the attachment debtor in such real estate.

APPEAL from the district court for Hall county. Heard below before THOMPSON, J. *Affirmed.*

Othman A. Abbott, for appellant:

Under section 476 of the Code, under the title "Executions," only the legal title of the judgment debtor can be levied on. *Dvorak v. More*, 25 Nebr., 735; *Connell v. Gallagher*, 36 Nebr., 749.

James H. Woolley, *Fred W. Ashton*, *Charles G. Ryan*, *W. S. Pearne*, *W. A. Prince* and *R. G. Glanville*, *contra.*

HOLCOMB, J.

One William Hagge was the owner of certain real estate situated in Hall county, upon which different alleged liens and their priorities are involved in this controversy. At or about the time of the transactions hereinafter

narrated, Hagge became financially distressed, because of his connection with, and liability as a stockholder in, the Citizens National Bank of Grand Island, which closed its doors and suspended business about December 4, 1893. On December 6 there was placed on record in the office of the county clerk a warranty deed, conveying the real estate in controversy from Hagge and wife to one D. H. Veiths, a relative of Hagge, for an expressed consideration of $10,500. The deed bore date August 9th preceding, and was acknowledged on the 24th of the same month. A mortgage from Veiths and wife on the premises was executed at the same time for an expressed consideration of $9,500, and recorded December 26, 1893. Soon after the recording of the instrument conveying the land from Hagge to Veiths, attachment suits were instituted by the appellee Taylor and appellant city of Grand Island, and the real estate was attached at the instance of Taylor as the property of Hagge, it being alleged that he had and was about to convey his property for the purpose of defrauding his creditors, and hindering and delaying them in the collection of their debts. In the suit brought by the city the property was attached as the property of Veiths on a contract liability claimed to be due the city on a bond, on which he was an obligor, in favor of the city, given by one West as city treasurer. Each of these two suits was prosecuted to final judgment, and the property attached was ordered sold in satisfaction of the judgments so rendered. On January 26, 1894, Veiths and wife transferred the real estate to Hagge, excepting in the covenants of warranty any lien or liens thereon by virtue of attachment proceedings in favor of the city of Grand Island, and all taxes. Afterwards, through a third party or trustee, the land was conveyed to Mrs. Hagge, the wife of William Hagge. Mortgages were then executed by Mrs. Hagge and her husband, one in favor of James H. Woolley to secure certain notes evidencing an indebtedness against Hagge, and one to the appellant as receiver of the Citizens Na-

tional Bank to secure $6,000 of a judgment rendered against Hagge on his stockholders' liability in said bank. The receiver then brought an action in equity to foreclose his lien by virtue of the mortgage securing the judgment, making all others claiming an interest in or lien on the land parties to the action, and claiming a prior lien on the premises, except as to the mortgage executed in favor of Woolley, which, it was admitted, was superior to the lien in favor of the receiver. Issues were joined, in the formation of which Taylor and the city of Grand Island set up their attachment suits and the judgments rendered therein, claiming a lien on the land by virtue thereof superior to those created by reason of the mortgages subsequently executed. On the trial the court found in favor of Taylor, awarding him a first lien; in favor of the assignees of the indebtedness secured by the Woolley mortgage, giving them a second lien; the receiver was decreed to have a third lien. The court dismissed the action as to the city of Grand Island and one other cross-petitioner, whose case is not here for review. The receiver and the city of Grand Island appeal from the decree.

In determining the respective rights of the appellants we are required to consider different and distinct propositions of law, and it is, therefore, proper to treat the appeal under two heads. The decree of the trial court, giving to the appellee Taylor on his cross-petition a first lien on the property by virtue of the attachment proceedings instituted by him December 8, 1893, and the judgment rendered thereon, is objected to on the ground, as argued, that the legal title to the property at the time the attachment was levied being in the said Veiths, and Hagge having only an equitable interest therein, attachment would not lie, and the plaintiff in the attachment suit acquired no lien on the property by reason of the levy on the land while standing in the name of Veiths, the grantee of Hagge. In *Shoemaker v. Harvey*, 43 Nebr., 75, it is held, in the second paragraph of the syllabus: "If

there is no possession of real property by an attachment defendant having an equitable interest therein, no valid levy and sale can be made upon such equitable interest, neither can it under such circumstances be subjected otherwise than by invoking the aid of a court of chancery." The opinion in the case sustains the proposition thus announced in the syllabus, and we have no disposition to modify or recede from the same, and if it be proper to apply the same principle to the facts in the case at bar, then the decree pronounced by the trial court can not stand. But is the principle applicable? In the *Harvey Case*, and all similar cases, the underlying principle is that where the interest of the attachment debtor in real estate is purely equitable, uncoupled with possession, then an attachment or execution can not be validly levied, but resort must be had to a court of equity to bring together the legal and equitable estate, and decree the property to belong to the actual owner. To illustrate: In the *Harvey Case* the legal title to the property had never been vested in the Harveys; their interest and estate, if any, in the property sought to be attached was equitable only, and could not be reached by the attachment as "lands and tenements" of the attachment debtor. In the case at bar, Hagge was the legal and equitable owner of the property, save only as his title may have been divested by the conveyance made by him to the said Veiths. By the conveyance he attempted to convey all his interest in the land, both legal and equitable. He evidently sought to put it out of the reach of his creditors, either by process out of a court of law or in an action in equity. Taylor levied his attachment on the land on the ground that Hagge had fraudulently disposed of his property with the intent to cheat, hinder, delay and defraud his creditors. By section 17 of the Statute of Frauds (Compiled Statutes, ch. 32) such a conveyance is fraudulent and void as to the creditors of the grantors. As to such creditors, the conveyance may be treated as absolutely void and a nullity, as though it had never been made and

the property remained as it actually was, the property of the debtor. The conveyance is at most only a cloud on the title of the debtor, and if required, may be removed in any proper proceeding brought for that purpose. The attachment laws would be ineffectual, and the provision for the attachment of property which has been fraudulently conveyed would be meaningless, if the construction contended for should prevail.

The proposition under consideration seems, however, to have been quite firmly settled by the prior decisions of this court. In *Keene v. Sallenbach*, 15 Nebr., 200 it is held: "Where an attachment is levied upon real estate belonging to the debtor, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor in the land which he may enforce after he recovers judgment." Says MAXWELL, J., the author of the opinion: "But where sufficient cause is shown for an attachment, and one is issued and levied upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of judgment. Where in such case it is necessary to set aside a conveyance alleged to be fraudulent as to creditors, an action may be commenced for that purpose against the alleged fraudulent grantee and other proper parties, and it is the duty of the court to render such decree in the premises as the testimony will justify."

In *Kimbro v. Clark*, 17 Nebr., 403, on the same subject, it is observed at page 406 by REESE, J., who wrote the opinion: "If the title to the property is held by another as a secret trust for the benefit of the debtor who is the real owner, and if such ownership is merely colorable such property will be deemed to be held for the benefit of creditors, and the conveyance, while good as between the parties, will be held void as to them. *Sturdivant v. Davis*, 9 Ired. [N. Car.], 365; Bump, Fraudulent Conveyances, 215; *Power v. Alston*, 93 Ill., 587. And is subject to the process of attachment." To the same effect is

Kennard v. Hollenbeck, 17 Nebr., 362, where the facts are quite similar.

It is stated in *Gormley v. Potter*, 29 O. St., 597, 599: "The land in controversy was subject to levy on execution, and the levy upon it was properly made. The conveyance to Flynn by the judgment debtor, and by Flynn to the debtor's wife, having been made with intent to defraud creditors, was, as against the creditors, absolutely void. As respects the rights of creditors, the land was still the property of the judgment debtor, and subject to execution as fully as if the conveyance had not been made."

Says the supreme court of Illinois in the case of *McKinney v. Farmers Nat. Bank*, 104 Ill., 180, 183: "The statute says such fraudulent conveyances shall be held void as against creditors. Creditors have the right to treat such conveyances as void. The moment appellees levied their attachments specially upon these lands, as the property of Patterson, their election to treat the former conveyances as void was declared, and such attachments became a lien against the lands with the same effect as if the fraudulent conveyances by Patterson had never been made."

The following authorities also sustain the proposition as announced by the prior decisions of this court heretofore referred to: *First Nat. Bank v. Hollerin*, 31 Nebr., 558; *McVeigh v. Ritenour*, 40 Ohio St., 107; *Westerman v. Westerman*, 25 Ohio St., 500; *Sockman v. Sockman*, 18 Ohio, 362; *Scott v. Hartman*, 26 N. J. Eq., 89; *Terhune v. Hackensack Savings Bank*, 45 N. J. Eq., 344; *Pratt v. Wheeler*, 6 Gray [Mass.], 520; *Arper v. Baze*, 9 Minn., 98. These cases are all distinguished from the *Harvey Case*, and those similar, in that, in the one class, the attachment or execution debtor, being the owner of the legal and equitable estate, has sought to alienate his interest in the property in fraud of the rights of creditors, who may treat the transaction as a nullity, and enforce their rights in, and claims to, the property, notwithstanding the

fraudulent transfer; while in the other class of cases, the attachment debtor has only an equitable interest in the property, which can be reached only by resort to a court of equity, which can take hold of the legal and equitable title at the point of divergence and direct them into the one channel of actual ownership.

We reach the conclusion, therefore, that Taylor acquired a valid lien on the real estate by virtue of the levy of his attachment thereon as the property of Hagge, which might be enforced in that action or in subsequent proceedings, and that, if required, a resort might be had to a court of equity to remove the cloud on the title caused by the fraudulent conveyance to Veiths. In the case at bar proceedings for this purpose were rendered unnecessary by reason of the reconveyance of Veiths to Hagge, which again restored to and vested in him full and complete title of record to the property to the same extent as though the conveyance in the first instance had not been made.

It is suggested that the attachment creditor has slept on his rights, and ought not in equity be given a lien in priority to that of appellant under the mortgage security. The record discloses that the attachment was levied on December 8, 1893; that final judgment was not rendered until December 2, 1895; that after the levy and during the pendency of the action, the appellant obtained his judgment and mortgage security therefor. On April 4, 1896, he began an action in equity, and made Taylor a party defendant, who came in and pleaded his attachment suit as giving him a lien on and interest in the land, which he asked to have adjudicated. We do not think there was any such laches as would forfeit his prior lien, and that the equity action begun by plaintiff afforded him an opportune time to adjust by decree the priorities of liens on the premises involved in the proceedings. The appellant, having acquired its lien *pendente lite*, was charged with notice and took subject to the rights of the plaintiff in the action wherein the at-

tachment was levied and final judgment rendered. *Wright v. Smith*, 11 Nebr., 341.

An objection is urged as to the validity of the levy of the writ of attachment, because, as claimed, a copy of the order was not left with the occupant of the land attached. The return of the officer shows a copy of the order to have been left with the occupant of the premises on which the writ was levied. The evidence shows that the person occupying the premises as tenant was absent from the county, and that the person to whom a copy of the order was delivered was occupying the premises with the tenant, and had the apparent control and possession, and had the actual possession of the premises at the time of the levy. This is sufficient. The law does not require the officer to determine who may be the lessee and legal tenant of the owner. The person who is in possession and occupying the premises with apparent authority and control thereof may be served with the order, and compliance is thereby had with the provisions of the statute, viz.: "Where the property attached is real, the officer shall leave with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the order." The person upon whom the order was served at the time of the service was the actual occupant of the lands attached, and the demands and object of the statutes were met and complied with by service upon him. The objection to the manner of service of the writ is not, we think, well taken.

With respect to the city of Grand Island and its interest in the lands involved in controversy by virtue of the writ of attachment by it levied on the land as the property of the grantee, Veiths, it is argued, as it is by the appellant, the receiver, that the Taylor attachment could be levied only on an equitable interest in the property belonging to the grantor, Hagge, and, therefore, it was invalid, and no rights accrued to Taylor by reason of the proceedings taken by him in that suit. What has been said with relation to the contention of counsel for

receiver in this regard applies with equal force and pertinency to the claims of counsel for the city. We are, therefore, under the necessity of inquiring only as to the relative rights of the city as an attaching creditor of the grantee Veiths, and the mortgagees claiming as creditors of Hagge. It is argued, in a very elaborate brief by counsel for the city, that as the mortgagees of Hagge and wife, after the reconveyance by Veiths to Hagge, take their rights to and interest in the property through the fraudulent conveyance from Hagge and wife to Veiths, and, in turn, from Veiths and wife to Hagge, and that as a proposition of law, those claiming under the grantor by way of deed, mortage or other security or conveyance, either directly or remotely, are conclusively bound by the transfers and the recitals contained in the fraudulent conveyances, and are estopped from questioning, except on the ground of fraud, the validity or legal effect of the different instruments of conveyance through which title, interest, or lien is claimed. The propositions announced are supported by well considered cases, which are entitled to great weight as authority. If the premises upon which the argument is based are sound and well founded, we are of the opinion that the conclusion arrived at as stated in the proposition would be inevitable and logically follow. But do the mortgagees of Hagge claim through fraudulent conveyances, from the consequences of which they can not escape, and by the recitals of which they are bound? That Hagge's property is morally and equitably pledged to pay his debts rather than the debts of some third party is a proposition that will not be seriously controverted. In fact, it is admitted by counsel for the city; but it is contended that the proper steps have not been taken to avoid the effect of the conveyance to Veiths, and subject the property to the payment of the debts of Hagge, the fraudulent grantor. On the trial of the case the court found the conveyance was fraudulent and void as to the creditors of Hagge. This is made manifest by the decree in favor of Taylor, an

attaching creditor. The conclusion reached by the trial court is the only proper one under the evidence. The question is one of fact, properly triable by the trial court. *Sherwin v. Gaghagen*, 39 Nebr., 238; *Houck v. Heinzman*, 37 Nebr., 463; *Goldsmith v. Erickson*, 48 Nebr., 48; *Crites v. Hart*, 49 Nebr., 53. It is shown by the evidence quite conclusively that Hagge transferred the property to Veiths wholly without consideration, and for the purpose of placing it beyond the reach of creditors, and that Veiths had no interest in the land whatever, save the naked legal title by reason of the transfer, colorable only, made by Hagge, as he says, to hold for him, and to be reconveyed whenever he requested it, and to avoid it being taken in satisfaction of his liability on a bond, to which his signature was obtained, as he claims, by misrepresentation. Veiths had no real ownership in the property, made no attempt to exercise any authority as owner, and took no steps to reduce the land to actual or constructive possession under the conveyance. The conveyance being in fraud of the rights of the creditors of Hagge, it was evidently so recognized by the parties thereto, and on January 26, following, the whole transaction was repudiated, and the property restored to its rightful owner. The deed of reconveyance was grounded on no new or valid consideration; it involved no new agreement or contract based on any good consideration. It was an undoing of that which had been wrongfully done, thus placing the parties in the situation in which they were prior to the first fraudulent conveyance. The legal effect was to restore the property to the legal owner, and render unnecessary any action or proceeding to annul and vacate the fraudulent conveyance. No action in the nature of a creditor's bill would lie, and the fraudulent grantee had relieved himself of being charged as trustee of the property for the benefit of the creditors of Hagge. Such an action would have been useless and barren of results, because the grantee had done all that a court of equity could, by order or decree, require him to do. *Swift v.*

Holdridge, 10 Ohio, 230; Bump, Fraudulent Conveyances [4th ed.], sec. 500; *Dolan v. Van Demark*, 35 Kan., 304, 309.

Can an attachment against Veiths, while he held the naked legal title under such circumstances, be held superior to that of the creditors of Hagge, the actual owner, whether a lien on the property was acquired through the voluntary act of Hagge, or by decree or process of court in litigation brought for the purpose of enforcing the rights of creditors and establishing a lien thereon? What the rights of Hagge are, or those claiming under him as subsequent creditors, grantees, or otherwise than as creditors at the time of the fraudulent alienation, it is unnecessary here to discuss or determine. In *Dolan v. Van Demark, supra*, it is said by Valentine, J.: "While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. (*Butler v. White*, 25 Minn., 432; *Boyd v. Brown*, 34 Mass., 453, *Murphy v. Moore*, 23 Hun [N. Y.], 94; *Stark v. Ward*, 3 Pa. St., 328; *Webb v. Brown*, 3 Ohio St., 246; Bump, Fraudulent Conveyances [3d ed.], 499, 500.) The fraudulent vendee may lawfully dispose of the property in any manner in which the fraudulent vendor himself might have disposed of the property if the fraudulent sale had not occurred." It follows, then, that if the prop-

erty may lawfully be disposed of by the fraudulent grantee in satisfaction of the claims of the creditors of the fraudulent grantor, it may be reconveyed to the fraudulent grantor, and by him disposed of in any lawful manner for the same purpose.

The attachment lien of the city as a creditor of Veiths, the holder of the naked legal title, like the lien of a judgment against him, can only attach to his actual interest as the holder of the legal title as against the creditors of Hagge, and this interest, as we have seen, is nothing, the transfer being colorable only. In *Roberts v. Robinson*, 49 Nebr., 717, 721, says this court, in speaking of the lien of a judgment, and where the principle involved is applicable to the case at bar: "By section 477 of the Code of Civil Procedure a judgment is made a lien upon the land of the judgment debtor; that is, the land owned by him. True enough, if the record shows the legal title to land to be in the debtor, the judgment is an apparent lien upon the land, but the fact that the record shows the legal title to land to be in a debtor is not conclusive evidence that the debtor actually owns the real estate. The rule is that where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of the judgment against him attaches only to the actual interest which he has in the real estate," citing *Uhl v. May*, 5 Nebr., 157; *Metz v. State Bank of Brownville*, 7 Nebr., 165; *Galway v. Malchow*, 7 Nebr., 285; *Dorsey v. Hall*, 7 Nebr., 460; *Mansfield v. Gregory*, 8 Nebr., 432; *Berkley v. Lamb*, 8 Nebr., 392; *Harral v. Gray*, 10 Nebr., 186; *Dewey v. Walton*, 31 Nebr., 819; *Mundt v. Hagedorn*, 49 Nebr., 409. In *Galway v. Malchow*, 7 Nebr., 285, 290, says LAKE, J.: "It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor;" citing Freeman, Judgments, sec. 357; *Swarts v. Stees*, 2 Kan., 236. See, also, *Lessee of Smith v. McCann*, 24 How. [U. S.], 398. We are of the

opinion, therefore, that the city in this action can not invoke the principle sought to be applied as against the creditors of Hagge claiming under the liens sought to be estblished by them on the property in controversy, and that the attachment on the real estate as the property of Veiths was unavailing to create a lien as against such creditors, because the fraudulent grantee had no actual or substantial interest in the property, to which, at the time, he held the legal title of record. The equities are clearly in favor of the creditors of the fraudulent grantor.

The decree of the district court should, in all respects, be

AFFIRMED.

COUNTY OF DOUGLAS V. GEORGE A. BENNETT ET AL.

FILED APRIL 10, 1901. No. 9,413.

1. **Action on Official Bond: EXCESS OF FEES: ANSWER: JUDGMENT ON PLEADINGS.** In an action by a county on the official bond of a county officer for fees alleged to have been received in excess of the amount allowed by law, and for which the officer failed to account and pay into the county treasury, an answer alleging a settlement and full accounting with the county commissioners of all items mentioned in the petition, and regarding the same facts therein mentioned, which were well known to and understood by the county commissioners, and that all of said accounts were duly and legally settled between the plaintiff and the said officer, presents a good defense, and in the absence of a reply, judgment on the pleadings in favor of the defendant is proper.
2. **Settlement of Officer with County Board Conclusive in Absence of Fraud, Mistake and Imposition.** Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making the same.

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

A. N. Ferguson, for plaintiff in error.

Wharton & Baird, contra.

HOLCOMB, J.

The county of Douglas began an action on the official bond of George A. Bennett, deceased, former sheriff of the county, against the sureties thereon, to recover a balance of fees alleged to have been collected by the officer in the performance of his duties as such, in excess of the sums he was authorized to retain, which he had failed, as alleged, to account for and pay over to the county, by reason of which there was a default in the conditions of the bond and a liability existing against the sureties thereon. To the petition the defendants answered, among other things, alleging a settlement and full accounting with the county commissioners of all the items mentioned in the petition; that at the date of such settlement the alleged facts in the petition were well known and understood by the county commissioners, and that all accounts were duly and legally settled between the plaintiff and the said officer in his life time. There was also a paragraph in which, as a defense, it was pleaded that the principal on the bond was deceased and his estate administered upon; that due and legal notice of the time for filing claims against the estate had been given, and had expired; that no claim had been filed, and that the claim of the plaintiff as against the estate of the principal had become barred, and by reason thereof the principal and his estate had been released of all liability on the bond, by reason of which the sureties were likewise released and discharged from any liability thereon. A demurrer was interposed to the paragraph of the answer pleading the facts above referred to, which was by the court overruled. The plaintiff thereupon asked and obtained leave to withdraw its reply to the remainder of the answer theretofore filed, and elected to stand on its demurrer. Thereupon the cause came on for hearing on the pleadings, upon which judgment was rendered dismissing the action. From the judgment of dismissal the action is by error proceeding brought here for review.

The withdrawal of the reply was, in effect, an admission of the truth of all facts pleaded in the answer, and left the demurrer a general one.

Without discussing the propositions of law involved in the defendants' plea to the effect that the estate of the principal on the bond was discharged from liability thereon, and that such discharge would also release the sureties, we are of the opinion that the answer presented a good defense, wherein it is alleged that a complete settlement and full accounting was had regarding the same facts and items mentioned in the petition, and that such matters had been fully adjusted and accounted for, and final settlement thereof had with the county commissioners of the plaintiff county. Unless there was mistake or fraud in such settlement (and the withdrawal of the reply admits the facts pleaded), the county could not thereafter maintain an action on the same items included in and accounted for by such adjustment and settlement. Says MAXWELL, C. J., in *Ragoss v. Cuming County*, 36 Nebr., 383: "A county board in allowing a claim which the law authorizes them to act upon may make an honest mistake, and allow or disallow an order. If any person is aggrieved thereby the law provides an adequate remedy by appeal. There should be an end to litigation, and an officer who has faithfully performed the duties of his office and made a full settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same." See, also, *Kennedy v. Goodman*, 14 Nebr., 585; *Keller v. Keller*, 18 Nebr., 366. If there was fraud or imposition, or a mistake had been made, the alleged settlement would not be final; but there is nothing of the kind raised in the pleadings, and, in the state in which we find them, the defendants were entitled to judgment, irrespective of the question of the ruling of the trial court on the demurrer to the paragraph of the answer pleading a discharge of the sureties, because the plaintiff was barred from a recovery against

the estate of the principal by reason of the proceedings had in administering the estate.

The judgment of dismissal is

AFFIRMED.

WILLIAM KEELER, APPELLEE, V. CHARLES MANWARREN ET AL., APPELLANTS.

FILED APRIL 10, 1901. No. 9,456.

1. **Absence of Bill of Exceptions:** PRESUMPTION. In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence.

2. **Written Stipulation:** RECORD: BILL OF EXCEPTIONS. A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions. *State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Nebr., 1.

APPEAL from the district court for Hitchcock county. Heard below before NORRIS, J. *Affirmed.*

John W. Cole, for appellants.

B. F. Smith, contra.

HOLCOMB, J.

On an application to confirm a sale of real estate made under a decree in proceedings of foreclosure of a real estate mortgage the defendant objected to the confirmation on the ground that the notice of sale had not been published in a legal newspaper, within the meaning of chapter 49, Session Laws, 1895. We are prevented from reviewing the ruling of the trial court on the objection, because the evidence on which the same was had has not been properly preserved in a bill of exceptions. In the absence of a record containing the evidence, the presumptions are all in favor of the correctness of the ruling made, and the presumption will be that the same was based on sufficient evidence to sustain it. There is in

the record no bill of exceptions or anything purporting to be one.

A stipulation of the parties as to the purported facts regarding the publication of the newspaper in which the notice was published is copied in, and sought to be made a part of, the transcript of the proceedings in the case, and certified to as such by the clerk. Such a stipulation is, however, no part of the transcript, and can not be considered for the purpose of determining the sufficiency of the evidence introduced before the trial court in passing on the objections to confirmation. Says this court, in *State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Nebr., 5: "The steps requisite to preserve the evidence upon which the jury found their verdict and the rulings of the court during the trial have not been taken. This could be accomplished only by a bill of exceptions duly settled in the mode required by statute. A stipulation of the attorneys in a cause is no more part of the record than a deposition or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the record can not be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof can not take the place of a bill of exceptions. *Credit Foncier of America v. Rogers*, 8 Nebr., 34; *State v. Knapp*, 8 Nebr., 436; *Herbison v. Taylor*, 29 Nebr., 217; *McCarn v. Cooley*, 30 Nebr., 552. This stipulation could have been brought into the record by a bill of exceptions; but that not having been done, it is not properly before the court, and hence it cannot be considered."

The ruling complained of must be presumed and held to be supported by the evidence.

AFFIRMED.

JOSEPH DOHERTY V. SYLVESTER LINN.

FILED APRIL 10, 1901. No. 11,445.

1. **Joint Action in Replevin:** CLAIM BY SEVERAL TITLE: NOMINAL DAMAGES. L. and B. began an action jointly in replevin against H., claiming by several title, and obtained possession of the property in controversy. Trial and judgment resulted in favor of both plaintiffs. On error to this court the judgment as to B. was affirmed, and reversed as to L. because of the insufficiency of the evidence to support a judgment in his favor. On a subsequent trial as between L. and the defendant, in replevin, *held*, that such defendant's possessory right as against L., the unsuccessful plaintiff, was nominal only, and that the recovery of damages as against L. was limited to a nominal sum.

2. **Affidavit.** Affidavit in replevin *held* sufficient.

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

John T. Cathers and *T. J. Mahoney*, for plaintiff in error.

George A. Day, contra.

HOLCOMB, J.

Sylvester Linn and Alexander Barrie began jointly an action in replevin for the recovery of personal property, consisting of three stallions, claiming a special ownership therein by virtue of a chattel mortgage executed in favor of Linn by one Jillson, the alleged owner. Barrie claimed as assignee of a part of the notes secured by the mortgage in favor of Linn. The property was, under the writ of replevin, taken and delivered to the plaintiffs in the action. The defendant, Dorsey B. Houck, as constable, claimed the property by virtue of a writ of attachment levied thereon in an action begun by Joseph Doherty, afterward substituted defendant in place of Houck, against Jillson, the owner, for a bill for feed and care of the animals in controversy. A trial resulted in a verdict and judgment for the plaintiffs, awarding them

the right of possession of the property, and a special interest and ownership therein by virtue of the mortgage executed as aforesaid. By proceeding in error the action was brought to this court for review by the defendant, where it was held that the judgment should be affirmed as to Barrie and reversed as to Linn. *Houck v. Linn*, 48 Nebr., 227, 232. Therein it is said by the author of the opinion: "The theory of the petition was that only a portion of the notes had been so transferred; but the evidence shows that they were all transferred, and when the action was commenced Barrie still retained them, Linn's debt to him not having been paid. Barrie was, therefore, at the commencement of the action, the owner of the mortgage, and the proper plaintiff. He could have sued upon the notes, and they being good as between the original parties, his recovery would have been for their whole amount, and not merely the amount of the debt for which they were pledged. *Barmby v. Wolfe*, 44 Nebr., 77; *Haas v. Bank of Commerce*, 41 Nebr., 754. So he had a right to foreclose the chattel mortgage for the whole debt secured thereby, and had a right both as against the mortgagor and the original mortgagee to the possession of the mortgaged property after condition broken. We think, therefore, no right of possession was established in Linn. The judgment in favor of Barrie is affirmed. That in favor of Linn is reversed and the cause as to him remanded." Upon the case being remanded for further proceedings, Linn undertook to dismiss his action, which was granted by the trial court, and the case was again brought here for review (*Houck v. Linn*, 56 Nebr., 743), and it is there held: "A plaintiff in replevin may not, after obtaining the property under the writ, dismiss the case without defendant's consent. A case can not be dismissed at the instance of a party who may be liable to a judgment therein, against the objection of his adversary, although the recovery might be only for nominal damages. Two persons joined as plaintiffs in an action of replevin and took the property under the writ. They

claimed a concurrent right of possession, but by several titles. One recovered judgment. *Held*, That the other could not thereupon dismiss the case as to himself, without the consent of the defendant." Upon a retrial of the case after being remanded for a second time, upon a stipulation of facts and instructions from the court, the jury found in favor of the defendant in the replevin action as against Linn, one of the plaintiffs, and awarded nominal damages only for the wrongful taking and detention of the property. The defendant again prosecutes error.

It seems to us that all questions in the case have heretofore been decided, and having become the law of the case, the verdict and judgment on the last trial are conformable thereto, and should be affirmed.

On the first hearing in this court on error it was decided that the judgment in favor of the plaintiff Barrie for the possession and right of the property in controversy should be affirmed. This holding is decisive of all the substantial questions in the case. The contention that the defendant as against Linn, the co-plaintiff of Barrie, is entitled to a verdict and judgment for the amount recovered in his attachment proceedings is untenable. It would be a most extraordinary and incongruous state of affairs to hold that a judgment awarding the property to one plaintiff, and finding against the defendant as to his right of possession to and claim of interest in the property replevied, was in conformity with law, and in the same action award the defendant judgment, for all that was claimed by him in and to the same property, as against the other plaintiff. The judgment last rendered against Linn as to his cause of action as between him and the defendant is the one that should have been rendered on the first trial; that is, under the holdings of this court on the first trial, under the pleadings and the evidence the plaintiff Barrie was entitled to the property replevied by him, and had a special ownership therein for the full value of the property, and was entitled to judg-

ment accordingly. As between the plaintiff Linn and the defendant, the defendant was entitled to the possession, the said plaintiff having failed to prove his cause of action, the possessory right of the defendant being nominal only, because of the judgment in favor of Linn's co-plaintiff. The case is somewhat analogous to one where an intervener in a replevin action comes in and establishes his right to the property in controversy. In such a case it will hardly be contended that because the plaintiff failed to maintain his case against the defendant, the defendant would be entitled to recover from the unsuccessful plaintiff the value of the property adjudged to belong to the intervener, on the theory that the judgment in favor of the intervener in no way affected the rights of these two parties to the controversy.

The case at bar is an exception to the rule that where the plaintiff fails to prove his cause of action, the defendant is entitled to a judgment for a return of the property, or its value, or the value of his interest in the event a return can not be had, as is ordinarily the case under such circumstances. The judgment between Linn and the defendant must be with reference to, and as modified, affected or controlled by, the judgment in the same action as between the defendant and Linn's co-plaintiff, Barrie. The right and interest of the defendant in the property in controversy has been, in this same action, adjudicated adversely to him, and, therefore, as against the unsuccessful plaintiff, Linn, he is entitled to nominal damages only, having suffered no substantial loss, because of the superior right and claim of the plaintiff Barrie. Cobbey, Replevin [2d ed.], sec. 951; *Treat v. Staples*, 1 Holmes [U. S. C. C.], 1.

By stipulation, the jury returned as special findings of fact the main facts stipulated by the parties; but we find nothing in these special findings, or the stipulation of facts, that changes or modifies the principles we hold to be applicable to the case at bar, or inconsistent with the general verdict of the jury.

Complaint is also made because of the denial by the trial court of a motion to quash the affidavit of replevin, on the ground that it is insufficient, being a joint affidavit by Barrie and Linn. The ruling of the court was proper. The affidavit was sufficient and so adjudged when the judgment in favor of Barrie was affirmed. Whether the proof as to Linn was sufficient to sustain the allegations in the affidavit and petition in replevin, presents another question.

The judgment of the district court is

AFFIRMED.

JESSE GEORGE V. STATE OF NEBRASKA.

FILED APRIL 10, 1901. No. 11,919.

1. **Information for Rape:** FEMALE CHILD: NEGATIVING INCEST. In an information under the second division of section 12 of the Criminal Code, charging a person with carnally knowing a female child under the age of eighteen years, with her consent, it is not necessary to allege that such female child is other than the "daughter or sister" of the one committing the assault.

2. ———: ALLEGATION OF CONSENT. Nor is it necessary to allege that the offense was committed "with the consent" of such female child.

3. **Cross-Examination:** DISCRETION OF COURT. As a general rule, the re-examination of a witness should be limited to the points arising out of the cross-examination. But whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge. *Schlencker v. State*, 9 Nebr., 241, followed.

4. **Age of Prosecutrix:** TESTIMONY OF MOTHER AND SISTER. Admission of testimony of mother and sister as to age of prosecutrix *held* without error.

5. **Subsequent Acts of Defendant in Leaving Locality May Be Shown.** The state may show, in a prosecution for rape, the subsequent acts of the defendant soon after the alleged commission of the crime, in leaving the locality apparently for the purpose of escaping arrest and prosecution.

6. **Instructions.** Instructions quoted, in view of the evidence on behalf of the defendant, *held* proper.

7. **Evidence.** Evidence examined, and found sufficient to support the verdict of the jury and the judgment of the trial court.

ERROR from the district court for York county. Tried below before GOOD, J. *Affirmed.*

George B. France, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

HOLCOMB, J.

The defendant was charged with the crime of rape under the second division of section 12 of the Criminal Code, which provides, in substance, that if any male person of the age of eighteen years or upwards shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age, and previously unchaste, shall be deemed guilty of rape. The charging part of the information was that the plaintiff in error, "a male person over the age of eighteen years, on the 30th day of May, A. D. 1900, in the county of York and state of Nebraska, in and upon one Susan Schroeder, a female child under the age of twelve years, then and there being, feloniously did make an assault, and her, the said Susan Schroeder, then and there wickedly, unlawfully and feloniously did carnally know and abuse." A plea of not guilty to this information was entered and a trial had to the court and jury, resulting in a verdict of guilty and sentence of the defendant to imprisonment in the penitentiary.

Several alleged errors are presented in the brief of counsel and urged as grounds for a reversal. It is suggested that motions to quash the information and in arrest of judgment, which were interposed, ought to have been sustained, because it was not alleged that the person upon whom the assault was committed, and of whom carnal knowledge was had, was "other than the daughter or sister of the defendant." It is provided by section 11 that an assault upon the sister or daughter by force and

against her will constitutes one offense, and it is also provided by the first division of section 12 that an assault upon any other woman or female child than the daughter or sister, forcibly and against her will, shall constitute the offense of rape; but by the second division of section 12 it is provided that the carnally knowing of any female child under the age of eighteen years, with her consent, except as therein noted, shall constitute the offense, and subject the person guilty thereof to the punishment mentioned. This second division, as we view it, constitutes an offense within itself, and charging the crime substantially in the language of the statute is all that is required; and it is not necessary to negative the requirements of either section 11 or the first division of section 12, providing what shall constitute the offense when committed by force and against the will of the person assaulted.

Regarding the requirements of the Criminal Code as to the allegations in an information charging the commission of the crime of rape by force and against the will of the person assaulted, whether a daughter or sister or other person, we are not here concerned. Under the provisions of the statute authorizing the prosecution of a person charged with having carnal knowledge of a female child under the age of consent, as in the case at bar, it is unnecessary to allege that the person assaulted is other than the daughter or sister of the one committing the act. *Jones v. State*, 42 N. E. Rep. [Ohio], 699.

It is also urged that the information is defective, in that it does not charge that the act was committed with the consent of the prosecutrix. This question must be regarded as set at rest and foreclosed by the case of *Davis v. State*, 31 Nebr., 247, wherein it is held: "In a prosecution for an assault upon the person of a girl under the statutory age of consent, with intent to commit a rape, it is not necessary to allege or prove that the acts were done against her will. Whether she consented or resisted is immaterial." Says NORVAL, J., the author of the opinion: "Section 12 quoted above defines the

crime of rape, and it was the intention and purpose of the legislature, in adopting section 14, to punish as a crime an assault upon a female child under fifteen years of age, with intent carnally to know her, whether she formally consent to the assault or not, as well as an assault made upon a female over the age of fifteen years, forcibly and against her will with intent to commit a rape. As it is not necessary in a prosecution for a rape committed upon a child under the age of consent to prove that the acts were done against her will, so an assault with intent to commit a rape made upon a girl under the age of fifteen years is punishable under the statute, although committed with the consent of the child. Whether she consented, or resisted the assault is not material. (*Fizell v. State*, 25 Wis., 364; *People v. Gordon*, 11 Pac. Rep. [Cal.], 762; *Hays v. People*, 1 Hill [N. Y.], 351; *Commonwealth v. Roosnell*, 8 N. E. Rep. [Mass.], 747; *People v. McDonald*, 9 Mich., 150; *Mayo v. State*, 7 Tex. App., 342; *State v. Johnston*, 76 N. Car., 209; *Territory v. Keyes*, 38 N. W. Rep. [Dak.], 440; *People v. Courier*, 44 N. W. Rep. [Mich.], 571; *Stephen v. State*, 11 Ga., 226; 1 Wharton, Criminal Law, 577; *State v. Grossheim*, 44 N. W. Rep. [Ia.], 541.)" Whether or not the prosecutrix consented being immaterial, it follows that it is unnecessary to allege or prove that the act was done with her consent. She is in law regarded as incapable of giving consent to the act. Every element necessary to constitute the crime may be established, irrespective of her consent or want thereof.

Objection is also made because of the admission of certain evidence, and because the prosecutrix was recalled and permitted to testify further regarding the same matters brought out in her examination in chief. It is held in *Schlencker v. State*, 9 Nebr., 241: "As a general rule the reexamination of a witness should be limited to the points arising out of the cross-examination. But whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge."

Says LAKE, J.: "The general rule on this subject is, as claimed by counsel for the prisoner, that the re-examination should be limited to the points arising out of the cross-examination. But while this is the rule usually observed by the courts, it seems to rest entirely in the discretion of the judge whether it ought to be strictly enforced or remitted as he may think best for the discovery of truth, and the administration of justice. 2 Phillips on Evidence, 912."

Objection is also made because the mother and sister of the prosecutrix were permitted to testify as to her alleged age. The objection is not well taken. The evidence of these witnesses as to the age of the prosecutrix was entirely competent for the purpose for which it was introduced.

Objection is further made because evidence was admitted as to the acts of the defendant in leaving the place where he had been staying soon after the commission of the alleged crime and going to another part of the state, apparently to escape arrest and prosecution. This evidence was proper and to be considered by the jury, to be given such weight only as they thought it entitled to in view of all the other facts and circumstances of the case. It was not error to admit it. *Mathews v. State*, 19 Nebr., 330; *Anderson v. State*, 4 N. E. Rep. [Ind.], 63.

There is further objection because the state was permitted to give evidence of statements purported to have been made by the defendant to the officer arresting him at the time of the arrest, in the nature of an admission of guilt. The evidence we think proper. The statements are shown to have been made freely and voluntarily, without inducement or influence of hope or fear on the part of the officer making the arrest, or any other person. *Furst v. State*, 31 Nebr., 403; *Burlingim v. State*, 61 Nebr., 276.

There are some other objections to the admission of evidence, but we find nothing in regard thereto upon which error can be successfully predicated, and must hold

that as to the admission of such evidence, no error appears in the record.

The defendant, on the trial of the case, introduced evidence for the purpose of proving that the prosecutrix was over the age of fifteen years at the time of the alleged offense, and was of unchaste character. Upon this phase of the case the court instructed the jury. The giving of such instruction was duly excepted to, and is now assigned as error. The court instructed the jury that the chastity or unchastity of the prosecutrix should not be considered, if the jury believed from the evidence beyond a reasonable doubt that she was under the age of fifteen years at the time the crime charged in the information is alleged to have been committed. It is then stated: "If, on the contrary, the jury believe from the evidence that the said Susan Schroeder was over fifteen years of age and under eighteen years of age at the time of the assault charged in the information, and that the said Susan Schroeder was unchaste as herein defined, or if you entertain a reasonable doubt as to her chastity, then you should acquit the defendant, unless you believe from the evidence beyond a reasonable doubt that the said Susan Schroeder was under the age of fifteen years at the time of the assault charged in the information." The defense sought to be established by the testimony referred to was good under the statute, and if the evidence in regard thereto raised a reasonable doubt in the minds of the jury, it was their duty to acquit; but if, as instructed by the court, they believed beyond a reasonable doubt that she was under fifteen years of age, the defendant would then be guilty of the offense charged, regardless of the question of chastity. There was no error in charging the jury upon this phase of the case. The instruction was based upon, and responded to, one theory of the defense sought to be established by the evidence on behalf of the defendant.

Lastly, it is urged that the evidence is insufficient to support the verdict, for want of corroborating evidence

to that of the prosecutrix. The defendant admits that he was with the prosecutrix at the time the offense is alleged to have been committed, going with her a distance of about one and one-half miles, during which time, it is claimed by the state, the offense was committed, but he denies that any act of sexual intercourse took place. A statement made by the defendant at or about the time of his arrest on the charge against him was in the nature of an admission, and might very properly be regarded as corroborative of the evidence of the prosecutrix. His apparent effort to escape soon after the alleged crime was a circumstance proper to be considered by the jury. There was also evidence before the jury, given by the defendant, most contradictory in character, which affected his credibility by reason thereof, and would correspondingly add weight and force to the evidence of the prosecutrix. While the corroborating circumstances are but few, and not as strong as might be desired in order that the commission of the offense be established in an entirely satisfactory manner, we are not prepared to say that there are not sufficient corroborating facts and circumstances to the testimony of the prosecutrix to sustain the conviction, notwithstanding the denial of the act by the defendant in his testimony.

The verdict of the jury is supported by sufficient evidence, and the judgment of conviction will not be disturbed.

AFFIRMED.

ELIZABETH SPORER MCCULLOUGH, APPELLEE, V. GEORGE E. DOVEY ET AL., APPELLANTS.

FILED APRIL 17, 1901. No. 10,343.

1. **Pleading of Fact:** CONCURRENT ALLEGATION: PROOF. Where both parties in their pleadings allege a given fact, proof of the averment is unnecessary.

2. **Finding of Fact:** CONFLICTING EVIDENCE. A finding of fact based on conflicting evidence will not be molested on review.

3. **Plaintiff Transferring Claim:** ACTION CONTINUED IN WHAT NAME? Where plaintiff, after suit commenced, transfers his interest in the subject of litigation to a third party, the action may be continued in the name of the original plaintiff, or the court may allow the transferee to be substituted for him.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Affirmed on filing of remittitur.*

A. N. Sullivan, for appellants.

C. S. Polk and *Jesse L. Root, contra.*

NORVAL, C. J.

Elizabeth Sporer McCullough commenced suit in the district court of Cass county to foreclose a tax lien upon certain lots in the city of Plattsmouth, making, among others, I. Oberfelder & Co. and Margaret and George E. Dovey defendants. The pleadings and the evidence disclosed that Charles S. Dawson and his wife had, prior to the time of suit, executed a mortgage on part of this property to the Plattsmouth Building & Loan Association as security for a loan made to them by said corporation. I. Oberfelder & Co. also claimed a mortgage upon this property from Dawson and wife to them, the lien of which is inferior to that of the building and loan association. The Doveys answered, setting up that, by mesne conveyances, Mrs. Dovey was, at the time suit was commenced, owner of the fee of these lots, and her husband claimed that he was the owner of the mortgage given by Dawson and wife to the building and loan association, and he claimed a first lien upon said property by virtue thereof, and of certain moneys claimed to have been advanced by him to redeem the property from tax liens. The records also show that prior to suit I. Oberfelder & Co. had obtained a judgment in Illinois against the Dawsons on the indebtedness secured by their mortgage; also, that no part of said judgment had been collected, and

that the full amount of the debt was unpaid. On trial the court found the issues in favor of plaintiff, making the amount she had paid for taxes a first lien upon the property, and decreeing a foreclosure. It ranked the lien of I. Oberfelder & Co. next after that of plaintiff on one lot, and third on another, and found all the issues against said George E. Dovey, and that the title to certain of the lots was in Mrs. Dovey. The Doveys, being dissatisfied with the judgment, bring the case to this court.

The brief of counsel for defendants Dovey is very unsatisfactory, as it is difficult to gather therefrom what particular part of the decree of the lower court is attacked, there being no assignments, and the argument being exceedingly disjointed. We assume, however, that the principal question urged is one going to the weight of the evidence. George E. Dovey insists that by virtue of his assignment from the building and loan association of its mortgage, and the payment of certain taxes, he has a lien upon the property prior to that of I. Oberfelder & Co. In answer to this, we call attention to the fact that there is evidence in the record from which the court was justified in finding that George E. Dovey never in fact owned the mortgage which he claims to have purchased. The evidence is more consistent with the theory that he paid the amounts of money mentioned voluntarily and without a thought of acquiring any lien upon or interest in the property in question. The evidence being of that nature, this court is not justified in reversing the judgment, even though we believed the claim of Dovey was just. *Zarrs v. Keck*, 40 Nebr., 456; *Dunn v. Dietz*, 38 Nebr., 581; *Thomas v. Long*, 41 Nebr., 55.

It is claimed, also, that I. Oberfelder & Co. failed to prove that they had secured a judgment in Illinois against the Dawsons, which had not been paid. The objection is exceedingly technical, so much so that we will consider it no further than to state that we think there was ample evidence to support the allegation relating to that fact.

Even had there been a failure to prove this averment, the Doveys are in no position to take advantage of it, for in their pleadings they affirmatively alleged this fact; hence no proof was necessary, for such allegation is equivalent to an admission of the truth of a similar averment in the pleadings of the adverse party. *Wise v. Loring*, 54 Mo. App., 258; *Johnson v. Reed*, 47 Nebr., 322.

On trial it was disclosed that subsequently to the commencement of the suit plaintiff's interest in the subject of the action had been transferred to a third party. It is urged that the further prosecution of this suit in plaintiff's name is in violation of section 29 of the Code of Civil Procedure, which requires action to be prosecuted in the name of the real party in interest. By section 45 of said Code it is provided that in case of a transfer of interest after suit commenced the action may be continued in the name of the original party, or the court may allow the transferee to be substituted. It was, therefore, not an improper procedure to allow the case to continue in the name of the original plaintiff.

There is an error in computation, of $69.22 in the amount due I. Oberfelder & Co., the finding being in that sum excessive. This excess they have offered to remit. There is no other irregularity in the findings or decree. On condition that I. Oberfelder & Co., within forty days of the filing of this opinion, file a remittitur of $69.22, with interest on that sum from the date of entering the decree in the lower court, said decree will be, and is in all else,

AFFIRMED.

STATE, EX REL. DOUGLAS COUNTY, V. ALBYN L. FRANK.

FILED APRIL 17, 1901. No. 11,384.

1. **Legislative Enactments:** JUDICIAL NOTICE. Courts will take judicial notice of legislative enactments and of the records kept by the two houses of the legislature.
2. **Absence of Record:** Presumption. Where legislative journals are defective or incomplete, their silence will not, as against an enrolled bill, be taken as conclusive evidence that the yeas and nays were not taken and recorded on the final passage of a bill.
3. ———: ———: EXTRINSIC EVIDENCE. Extrinsic evidence may not be received to contradict the legislative journals, but such evidence is competent to supply missing portions of the journals which had become detached through accident or design.
4. **Enrolled Bill:** PRIMA FACIE EVIDENCE. Enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of the regularity of its enactment.
5. **Amendment:** GERMANE TO SECTION AMENDED. Chapter 31, Session Laws, 1899, amending section 3, chapter 28, Compiled Statutes, 1897, is germane to the section amended, and its provisions are within its title.
6. **General Law:** SPECIAL LEGISLATION. A general law, though affecting a single county, is not for that reason special legislation.
7. **Former Opinion.** Former opinion, 60 Nebr., 327, adhered to.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. Rehearing of case reported in 60 Nebr., 327. *Former decision of reversal sustained.*

George W. Shields, for plaintiff in error.

Ed P. Smith and *Greene & Breckenridge, contra.*

NORVAL, C. J.

This is a rehearing. The former opinion of the court, together with a statement of the facts, will be found reported in 60 Nebr., 327.

With an acerbity that lends not force to the argument, counsel for respondent Frank except to the opinion of

Justice SULLIVAN heretofore filed, as wrong in nearly all its conclusions. We will, therefore, consider practically all the assignments of counsel, with a view to determine whether we were right or wrong in reversing the judgment of the lower court, although all of the reasons set forth in the former opinion may not be referred to.

The points argued by counsel in their briefs on rehearing are:

1. The yeas and nays were not entered on the house journal as the constitution requires, at the time the bill passed the house, where it originated.

2. The house never concurred in the senate amendments, after the bill was returned by the latter, and never passed the bill as it was enrolled and signed by the governor.

3. The body of the act is broader than its title.

4. It is special legislation, so far as concerns respondent.

The record before us discloses the fact, although the journal does not show it, that the yeas and nays were recorded on the third reading in the house, but that portion of the journal which contained such entry is missing. It is doubtless the duty of the courts to take judicial notice of the laws enacted by the legislature, and of the records kept by the two branches thereof. To enable the court to ascertain what was done by the legislature, it may call to its assistance evidence of the character of that produced on the trial below. This evidence did not contradict the house journal; it merely established the record as in fact made by the legislature. It is fallacious to argue that such evidence contradicts the record; it merely supplies missing parts thereof and enables the court to know what the record in fact was when the legislature made it, not what it is after having been mutilated, through either accident or design. To hold that such evidence is not competent would result in the absurdity that, in case the journals of a session should be destroyed, all the acts passed at that session would be invalidated.

The journals of the legislature are like any other records. Should they be lost or destroyed, in whole or in part, the missing portions can be supplied by evidence of the same character as required when the contents of any lost or destroyed record are to be established or proved. The manner in which this journal was kept is fully discussed by Judge SULLIVAN in the former opinion, and need not be particularly referred to here. We may be pardoned perhaps, however, if we add that a system better calculated to facilitate mistakes, or the loss, through either design or carelessness, of portions of the journal, could not well have been adopted. It is conceded by counsel that the evidence introduced, if competent, impeached the journal, so far as related to the yeas and nays when the bill first passed the lower house, and the latter was, therefore, not competent to contradict the *prima facie* proof of regularity afforded by the duly enrolled bill, so far as relates to the first point argued; and it is, therefore, not necessary to discuss the same at greater length.

But, it is urged, this objection does not apply to the second point made, to-wit, that the house never concurred in the senate amendment. To this we can not assent, for the journal was in this respect discredited; at least evidence of such a character touching its integrity is adduced, in fact is supplied by the record itself, as required of respondent an explanation of its condition, and none is forthcoming. It is true there is no affirmative evidence in the journal to prove that a vote was taken by the house on the senate amendment, after the bill was returned to the house. Neither was there an attempt, except that afforded by the mere silence of that record, to prove the contrary, that no vote was taken. But, the journal itself proves that after the bill was returned to the house, accompanied by the usual message of the senate calling attention to the fact that the latter had amended the bill, and asking for the concurrence of the house therein, there appears in that portion of the journal wherein a vote on the senate amendment would, or at least could naturally

have been recorded, a hiatus; a page is torn out, merely a stub remaining. Here then is further matter touching the integrity of the record which calls for an explanation on the part of the party who relies upon it to rebut the *prima facie* evidence afforded by the duly enrolled bill, but no evidence of that character was adduced. From the point where the missing page occurs, the journal is complete, and shows that, in due order, the senate was notified that the house had concurred in the senate amendments; the enrolling and engrossing committee reported to the house that the bill had been duly enrolled; that the bill as enrolled had been presented to the governor and received his approval; and that all other forms usual and necessary had been observed; all going to show that the members had ample opportunity to ascertain whether its servants had omitted any of their duties with respect to this record, and must have known that it had voted on the senate amendment, and that a record of such vote had been made, otherwise the further proceedings which the record shows were taken, would have been meaningless and foolish. Now, taking into consideration the fact that in one particular this journal is conclusively shown to have been changed, after the action of the legislature on this very bill had been duly recorded, and that in another important particular it is defective or mutilated, and that no explanation of such condition is made by those who rely upon it to impeach the validity of the enrolled bill, a court must be constrained to hold that to this journal, so far as relates to the bill under consideration, the maxim, *falsus in uno, falsus in omnibus* applies, and that the court must refuse to consider it as a safe guide in determining whether this bill ever became a law, according to the mandate of the constitution. Hence regardless of whether a presumption in favor of the regularity of legislative proceedings arises, there is nothing before the court to rebut the *prima facie* proof afforded by the enrolled bill, which purports to have been duly passed, and which fact stands uncontradicted by the

journal. This court is committed to the doctrine that the records of the lawmaking body may be looked into for the purpose of ascertaining whether a statute has been constitutionally enacted or not; and that the journals of the two houses are the highest class of evidence that can be adduced to establish or disprove such legislative acts. But, unless the unimpeached journals are in existence to rebut it, the enrolled bill is *prima facie* proof of the existence of a statute, and of the regularity of its enactment. The court is, under the facts in this case, amply justified in adhering to the conclusions reached in the former opinion relative to the point now under discussion, that "the condition of the house journal as a record of legislative action upon House Roll 251 does not justify us in accepting it as an unimpeachable witness, and we accordingly hold that the bill was passed in strict conformity with constitutional procedure."

We now pass to the consideration of the third point made in the brief on rehearing; that the body of the act is broader than the title, and, therefore, contravenes the constitutional mandate found in section 11, article 3, of that instrument. We will not attempt to follow closely the reasoning in the former opinion, but will answer such objections as seem to need it, and give some of the reasons which prompt the court in adhering to that opinion, so far as relates to this point. Counsel insist that that portion of the act which requires the clerk of the district court to report the amount of his fees at stated intervals to the county clerk, with what follows thereafter, is not germane to the original section 3 which it purports to amend; but is germane to section 1. It is argued that section 3 is a mere schedule of fees, and in and of itself does not profess to designate the persons to whom they shall belong, while section 1 does. This, with some others of the matters contended for by counsel, is probably true, but the trouble with the argument of counsel is that it assumes that section 1 is complete in itself and that section 3 is not, while, as a matter of fact, neither

section makes sense without the aid of the other. The two sections, while they are numbered separately, are mutually dependent. How this condition of things came about, a brief history of the chapter may assist us in determining, and in the end serve us in reaching a right conclusion on the point in controversy. This chapter was first enacted in 1865. See Session Laws, 1865, p. 20. The act is entitled "An act to regulate the salaries and fees of certain officers in the Territory of Nebraska." Section 1 is as follows: "Section 1. Be it enacted by the council and house of representatives of the territory of Nebraska: That the salaries and fees of the several officers hereinafter named throughout this territory shall be as they are hereinafter determined, and no more." Section 2 reads: "Section 2. The fees to be received by the clerk of the supreme court shall be as follows," and thereafter follows a schedule of fees. Section 3 provides: "Section 3. The fees to be received by the clerks of the district courts shall be as follows," and here follows a schedule practically as contained in the present section 3. In 1866 the statutes of the territory were revised by the legislature, and the statute in question appeared therein as chapter 19, without other title than the word "Fees," as is the case in the current Compiled Statutes, and sections 1, 2 and 3 are similar in wording as at present. It is evident that the legislature sought brevity in the revision, and, therefore, omitted the title and section 1 of the original act, drawing section 1 so that it would apply to all the succeeding sections, and at the beginning of each of such sections merely designating the officer for whom the schedule was intended. Although this chapter has been frequently amended, its general form has continued to the present time. This review enables us to understand why sections 1 and 3 are now mutually dependent, and why neither of them taken alone makes complete sense. The chapter has been condensed from a former more expanded statute, although the sense of the older statute has been retained. Formerly, section 1 was

not necessary to the sense of any of the subsequent sections, except perhaps it made more explicit the limitation on the amount to be received by the several officers designated in the act. Ever since the revision however, section 1 is necessary to the complete meaning of all subsequent sections, as is also each of the subsequent sections necessary to the full meaning of the first. Hence, the first section must be read in connection with each of the subsequent ones, exactly as if the former were printed and embodied as a part of each of them. The chapter is nothing more, so far as concerns its substance, than one section, with numerous subdivisions, each of which it is true is denominated a section, but which is in fact merely a paragraph or subdivision. It is, therefore, as illogical to call section 1 complete as it is to designate any of the subsequent sections as complete. It takes the first and at least one of the sections following to make complete sense—"useless each without the other." This court has frequently held that a subdivision of a section, as numbered in the statutes, may, so far as relates to its construction, be a section, within the meaning of that word as employed in the clause of the constitution under discussion. *State v. City of Kearney*, 49 Nebr., 325, and cases cited. This is the settled rule of this court and rests upon a solid basis of reasoning. If a subdivision of a section may be considered as a section, within the meaning of the constitution, then there is no reason why two sections in an act constituted as this one is, where it is necessary to read both together in order to make sense, may not be considered as a single section, subdivided into clauses, with one section or subdivision understood whenever the other is read. If we adopt this view, it is evident that an amendment that would be germane to section 1 would be germane to section 3, and *vice versa*, for the two are but parts of a single section. The principal argument of counsel is to the effect that the law in question is invalid because it is clearly germane to section 1 and not to section 3, and it is contended that if the amendment had

been connected with section 1, no lawyer would have questioned its validity. This, we think, is true, and for that very reason it is also germane to the remaining portion of section 1, that is, section 3. Nor is anything contained in said amendment not germane to the two subdivisions mentioned, that is, to section 1 and section 3, as they are designated in the chapter. The two sections together, taken as they were before the attempted amendment, accomplished a number of things. They fixed and limited the clerk's salary, or income from his office, the amount he was entitled to charge litigants, and determined the disposition to be made of it. What more do the two sections, as amended, accomplish? They require him to pay the excess of a certain amount into the county treasury, which in effect merely limits him in the amount he is to receive. He is further required to report, at stated intervals, to the county clerk the items of fees that have been paid into his office. This provision is merely to enable the proper authorities to keep account of the condition of his office, and is ancillary to the main object, the limiting of his fees. Should the county board consider a deputy necessary, it fixes his compensation, to be paid out of the avails of the office, after the clerk's salary is paid. The county board has no power given it to name the deputies, or to designate how many may be appointed. The appointing power is clearly left with the clerk, under section 43, chapter 19, Compiled Statutes. Whether such deputies shall receive pay from the income of the office, and the amount of such pay, are within the board's power, but no more. The clerk still retains authority to appoint his assistants, under section 43, but they can not be paid out of the surplus unless the county board authorizes it. This provision then does nothing more than dispose of the surplus, and in nowise conflicts with section 43, nor is it amendatory thereof, and the amendatory portions are germane to the sections mentioned.

Nor do we think the act is special legislation as re-

spects the respondent. It is claimed that, although the act may be valid as against everybody else, including the successor of respondent, he was the only one to whom it was immediately applicable in so far as relates to counties having the population of Douglas, and it was not within the range of human possibilities that during his term of office there would be anybody else to whom it would apply, and that, therefore, the principle of *State v. Stuht*, 52 Nebr., 209, cited on this point on the former opinion is not in point, and that the act, so far as concerns respondent, comes within the inhibition of section 15, article 3, of the constitution, relating to prohibited special legislation. The act in question relates to all clerks of district courts, classifying them by the population of their respective counties. There is nothing in the bill to indicate that the legislature singled out Douglas county specially. It so happens that this county, by reason of its population, falls in a class to which no other county is at present eligible. There is nothing in the act which will preclude any other county in the state, so soon as it acquires the requisite population, from inclusion in the same class. While it is true that the probabilities are against any other county reaching this class during the term of office now being served by respondent, it is not impossible, and there is nothing whatever in the bill to prevent such a county from entering this class. In the absence of something more tangible than the mere doctrine of probablities, we must hold that there was no intention on the part of the legislature to enact special legislation in this bill, nor do we think it has done so.

The former opinion is, therefore, adhered to.

REVERSED.

CLAUD CLARY V. STATE OF NEBRASKA.

FILED APRIL 17, 1901. No. 11,840.

1. **Credibility and Interest of Witness for Jury.** The credibility of witnesses is alone for the jury, and the interest of any witness is proper to be considered in weighing his testimony.
2. **Instructions:** CONSTRUCTION. Instructions must be construed together.
3. ———: QUESTION OF PUNISHMENT. It is not error to tell the jury, in a prosecution for assault with intent to wound, that they have nothing to do with the question of punishment.
4. **Intent:** INFERENCE. The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it.

ERROR from the district court for Nemaha county. Tried below before STULL, J. *Affirmed.* SULLIVAN, J., dissents.

George W. Cornell, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

NORVAL, C. J.

Claud Clary was convicted of an assault with intent to wound one Charles Wright. The record is here for review without a bill of exceptions.

The instructions in the case are numerous and lengthy. Eleven were given on request of the state, twenty-three were submitted by defendant and four were given by the court on its own motion. It is not now suggested that any point in the case was not covered by the charge, but it is urged that certain paragraphs of the instructions are erroneous, among others, the following: "2. The credit of a witness depends largely upon two things, that is, first his ability to know what occurred and his disposition for telling the truth as to the occurrence. Statements by a witness having superior opportunities for knowing

what took place and superior intelligence and memory, and entirely uninterested in the event of the suit, other things being equal, is entitled to greater weight before the jury. One of the tests for determining the credibility of a witness, is his interest in the result of the suit. As a general rule a witness who is interested in the result of the suit will not be as honest, candid and fair in his testimony as one who is not so interested; but the degree of credit to be given to each and all of the witnesses is a question for the jury alone, and not for the court." Two criticisms are made upon this instruction; first, that it is argumentative, and second, it encroaches upon the province of the jury. Neither objection is well taken. Manifestly, it is not argumentative, and when taken as an entirety and in connection with the other portions of the charge, it is not vulnerable to the other attack made upon it, by counsel for the accused. It in effect told the jury, and properly so, that the credibility of the witnesses was for them alone to pass upon and in determining that question the interest of a witness is proper to be considered. By the instruction the court expressed no opinion upon any issue of fact in the case, and the court so stated to the jury in the following request tendered by the defendant. "1. The court instructs the jury that in the trial of this case and in the instructions given, the court has in nowise attempted to express its opinion as to the guilt or innocence of the defendant, and you must not construe any actions or rulings of the court in the trial of this case, or in the instructions given, as an intimation of the opinion of this court as to the guilt or innocence of the defendant." The rule is that instructions must be construed together, and when so construed, if they state the law applicable to facts and issues in the case, they will be upheld. But it is argued that the instruction assailed was prejudicially erroneous because it affirmed the principle that the testimony of any intelligent, disinterested witness, other things being equal, is entitled to greater weight than that of one less intelli-

gent, and who is interested. Without the bill of exceptions we can not know that the accused was prejudiced, since his witnesses may have been entirely free from interest, and more intelligent than those who testified for the state. If this were so, it is obvious that the defendant was not prejudiced by the giving of the instruction. We have said that in the absence of a bill of exceptions instructions will be presumed free from error, unless they are erroneous under any possible case made by the proofs under the issues. *Home Fire Ins. Co. v. Weed*, 55 Nebr., 146. *Omaha B. R. Co. v. McDermott*, 25 Nebr., 714, 720, does not conflict with the views we have expressed. In that case the instruction criticised was in the following language: "And you are instructed that witnesses who are disinterested are entitled to more weight than those who for any reason are shown to have an interest in the determination of the case. A witness who has a lawsuit of a similar character to this, against the same defendant, is not entitled to the same consideration, and his opinion is not entitled to have the same weight as that of a witness who is disinterested, and who has equally as good knowledge of what he testifies to." The infirmity in the instruction condemned is that part which suggested the idea that a witness who has a lawsuit against one of the litigants is not entitled to the same consideration as a witness who is disinterested. The difference in the two instructions is obvious.

In response to a question put to the court by a juror this instruction was given: "I have no right to instruct you as to what sentence might be in case the defendant is found guilty on either of the three counts in the indictment. That is a question [with] which you have nothing in the world to do. The question that you have to determine is simply a question of fact. It is entirely out of place for you to consider what punishment might be inflicted upon the defendant in case he is found guilty of any offense, that is a question that comes later in the case. You are to consider the evidence adduced in this

case and then determine as to the defendant's guilt or innocence and nothing else. The law prohibits this court from giving you any instructions, or making any remarks to you whatever as to what punishment the defendant might receive in case he is found guilty." This instruction assumed nothing, and very properly told the jury it was none of their business as to the punishment. That question in a case like this is for the court, and arises after verdict of guilty, and not before.

At the request of the state the court informed the jury that "a deadly weapon is one likely to produce death, or great bodily injury, as a knife, an ax, or a club." It is urged that the instruction was prejudicial, in that by naming a knife it emphasized that instrument as a deadly weapon. It did no such thing. The court designated a knife, an ax and a club as deadly weapons, and emphasized one of them no more than the others.

Lastly, it is urged that the fourth instruction given on the request of the state is erroneous. It reads: "The court instructs the jury that the intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected." The criticism is upon the use of the word "must." The court, by employing that word, merely intended to convey to the jury that the intent of a person is deducible from his words and conduct only, and not that the jury were obliged to infer the unlawful intent in the case. The instruction was doubtless copied from the opinion in *Botsch v. State*, 43 Nebr., 501.

It follows that the judgment must be, and it is,

AFFIRMED.

SULLIVAN, J., dissents.

NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V. MARY FITZGERALD ET AL., APPELLANTS.

FILED APRIL 17, 1901. NO. 9,437.

1. **Action to Foreclose a Mortgage Not Suit for the Recovery of Money Only.** An action to foreclose a mortgage is not a suit to recover money only, and consequently is not within the prohibition of section 227, chapter 23, Compiled Statutes, 1899.
2. **Suit After Death of Mortgagee:** FILING OF CLAIM AGAINST ESTATE. A mortgagee may, after the death of the mortgagor, institute a suit to foreclose his mortgage, and the mere filing in the county court of the mortgage debt as a claim against the decedent's estate while the foreclosure suit is pending will not operate as a release or discharge of the mortgage.
3. **Right of Mortgagee Under Statute:** QUÆRE. Whether, under section 848 of the Code of Civil Procedure, a mortgagee is entitled to have his debt against the general estate of a deceased mortgagor allowed in the county court while his foreclosure action is pending, *quære.*
4. **Foreclosure:** PERSONAL LIABILITY: DEFICIENCY JUDGMENT: REVIEW. A judgment fixing the personal liability of defendants in a foreclosure suit can only be reviewed after a deficiency judgment has been rendered.

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

James Manahan, for appellants.

S. L. Geisthardt, contra.

SULLIVAN, J.

This cause comes here by appeal from a decree foreclosing a real estate mortgage given by John and Mary Fitzgerald to secure the sum of $12,000 due from them to the Clark & Leonard Investment Company. John Fitzgerald is now dead and his widow, Mary Fitzgerald, is the administratrix of his estate. The appellee, the National Life Insurance Company, having succeeded to the rights of the investment company, commenced this

suit to foreclose its mortgage after the death of Mr. Fitzgerald and while his estate was being administered in the county court. Afterwards, but before the decree of foreclosure was rendered, the evidence of the debt secured by the mortgage was filed in the county court as a claim against the Fitzgerald estate. Upon this claim the court has not yet acted; it has neither been allowed nor disallowed. Nevertheless, it is, on behalf of appellants, contended that what has been done amounts in law to a waiver and abandonment of the mortgage. The argument in support of this position is that the filing of the claim was the assertion of a general lien which is inconsistent with the existence of the special lien on a part of the decedent's estate. Every mortgagee secures by his contract a special lien on some part of his debtor's property; and, speaking generally, a right to appropriate the whole of such property, if necessary to satisfy his claim. These rights continue during the debtor's life, and they are not lost by his death. When the debtor dies, the creditor's remedy for the enforcement of unsecured claims is altered; but his contract rights remain the same as before. He may still enforce his specific lien without forfeiting his right to share with other creditors in the general assets in the hands of the executor or administrator. It may be that the plaintiff could not, in view of the provisions of section 848 of the Code of Civil Procedure, enforce his claim in the county court during the pendency of the foreclosure suit; but that question is not now before us and we express no opinion in regard to it. By section 272 of chapter 23, Compiled Statutes of 1899, it is provided that "in all cases a creditor having a lien upon the real or personal estate of the deceased by judgment, execution or attachment previous to his death, may proceed to enforce said lien the same as if such death had not occurred." Section 287 of the same act declares that any creditor whose claim is secured by mortgage or other lien may rely on his security, and shall not be affected by any order of the county court settling

the accounts of an executor or administrator. It is further provided by section 227 of chapter 23 aforesaid: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in this chapter; nor shall any attachment or execution be issued against the estate of the deceased until the expiration of the time limited by the court for the payment of the debts, except in the actions mentioned in this section, and in the cases provided for in section two hundred and seventy-two of this chapter." An action to foreclose a mortgage is not a suit for the recovery of money only (*Jones v. Null*, 9 Nebr., 57), and consequently it is not within the prohibition of this section. *Null v. Jones*, 5 Nebr., 500, 9 Nebr., 60.

Considering together the various provisions of chapter 23, *supra*, it is quite apparent that the right of a mortgagee to foreclose his mortgage is not affected in any way by the death of the mortgagor; and it is equally clear that the legislature did not intend that the filing in the county court of a claim secured by mortgage or other lien on the debtor's property should work a forfeiture of the security. The following authorities bear upon the question and tend directly or inferentially to sustain the conclusion we have reached: *Meehan v. First Nat. Bank*, 44 Nebr., 213; *State v. Nebraska Savings Bank*, 40 Nebr., 342; *Andrews v. Morse*, 51 Kan., 30; *Kohli v. Hall*, 141 Ind., 411; *Simms v. Richardson*, 32 Ark., 297; Jones, Mortgages, sec. 1218; 5 Am. & Eng. Ency of Law [1st ed.], 213; 8 Am. & Eng. Ency. Law [2d ed.], 1069. The authorities cited by counsel for appellant (*Libby v. Cushman*, 29 Me., 429; *Whitney v. Farrar*, 51 Me., 418; *Evans v. Warren*, 122 Mass., 303; *Buck v. Ingersoll*, 11 Met. [Mass.], 226), to the effect that a mortgagee may waive his lien and will, under some circumstances, be held to have waived it by his conduct, are not, we think, applicable to the facts of this case. The plaintiff did not

actually intend to abandon his lien, and he has done no act which is inconsistent with the existence of the right to enforce it. His position is as logical now as it would have been had he brought a foreclosure suit against Fitzgerald in his lifetime and afterwards sued him to recover a personal judgment on the mortgage debt.

Complaint is made of a provision in the decree fixing the liability of the administratrix for a possible deficiency. This, it would seem, is a matter belonging exclusively to the county court. But this part of the decree is not a final adjudication, and is not appealable. It can only be reviewed after a deficiency judgment has been rendered. *Millard v. Parsell*, 57 Nebr., 178; *Parmele v. Schroeder*, 59 Nebr., 553, on rehearing, 61 Nebr., 553; *Morris v. Linton*, 61 Nebr., 537.

The decree, to the extent that it is final, is

AFFIRMED.

THOMAS B. MCPHERSON V. COMMERCIAL NATIONAL BANK OF OGDEN.

FILED APRIL 17, 1901. No. 9,444.

1. **Undertaking for Costs Enforceable, Though No Obligee is Named Therein.** An undertaking for costs, meeting all the requirements of the statute under which it was given, is valid and enforceable although no obligee is named therein.

2. **Synonyms:** BOND: UNDERTAKING. There is no substantial difference between "a bond for costs" and "an undertaking for costs." Each expression is the recognized equivalent of the other.

3. **Clerk of State Court:** POSSESSION OF TERRITORIAL RECORDS: PRESUMPTION. Where the clerk of a state court for a certain county has possession of the records of the territorial court for the same county, it will be presumed, both courts being of the same description, that his possession is rightful.

4. **Evidence:** OBJECTION INDEFINITE AND UNINTELLIGIBLE. A party can not justly complain of an adverse ruling upon an objection to the introduction of evidence which is so indefinite as to be unintelligible.

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

Byron G. Burbank, for plaintiff in error.

Richard S. Horton, contra.

SULLIVAN, J.

This cause, after having been tried before a justice of the peace, was removed by appeal to the district court of Douglas county, where the plaintiff, the Commercial National Bank of Ogden, Utah, recovered a judgment against the defendant, Thomas B. McPherson, for the sum of $201.55. The material facts as found by the trial judge are as follows:

"1st. That prior to November 30th, 1894, T. H. Ensor and the Ensor Remedy Company were plaintiffs in actions pending in the district court of the Fourth Judicial district of Utah; that on the 11th day of November, 1894, the defendants in said suits requested plaintiffs to furnish security for costs in each of said actions.

"2d. That on the 30th day of November, 1894, the defendant, Thos. B. McPherson, wrote to J. L. Loar, the attorney for plaintiffs in said suits, requesting him to show said letter to the Commercial National Bank, plaintiff herein, and asked them to furnish bond for costs; and stating that defendant would hold them harmless by reason of their undertaking.

"3rd. That said attorney did show said letter to the plaintiff, and the plaintiff, relying on said letter, procured T. D. Ryan and R. T. Hume to sign an undertaking for costs in each of said actions.

"4th. That each of said undertakings was in words and figures following: 'Whereas, the defendant in the above entitled action filed his notice in the district court of the fourth judicial district, in the Territory of Utah and county of Webster, notifying and requiring the plaintiff to furnish bond for costs in the above entitled action.

" 'Now, therefore, in consideration of the premises, we, the undersigned, residents and freeholders of the said territory of Utah and county of Weber, do hereby jointly and severally undertake in the sum of three hundred dollars ($300.00), to the effect that the plaintiff will pay such costs and charges as may be awarded against the plaintiff by said judgment not exceeding said amount, in which amount we acknowledge ourselves jointly and severally bound. Thomas H. Ensor, By James L. Loar, His Atty. T. D. Ryan. R. T. Hume.'

"5th. That each of said suits was prosecuted in said district court to final judgment, and judgment rendered against the plaintiff for costs. In case of Thomas H. Ensor v. E. F. Bratz for the sum of $99.65. In case of Ensor Remedy Co. v. James E. Horrocks, the sum of $65.85.

"6th. That the undertakings for costs furnished by the plaintiff were each in conformity to and in compliance with the law of Utah, and the signers thereof were under the law of Utah legally liable thereon.

"7th. That the signers of said undertakings paid and satisfied said judgments for costs, and that the plaintiff herein furnished the money with which to make such payments, relying upon the letter of defendant that he would save them harmless in so doing, and that no part of the same had been repaid to plaintiff by defendant, or any person for him."

The first argument advanced by counsel for McPherson is that the instruments signed by Ryan and Hume were not valid obligations to answer for costs, and that the judgments rendered by the district court of the fourth judicial district of the territory of Utah were paid voluntarily and not under legal compulsion. It is true that there is no obligee named in either of the undertakings, but the statute of Utah does not require that there should be. They were binding engagements, because they conform to the requirements of the law under which they were given. The validity of a statutory guaranty is not

to be determined by inquiring whether it contains the essential elements of a common law bond.

It is next contended that there was a departure in the district court from the cause of action pleaded before the justice of the peace. The bill of particulars states that the defendant requested the plaintiff to furnish "a bond for costs," while the amended petition alleges that the request was to furnish "an undertaking for costs." This difference of description is not substantial. In both courts the foundation of plaintiff's cause of action, as pleaded and proved, was the letter written by McPherson to Loar. At every stage of the case the defendant was well advised that the plaintiff was seeking a recovery on the theory that it had furnished security for costs as requested. The issue tried before the justice was the identical issue tried in the district court. It can not be of much consequence whether the obligation which a nonresident plaintiff is required to give as a condition to the right to prosecute an action in Utah is called a bond for costs or an undertaking for costs. Each expression is the recognized equivalent of the other; either description is sufficiently accurate. The learned counsel for defendant has endeavored to make a distinction that is altogether too subtle for judicial prehension; he has carried refinement of definition beyond practical limits. *Sells v. Haggard*, 21 Nebr., 357; *Levi v. Fred*, 38 Nebr., 564; *Ball v. Beaumont*, 59 Nebr., 631.

A further contention in behalf of defendant is that the judgment rendered by the district court of the fourth judicial district of the territory of Utah were not established by competent proof. Transcripts of the records of said court containing a complete history of the cases of *Ensor v. Bratz* and *Ensor Remedy Co. v. Horrock*, were offered and received in evidence over objection that they were incompetent, irrelevant, and immaterial. The cases were pending and the judgments were rendered in the district court of the fourth judicial district of the territory of Utah, within and for the county of Weber. The

transcripts, which were made after Utah became a state, are attested by Joseph P. Ledwidge as "clerk of the district court of the second judicial district of the state of Utah, within and for the county of Weber." He states in his certificate that the transcripts are true and correct copies of the recorded proceedings in said cases "as the same appears of record in my office." We think this certificate is sufficient in form and substance. It shows that Mr. Ledwidge had possession, in his official capacity, of the records of the territorial district court for the county of Weber; and the presumption will be indulged that his possession was rightful. But if the certificates were imperfect, the objection to the admission of the transcripts in evidence would furnish no ground for complaint. It was too general; it did not direct the attention of the court to any specific defect; it was merely a dark hint that some defect existed. If an objection to evidence is an enigma, it is not error to overrule it; the time of the courts should not be consumed in reading riddles. A party can not justly complain of an adverse ruling upon an objection which is so indefinite as to be unintelligible. *Gregory v. Langdon*, 11 Nebr., 166; *Dworak v. More*, 25 Nebr., 735; *Rupert v. Penner*, 35 Nebr., 587; *Maul v. Drexel*, 55 Nebr., 446; *Krull v. State*, 59 Nebr., 97; *Jewett v. Black*, 60 Nebr., 173.

The judgment is

AFFIRMED.

JEROME H. SMITH, APPELLEE, V. C. C. NEUFELD ET AL., JOHN M. DAY, INTERVENER, APPELLANT.

FILED APRIL 17, 1901. No. 11,727.

1. **Res Judicata:** FORMER HOLDING. The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and, for the purposes of the litigation, settles conclusively the points adjudicated.

2. ——: ——: PETITION: RULING ON DEMURRER. A decision of this court holding that a petition states a cause of action is an ad-

judication that the facts pleaded will, if admitted or proved, entitle the plaintiff to the relief demanded.

3. **Quia Timet: FRAUD IMMATERIAL.** In an action by the vendee of exempt property to quiet his title as against judgment creditors of the vendor, fraud is an immaterial issue.

APPEAL from the district court for Hamilton county. Heard below before SORNBORGER, J. *Affirmed.*

Stark, Day & Grosvenor, for appellant:

Smith has no standing in a court of equity, for the reason that "He who comes into a court of equity must come with clean hands." 6 Am. & Eng. Ency. Law [1st ed.], 704.

Hainer & Smith, contra.

SULLIVAN, J.

The appellee, Jerome H. Smith, having purchased of Tobias Voth certain real estate in Hamilton county, brought an action against C. C. Neufeld and Jacob I. Kroker, judgment creditors of the vendor, to quiet his title to the property. The district court sustained general demurrers to the petition and gave judgment on the merits in favor of the defendants. The case was then brought by appeal to this court, where a decision was rendered reversing the judgment on the ground and for the reason that the facts pleaded were sufficient to constitute a cause of action and to entitle the plaintiff to the relief for which he prayed. When the case went back to the district court the intervener, John M. Day, who had in the meantime succeeded to the rights of Neufeld and Kroker, filed an answer, alleging that the sale by Voth to Smith was fraudulent as to Voth's creditors and asking that his judgments be established as liens upon the land. The evidence adduced at the trial having clearly shown that all the material averments of the petition were true, the court found generally in favor of the plaintiff and rendered judgment, quieting his title. The

evidence bearing upon the charge of fraud in the transactions between Voth and Smith was held to be immaterial and no finding was based upon it. The facts alleged in the petition are fully set out in the opinion of this court reversing the judgment rendered by the district court in favor of Neufeld and Kroker. *Smith v. Neufeld*, 57 Nebr., 660. That decision determined the legal significance and effect of those facts. It is a binding adjudication, from the consequences of which the parties can not now escape. On the facts admitted by the demurrer it was held that Voth had no interest in the property that might be sold upon execution, or by any other means or process, for the satisfaction of the judgments against him. From the same facts, when established by evidence, the same conclusion results as a matter of course. *Garneau v. Kendall*, 61 Nebr., 396; *Kittredge v. Stevens*, 23 Cal., 284.

Following an almost unbroken line of authorities in other jurisdictions, this court in a number of early cases held that when a question in controversy has been once squarely decided, the decision, if acquiesced in or if not recalled, becomes the law of the case and is binding upon the parties, and those claiming through or under them, in all subsequent stages of the litigation. This doctrine was, it is true, challenged as harsh and unjust in *City of Hastings v. Foxworthy*, 45 Nebr., 676, but it has been reiterated and reaffirmed in many cases since decided, and may now be regarded as firmly established in the jurisprudence of this state.

The trial court was right in its conclusion that the evidence bearing upon the charge of fraud in the transfer from Voth to Smith was not material. After deducting from the gross value of the property the amount due upon the incumbrances conceded to be valid and enforceable, the real interest of Voth was only $267.10. This interest was exempt under the homestead law; it could not be reached by creditors, and was, consequently, incapable of fraudulent alienation. *Derby v. Weyrich*, 8 Nebr., 174; *Boggs v. Thompson*, 13 Nebr., 403; *Gillespie v. Brown*, 16

Nebr., 457; *Bloedorn v. Jewell*, 34 Nebr., 649; *Hooper v. Castetter*, 45 Nebr., 67; *Mundt v. Hagedorn*, 49 Nebr., 409; *Roberts v. Robinson*, 49 Nebr., 717; *Bank of Bladen v. David*, 53 Nebr., 608.

The trial court having conformed its action to the decision of this court on the former appeal, the judgment quieting plaintiff's title should be, and is,

AFFIRMED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLEE, V. WILLIAM M. OYLER ET AL., MINNESOTA TITLE INSURANCE & TRUST COMPANY, APPELLANT,

CONSOLIDATED WITH

PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA V. WILLIAM M. OYLER ET AL.

FILED APRIL 17, 1901. No. 9,301.

1. **Foreclosure of Real Estate Mortgage:** DEFICIENCY JUDGMENT: LIABILITY: BENEFICIAL INTEREST IN RESULT OF SUIT: APPLICATION FOR APPOINTMENT OF RECEIVER: RIGHTS OF PARTY. In an action to foreclose a real estate mortgage a defendant who is liable for a deficiency judgment has such a beneficial interest in the result of the suit that he may, if proper grounds exist therefor, apply for and obtain the appointment of a receiver for the purpose of preserving the property and the income therefrom, for the satisfaction of the debts which are a lien thereon.

2. ———: APPOINTMENT OF RECEIVER. Where mortgaged premises are probably insufficient to satisfy the mortgage debt, and the property is allowed to deteriorate and taxes to accumulate, these are grounds sufficient to justify the appointment of a receiver to take charge of the mortgaged premises, collect the rents and apply them in such manner as to preserve the property for the satisfaction of the debt for which it is pledged.

3. **Appointment of Receiver:** EVIDENCE. Evidence examined, and *held* sufficient to support the order made for the appointment of a receiver, and the application of the income of the property in his hands for the payment of the delinquent taxes assessed against the same.

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

Strode & Strode, for appellants.

S. L. Geisthardt and *Field & Brown, contra.*

HOLCOMB, J.

Two separate actions in equity were instituted for the purpose of foreclosing mortgage liens on two tracts of real estate, and the recovery of the debts secured thereby, which were afterwards consolidated and prosecuted as one action. The matters in controversy are common to both actions before consolidation; hence, the propriety of treating them as but a single case. After the execution of the mortgages, the properties mortgaged, being two adjoining improved lots, were several times transferred, the grantee in each instance assuming and agreeing, as a part of the consideration for the purchase price, to pay the mortgage debt with which the property was encumbered. At the time the action was begun the properties were owned by one Charles W. Russell, a non-resident, who prior to its commencement had executed a second mortgage on both lots to the appellant, the Minnesota Title Insurance & Trust Company, to secure the payment of the sum of $2,000. After the commencement of the action, and on the 10th day of March, 1896, the Title Insurance & Trust Company, subsequent mortgagee, obtained from the owner of the premises as further security an assignment of a lease to the premises held by the owner, and the rents accruing thereunder, amounting to the sum of $200 per month. During the pendency of the foreclosure proceedings, and on May 26, 1896, the defendant and appellee, Cochran, made application for the appointment of a receiver of the premises in controversy, in which application the mortgagor and defendant Oyler afterwards joined. A receiver was prayed for on the

ground that the applicants were liable for any deficiency that might exist after the sale of the mortgaged property; that the subsequent grantees, who were also liable for a deficiency, and to whom they stood in relation as surety to principal, were non-residents of the state, without the jurisdiction of the court, and against whom no judgment could be rendered, and that they could obtain no relief as against them, except by resort to a court of foreign jurisdiction, in the event they were required to pay any deficiency in the action at bar. It is also alleged, in substance, that the taxes on the premises have not been paid, and have been suffered to become delinquent in a large sum, and that the premises were liable to be sold for taxes; that they were in a bad state of repair, were going to waste, were falling into decay and becoming unsuitable for tenants; that the rents and profits were being diverted for the purpose of paying a subsequent lien, etc.; all of which endangered the security and rendered the property insufficient to pay the mortgage debt. The application was resisted by the Title Insurance & Trust Company on the ground that it held a valid assignment of the lease of the premises; that the applicants had no standing in court for the purpose of having a receiver appointed, and, in case of any deficiency, had ample recourse on the subsequent grantees, who were solvent, that the Russells, its creditors and subsequent grantees, were insolvent, and unless the rents and profits were applied to its lien, it would be remediless; and denying the allegations of waste. The sheriff was, on June 5, appointed a temporary receiver. On October 6 the mortgagees joined in the application for a receiver. On December 8 the applicants, Oyler and Cochran, moved to have the sheriff apply the moneys received by him as temporary receiver on the delinquent taxes assessed against the premises. This was resisted by the appellant, who prayed for an order directing the sheriff to pay the moneys held by him to it. As to the appointment of a permanent receiver, and the disposition

of the moneys collected by the temporary receiver, it was ordered by the court that a permanent receiver be appointed, and that the temporary receiver be directed to pay and apply the moneys received by him on delinquent taxes assessed against the mortgaged premises. From the order directing the temporary receiver to pay the moneys collected by him in satisfaction of taxes assessed against the premises, and denying appellant's motion to have the same paid to it, an appeal is taken to this court, and we are called upon to decide as to the correctness of the ruling referred to.

It is argued by appellant that the order is in violation of its rights as an assignee of the lease of the premises and the rents accruing thereunder; that Cochran and Oyler had no such interest in the suit as would give them a standing to apply for the appointment of a receiver, and that the subsequent grantees, being financially responsible for any deficiency, the applicants would not suffer any injury, and that the evidence was not sufficient to authorize the appointment of a receiver. It occurs to us that but two principal propositions are involved in a proper discussion of the case: First, were the applicants, occupying the position they did with relation to the suit, entitled on their motion in a proper case to have a receiver appointed; and second, under the facts as disclosed by the record, was it an abuse of discretion in the trial court to appoint a receiver of the property and direct the payment of the moneys collected in the manner stated?

By the provisions of the statute a receiver may be appointed for several causes, among which are: (*a*) In an action by a creditor to subject any property or fund to his claim, or between those jointly owning or interested in any property or fund which is in danger of being lost, removed or materially injured; (*b*) in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt; and (*c*) in all other cases where receivers have heretofore

been appointed by the usages of courts of equity. Code of Civil Procedure, sec. 266. The property mortgaged is pledged to the payment of the mortgage debt. In equity, the property must be exhausted before a deficiency judgment can be recovered. The mortgage provided, in express terms, that the mortgagor (and grantees) would keep the premises in repair, and pay the taxes assessed against the same. The charges to meet the public revenues were a prior lien to the mortgage, and as they were permitted to accumulate, to that extent lessened the mortgage security and enhanced the probability of a deficiency when resort was had to proceedings to subject it to the satisfaction of the debt. The property, by virtue of the delinquent taxes, was subject to sale at any time, which would entail as an additional charge, costs, penalties and a high rate of interest, all calculated to depreciate the value of the mortgage security. If in all these matters the appellant was charged with notice at the time of taking its second mortgage security, as assignee of the lease of the premises and the rents accruing thereunder, it, by that fact alone, stood in no better position than the owner and lessor.

The applicants for the appointment of a receiver had such an interest in the result of the suit as made it of vital importance to them that the premises should be preserved from waste and decay, from tax liens or other causes which would lessen the security for the debt for which they were personally liable. They had no adequate and certain remedy with respect to the alleged solvency of their subsequent grantees, who were pecuniarily liable for any deficiency, and who stood to them in the relation of principal and surety. These parties were beyond the jurisdiction of the court, and were not parties to the action. Nothing could be determined as against them as to any liability for a deficiency. In jurisdictions where insolvency of a mortgagor is required in determining the inadequacy of security for the purpose of furnishing a basis for the appointment of a receiver,

absence of a solvent mortgagor or other person liable personally for the debt is held to be sufficient, the same as though insolvency was made the basis. For reasons analogous, the alleged solvent grantees being without the jurisdiction of the court, the fact of their solvency would not prevent the appointment of a receiver, if otherwise proper. Under our statute, the insolvency of the mortgagor or other person liable for the mortgage debt is not required before the appointment of a receiver is justified. "Where the mortgaged property is probably insufficient to discharge the mortgage debt," says the statute, a receiver may be appointed. The receivership is asked only for the purpose of preserving the property, sequestering the rents and profits and having them applied to the extinguishment of taxes, which are a first and prior lien, which enhances the security of the second as well as the first mortgage, and is in the interest of all parties concerned.

The appellant's position is, in effect, to have its second mortgage declared a prior lien over all others, by directing the income of the property, which in equity and under the terms of the mortgage should be applied to the preservation of the property and the payment of charges existing against the same for purposes of revenue, to be paid to it. As between the subsequent mortgagee and persons liable personally for a deficiency, the equities are in favor of the latter, who should be relieved of liability before the property or the income therefrom should be taken to satisfy the debt due under the subsequent mortgage. The statute does not restrict the application for a receiver to a plaintiff, nor is it believed such was intended by the legislative enactment. A defendant may, in a proper case, be heard to make such an application. A receiver will be appointed when justice and equity will thereby be promoted (Beach, Receivers, sec. 12); and on the application of a defendant against a co-defendant when a party is beneficially interested, and to prevent fraud and spoilation. Beach, Receivers, sec. 53; *State v.*

Northern C. R. Co., 18 Md., 194; *Henshaw v. Wells*, 9 Humph. [Tenn.], 566. It would be, it seems to us, permissible for a mortgagor of premises afterwards conveyed to a third party, and which secured a debt upon which he was personally liable, in an action to foreclose such mortgage, and where waste or inadequacy of security is made the basis, to apply for a receiver of such premises for the purpose of having the debts satisfied out of the property pledged to their payment according to priorities, regardless of the question of his solvency and liability to meet a deficiency by reason of his personal liability, and in this case we hold that the mortgagor and grantee had such a substantial and beneficial interest in the suit by reason of their personal liability for the debt as would give them a standing in a court of equity for the purpose of applying for a receiver to take charge of and preserve the mortgaged property, and apply the income to the payment of taxes or in satisfaction of the mortgage debt, and thus lessen their liability and save them from injury by reason of a judgment for deficiency.

On the second proposition, to-wit, the sufficiency of the evidence to warrant the appointment of a receiver, we think it abundant to justify the action taken. The rule is that an appointment of a receiver will not be disturbed on appeal, unless it clearly appears that there has been an abuse of discretion and the order ought not to have been entered. Beach, Receivers, sec. 118; *Roberts v. Washington Nat. Bank*, 37 Pac. Rep. [Wash.], 26; *Sanders v. Slaughter*, 89 Ga., 34; *Beaumont v. Beaumont*, 166 Pa. St., 615; *Fluker v. Emporia C. R. Co.*, 48 Kan., 577. And where the order is based on conflicting evidence, it will not be disturbed, unless clearly wrong. *Beaumont v. Beaumont, supra; Nimocks v. Shingle Co.*, 110 N. Car., 230; *Ponder v. Tate*, 96 Ind., 330. Where the mortgaged premises are probably insufficient to satisfy the mortgage debt, the property allowed to deteriorate, and taxes to accumulate, these circumstances are all reasons appealing strongly to a court of equity for the appointment of

a receiver to take charge of the mortgaged premises, collect the rents and apply them in such manner as to preserve the property for the satisfaction of the debts for which it has been pledged. *Rogers v. Marshall*, 38 How. Pr., 43; Beach, Receivers, sec. 530; *Wall Street Fire Ins. Co. v. Loud*, 20 How. Pr. [N. Y.], 95; *Stockman v. Wallis*, 30 N. J. Eq., 449; *Finch v. Houghton*, 19 Wis., 163; *Haugan v. Netland*, 53 N. W. Rep. [Minn.], 873; *Schreiber v. Carey*, 4 N. W. Rep. [Wis.], 124; *Farmers Nat. Bank v. Backus*, 66 N. W. Rep. [Minn.], 5. In *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Nebr., 804, 813, this court announces the rule as follows: "The fact that the mortgaged premises are of insufficient value to pay the amount of plaintiff's claim, and costs, coupled with the further facts that the order confirming the sale may possibly be reversed, that the defendant is collecting the rents and refuses to apply the same on the decree or in payment of the taxes and assessments against the property or to keep the premises insured, and the liability of the real estate being sold for the non-payment of said taxes, justify the appointment of a receiver." The case at bar comes entirely within the reason of the rule in the case just cited.

The order of the district court complained of is right and should be affirmed, which is accordingly done.

AFFIRMED.

TECUMSEH NATIONAL BANK OF TECUMSEH V. MARY A. S. MCGEE.

FILED APRIL 17, 1901. No. 11,761.

1. **Exception to the Rule that Administrator or Personal Representative of Decedent Must Prosecute for Debts Due Estate: SUBSTITUTION OF HEIR AT LAW.** While the general rule is that an administrator or personal representative of a decedent's estate must prosecute actions for recovery of debts due the estate, there are exceptions to the rule; and in the present case *held* that the order of the trial court, substituting an heir at law and permitting her to prosecute the action for her interest in

the claim in controversy in her own name, the other heirs having settled and compromised theirs, was not erroneous.

2. **Setting Aside Order of Dismissal Made on Stipulation:** HEIR AT LAW SUBSTITUTED PLAINTIFF: ABSENCE OF BILL OF EXCEPTIONS: PRESUMPTION. Where, during the proceedings in an action to recover a debt alleged to be due an estate, the trial court, on application of an heir at law, sets aside an order of dismissal made at the same term, on a stipulation entered into by the administrator and the defendant, and permits the heir at law to be substituted plaintiff and prosecute the action in her own name and right for her interest in the subject-matter of the litigation, and the evidence upon such hearing has not been preserved in a bill of exceptions, the presumption is that there was sufficient evidence to support the finding and order made by the trial court on such hearing.

3. **Settlement by Administrator:** RIGHTS OF HEIR AT LAW: POWER OF COURT: SUBSTITUTION. Where a settlement of a matter in litigation is entered into by the administrator, which is prejudicial to the substantial rights of an heir at law, and not such as properly protects her interests, or was entered into collusively and in fraud of her rights and without her consent, *held*, the court may properly, under the circumstances, permit the heir at law to be substituted to prosecute the action in her own name.

4. **Substitution:** STATUTE OF LIMITATIONS. Such substitution would not be equivalent to the beginning of a new action, and the statute of limitations can not be interposed by reason thereof.

5. **Matters of Law May Be Properly Withdrawn from Jury.** Action of the trial court in disposing of the first, second and third defenses, pleaded in the answer, as matters of law, to be decided by the court, and withdrawing the same from the consideration of the jury, *held* proper.

6. **Rulings of Trial Court Made During Pendency of Action Are Res Adjudicata.** Where the questions raised by the defense pleaded have been disposed of by the rulings of the trial court, made during the pendency of the action, they have become *res adjudicata*, and are not proper questions to be tried by the jury as issues of fact.

7. **Bank Officer and Stockholder:** TRANSFER OF INTEREST: DIRECT LEGAL INTEREST. Where a person was a stockholder and an officer in a bank at the time of an alleged deposit out of which litigation grew, but before the litigation, and long prior to the death of the plaintiff who began the litigation, transferred all his interest in the bank and severed his connection therewith, he would not, on a subsequent trial of the case, after the death of the plaintiff, by reason of his prior connection with the bank, be incompetent to testify as to transactions had with the de-

ceased plaintiff at the time of, and relating to, the alleged deposit, and would not have a direct legal interest in the result of the suit, within the meaning of section 329 of the Code.

8. **Witness:** DIRECT LEGAL INTEREST. If a judgment pronounced in a pending action will be legal evidence for or against the witness in another action, then such witness has a direct legal interest in the result of the suit, which renders his testimony incompetent under the provisions of said section.

9. **Wi n ss:** INCOMPETENT TESTIMONY. Testimony of witness as to transactions inquired about *held* incompetent as against the representatives of the deceased by reason of his connection with the firm or bank of Russell & Holmes, of which he was a member.

10. **Testimony of Deceased on Former Trial:** PARTICULAR TRANSACTION INVOLVED. Where testimony of a deceased person taken on a former trial is read in evidence at a subsequent trial, but not relating to a particular transaction involved in controversy, the testimony of a witness regarding such particular transaction is not thereby rendered admissible.

11. **Instruction:** ONUS PROBANDI: FAIR PREPONDERANCE OF EVIDENCE. Where, under the pleadings, the burden was on the defendant, it is not error to charge the jury that "unless you find further that the defendant has proved by a fair preponderance of the evidence that defendant has paid to George W. Harmon or the bank of Russell & Holmes on the authority of George W. Harmon the sum of $5,000 and interest, if you find that interest was to be paid by defendant bank, you must find for the plaintiff."

12. **Instructions.** Instructions examined, and found to be pertinent to the issues as presented by the pleadings, and the giving of the same without error.

13. **Evidence.** Evidence examined, and found to support the verdict and the judgment rendered thereon.

ERROR from the district court for Johnson county. Tried below before STUBBS, J. *Affirmed.*

S. P. Davidson and *Frank M. Hall,* for plaintiff in error.

Jefferson H. Broady and *E. F. Pettis, contra.*

HOLCOMB, J.

The plaintiff's right of action is based on an alleged deposit of $5,000 made by one George W. Harmon in the defendant bank, plaintiff in error in this court. On a

former appeal the case was reversed, because, under the answer which, by stipulation, was permitted to be filed after the trial, the plea of payment was tendered, and the instructions failed to properly present to the jury that issue. *Tecumseh Nat. Bank v. Harmon*, 48 Nebr., 222, 226. Says Commissioner IRVINE in that opinion: "As the issues stood at this time, the petition was on a deposit. The answer was a general denial, and under this answer the defendant could not prove discharge by payment or otherwise; but under the answer as finally filed, while it was perhaps not very artificially drawn, the issue of payment was presented; and the question was not merely whether a deposit had been made on March 6, but it was whether the bank had discharged the liability thereby incurred by collecting the check and paying its proceeds to Russell & Holmes, in pursuance of plaintiff's direction." The issues respecting the alleged deposit and the discharge of the obligation thereby created remain substantially the same as in the first trial. After the case was reversed and remanded for further proceedings, the then plaintiff, George W. Harmon, died, and the action was revived and prosecuted in the name of the administrator of the estate of the decedent. A second trial was had, resulting in a disagreement of the jury. Thereafter the administrator entered into a compromise and settlement of the case by defendant paying $800, or $200 for each of the four heirs of the estate. A stipulation embodying the terms of the settlement was entered into and filed in the case, upon which judgment was rendered. The stipulation seems to have had the consent and support of three of the heirs, one of whom was also a stockholder in the defendant bank. The fourth heir, who was afterwards substituted plaintiff in the action, and who is now the defendant in error, at the same term of court at which the stipulation of settlement was filed and judgment rendered thereon, presented a motion and objections to the settlement, claiming that it was without her knowledge or consent and unauthorized, and violative

of her rights as one of the children of the deceased, an heir to the estate, and that the court was without jurisdiction to enter the order made without her consent, and prayed that the settlement and the judgment thereon be vacated and set aside, and that she be permitted to be substituted as plaintiff and prosecute the action in her own name, in the event the administrator refused or neglected so to do. After a hearing on the motion, the evidence taken at the time not being preserved in a bill of exceptions, the court sustained the motion as to the one-fourth interest in the cause of action set forth in the petition of the party objecting, upon condition that she pay or return to the defendant the $200 paid to the administrator as her proportion of the money paid under the terms of the settlement. This she did, and thereupon was permitted to, and did, prosecute the action to final judgment in her favor for one-fourth of the amount found due on the cause of action stated in the petition. From this judgment the defendant prosecutes error to obtain a review of the proceedings had in the trial court.

It is contended that the order substituting and permitting the defendant in error to prosecute the action in her own name, as was done, was erroneous, and that she is without legal capacity to sue; that the administrator alone can prosecute the action, involving, as it does, a claim due the estate of which he is the duly constituted and legal representative, and we are cited to the case of *Cox v. Yeazel*, 49 Nebr., 343 in support of the contention. In the first and second paragraphs of the syllabus in that case it is held: "Generally, an action to recover a debt payable to a deceased intestate must be brought by the administrator of the estate." "Such an action cannot be maintained by the heirs at law, unless there be no demands against their decedent ancestor, and there has been no administration, or the administration has been closed." Says NORVAL, J., in the opinion, page 349: "Counsel for plaintiffs below concede the general rule to be that the heirs cannot sue for assets belonging to

an estate of an intestate, but that such action must be brought by the administrator. They insist, however, that this rule has a general recognized exception, that when it is shown that the estate owes no debts and that no letters of administration have been granted, the title to the personal property and choses in action passes to the heirs and they may sue to recover the same, and distribute the assets among themselves without the expense of administration. That such doctrine exists and is abundantly sustained by the authorities, cannot be doubted. Where there are no liabilities or debts against the estate of an intestate, there is no necessity for increasing the expense of administration, and in such case the heirs may maintain an action to recover a debt owing the estate. * * * His estate had not been fully settled, nor is it alleged that even the costs of administration have been paid; hence, the administrator, and not the heirs, had the right to recover the debts due his intestate." The purpose of the rule unquestionably is to prevent different suits on the same cause of action, and it is also necessary because the creditors of an estate have an interest therein, which can be protected only by the personal representative, to whom they may look for the conservation of the estate and its assets until the debts against the same are satisfied and the costs of administration paid, after which no other interests are involved, save those of the heirs, who may then be allowed to prosecute in their own names an action for the recovery of a debt due the estate. There is a marked distinction between the case at bar and the one cited. The conditions are entirely dissimilar. By the stipulation of settlement the defendant agreed to and paid $200 to each of the four heirs of the deceased, except the defendant in error, and for her $200 was paid to the administrator for her use as the only remaining heir at law of said deceased. This payment she refused to authorize, accept or consent to. No creditors of the estate were concerned in the settlement. It was not made with the adminis-

trator for the purpose of swelling the assets of the estate to pay debts. These had evidently been provided for. The right of the heirs at law were recognized, and as to three of them the money, according to the terms of the settlement, was paid direct, and their consent obtained and authority recognized. The money for the fourth heir only was paid to the administrator and for her use and benefit. The defendant bank was a party to all these proceedings and, having recognized the rights and authority of the heirs at law in the premises, ought now to be estopped from denying the substituted plaintiff's right to repudiate the settlement as to her and prosecute on her own behalf for her interest in the debt sued for. The other heirs at law, having accepted the benefits of the settlement so far as it affected them, are not now in a position to claim anything from the defendant by reason of its obligation on the alleged deposit. The case is thus taken out of the general rule respecting the right of the personal representative to prosecute an action and represent the interests of creditors and heirs in a decedent's estate. The right of recovery in the case at bar is restricted to the interest of one only of the heirs at law. The defendant has received from her the $200 paid for her use to the administrator, and is thus estopped from claiming a settlement of the controversy as to such interest. The evidence submitted on the motion to vacate the order of dismissal entered on the stipulation of settlement we are to assume is sufficient, and the order can not now be subject to review. We may presume, in the absence of this evidence, that it was shown that the estate was settled up, or so far that all necessary arrangements had been made for the satisfaction of all claims against the estate and the costs of administration, leaving the subject of the present controversy purely one affecting the rights and interests only of the heirs at law. But even if this is not the case, the proceedings must be regarded as an exception to the general rule. By the terms of the compromise the heirs, or the estate, were

receiving but little, an insignificant sum compared with the amount claimed in the petition. There was no substantial increase in the general assets of the estate. The sums paid went to the heirs at law. One heir disavowed the settlement, and certainly had the right to be heard in her own behalf, if not for the estate and all interests represented therein. The court found in her favor. This was equivalent to finding that the settlement was unwise and improvident, and prejudicial to her substantial rights or collusive and in fraud of her rights, and that the act of the representative of the estate was not such as to properly protect her interests. Thereupon she was given the right to prosecute in her own behalf. This, we think, was proper to be done under the circumstances of the case, and no error was committed in so doing. 15 Ency. Pl. & Pr., 639; *United States Trust Co. v. New York, W. S. & B. R. Co.*, 67 How. Pr. [N. Y.], 390; *Quackenbush v. Leonard*, 10 Pai. Ch. [N. Y.], 131; *Holley v. Glover*, 9 Pai. Ch. [N. Y.], 9; *Dugger v. Tayloe*, 60 Ala., 504, 517; Story, Equity Pleading, sec. 514; 1 Daniell, Chancery Pleading & Practice, 324.

It is asserted by plaintiffs in error that the cause of action as to the substituted plaintiff in the court below is barred by the statute of limitations. This is upon the theory that the act of substitution was equivalent to the commencement of a new action. We are unable to agree with counsel in this view of the case, and must hold that the action was but the continuation of the prior proceedings, and that during its pendency the statute did not run. There is no change of the cause of action pleaded in the original petition or abandonment thereof; nor is there a change of parties, except that the real party in interest was substituted for the administrator. The supplemental petition presents no amendment to the cause of action originally pleaded, but only matters occurring after the commencement of the action, and more particularly with reference to the action taken regarding the settlement, and which led to the substitution

of the plaintiff in place of the administrator, and granting her leave to prosecute from that stage of the proceeding forward. The issues as originally presented have continued until the present to be identical, save as a settlement with the three heirs mentioned has reduced the demand against the defendant in that proportion. The case is analogous to one of revivor or substitution of parties by reason of change in interest during the pendency of the action, and the same rule as to the running of the statute would apply in each instance. The cases cited (*Buerstetta v. Tecumseh Nat. Bank*, 57 Nebr., 504; *Wigton v. Smith*, 57 Nebr., 299) are not in point. In each of the cases mentioned the subsequent proceedings were held to have worked an abandonment and discontinuance of the cause of action originally begun, and the beginning of substantially a new action, against which the statute had run. These and similar cases cited are not authority in the present case.

In the answer to the original and supplemental petition the defendant, as a first, second and third defense pleaded in substance that the action was barred by the statute of limitations; that the plaintiff had no right or legal capacity to sue and prosecute the action, and that the settlement heretofore referred to was a bar to a right of recovery by the substituted plaintiff. In the instructions the court told the jury that regarding these first three defenses they had nothing to do, but should determine only the issues as raised by the fourth defense. This was the original defense interposed, and substantially as pleaded in the answer filed after the first trial, and which was construed as a plea of payment in the opinion rendered in this court heretofore referred to. Objection is made to this instruction, because it took away from the jury the right to find as a question of fact any of the matters presented in the first three defenses. These questions, except that of the statute of limitations, were disposed of by the rulings of the court made during the pendency of the trial, and were not thereafter

the subject of litigation, upon which an issue of fact might be raised and tried to the jury. They had become matters *res adjudicata* upon the ruling of the trial court on the motion and objections interposed by the plaintiff to the settlement had and dismissal of the case by reason thereof. The question of the running of the statute of limitations, as raised by the answer, is a question of law only, and was properly ruled on by the trial court, as we have heretofore expressed ourselves. The only question proper to be submitted to the jury under the issues was the one of payment or discharge of the obligation by the defendant for the deposit which it is admitted came into its possession, and which it seeks to avoid by the plea that it was paid to the firm or bank of Russell & Holmes upon the authority and at the instance and request of the deceased.

To avoid its liability by reason of the deposit made by the plaintiff, the defendant bank sought to prove that the funds so deposited were paid to the firm or bank of Russell & Holmes by the authority of the deceased, under an agreement made by him with Holmes at the time of leaving with the bank the check drawn by deceased in its favor and against the Carson National Bank of Auburn, the proceeds of which check were received by and deposited in defendant bank. The testimony of Holmes, taken in the form of depositions, was offered in support of plaintiff's theory in this regard. Complaint is made because of the exclusion of that portion of the testimony which related to the original transaction claimed by defendant to have been had by and between the deceased and the witness Holmes when the deposit was made. The evidence was excluded on the ground that Holmes had a direct legal interest in the result of the action, and was therefore disqualified from testifying regarding such transaction under the provisions of section 329 of the Code of Civil Procedure. It is argued that the ruling of the trial court in excluding the evidence was correct for two reasons: first, because Holmes

was, for quite a while after the transaction referred to, a stockholder in the defendant bank, and therefore incompetent to testify; and second, that as a member of the firm or bank of Russell & Holmes he had such an interest in the result of the controversy as would also render his testimony incompetent.

It is disclosed by the record that at the time of the transactions in relation to the deposit and the payment of the proceeds to the firm or bank of Russell & Holmes, Holmes was an officer and stockholder in the defendant bank. This was about March 6, 1891. In October, 1892, and prior to any litigation regarding the deposit, and long prior to the death of Harmon, the original plaintiff, Holmes severed his connection with the defendant bank, transferred all his interest therein, since which time he appears to have been in no wise connected with or interested in its affairs. An action was begun by the plaintiff in his lifetime on the alleged deposit, November 26, 1892, and after trial and judgment in the case, which upon error was reversed and the case remanded, the plaintiff in the action, in September, 1896, died. It is under these facts that we are called upon to decide whether, upon a second trial by the representatives of the deceased plaintiff, the testimony of the witness Holmes is rendered incompetent by reason of the provisions of the section referred to. Had the transfer of interest been made subsequent to the death of the original plaintiff, we think the effect of the operation of the statute would be to disqualify the witness under the rule announced in *Magenau v. Bell*, 13 Nebr., 247, where it is held that a transferrer of a claim against an estate can not, by reason of the transfer, qualify himself to testify regarding a transaction as to which he would be incompetent to testify because of the section referred to were it not for such transfer. It is by this rule held to be against the policy of the law to permit the statute to be evaded and its purposes thwarted by a transfer of interest in a matter which may be a subject of litigation. He is, notwithstanding the transfer,

deemed to have a legal interest in the result of the litigation, which brings him within the scope and object of the statute. But can it be said that a person who has parted with all interest in the subject matter of litigation before the death of any of the parties in interest, and before the statute can be invoked or become effective, is rendered incompetent to testify regarding a transaction with a party who afterwards dies, and whose representatives are parties to the action? Is it the intention of the statute to exclude the evidence of such witness? In *Sorensen v. Sorensen*, 56 Nebr., 729, it is held: "The incompetency of one as a witness, or the incompetency of his evidence, must be found in express law and not based on strict or technical construction. If there is reasonable doubt, the witness and the evidence are competent." The exclusion of evidence under consideration is based on the statute, which declares that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness" etc. Code of Civil Procedure, sec. 329. The ground of incompetency is solely one of legal interest in the result of the suit. To render the testimony of the witness incompetent it must appear that he has a direct legal interest in the result of the suit. "The true test," says RAGAN, C., in *Sorensen v. Sorensen*, *supra*, "is, as it was at common law, will the witness gain or lose by the direct legal operation and effect of the judgment or final order rendered in the proceeding in which the testimony is offered." 1 Greenleaf, Evidence, sec. 390. Tested by these rules, it does not appear that the witness Holmes had such an interest in the result of the suit growing out of his prior connection with the defendant bank as would preclude him from testifying as a witness in the case to the transactions or conversations had with the deceased regarding the disposition to be made of the funds on deposit with defend-

ant bank. At the time the controversy arose his former interest in the bank was wholly divested, and at the time of the death of the plaintiff thereafter his relation to the subject matter of the controversy was that of a witness wholly disinterested; and at no time since the death of Harmon has he had any legal interest in the result of the action begun prior thereto. We conclude, therefore, that the witness was not rendered incompetent by reason of his connection with the bank at the time the transaction was entered into and for a short time thereafter.

We are next to inquire whether, by reason of the witness's connection with the bank of Russell & Holmes, of which he was a member, and to whom it is alleged the deposit was paid on the authority of Harmon, he was disqualified from testifying to the transaction between him and the deceased inquired about. Under the issues, the bank of Russell & Holmes, and not defendant bank, was alleged to be the debtor of Harmon for the funds deposited by him in the defendant bank. This Harmon and his representatives after him denied, claiming defendant bank as his debtor, and denying any transaction with the firm of Russell & Holmes. If the judgment pronounced in the pending action will be legal evidence for or against the witness in another action, then he has a direct legal interest in the result of the suit, rendering his testimony incompetent, under the provisions of the statute quoted. 1 Greenleaf, Evidence, sec. 390. *Sorensen v. Sorensen, supra; Eisenlord v. Clum,* 27 N. E. Rep. [N. Y.], 1024.

It is to be noted that the judgment in the present case would not be binding on the witness or the firm of which he was a member, as to its liability for the money alleged to have been loaned and paid to the firm as the funds deposited by Harmon. The judgment, however, is evidence that, in the present proceedings, the bank has been adjudicated to be the debtor of Harmon for the money deposited, and liable to him or his representatives therefor, and that Harmon and his representatives, having

obtained the judgment, are estopped from claiming or recovering anything from the firm of Russell & Holmes for the moneys by it received from the defendant bank as being the funds deposited by Harmon and belonging to him. It is certainly competent evidence for the purpose of releasing the firm of Russell & Holmes from liability to Harmon and his representatives. Whatever liability exists against the firm of Russell & Holmes may by the evidence of the judgment be shown to be in favor of the defendant bank, or those claiming through it. Whether Harmon or the defendant bank shall be proven to be the creditor of the firm of Russell & Holmes is a matter which may, in many ways, be of vital importance to them. It is quite possible that knowledge of the running of the statute of limitations pending litigation makes Holmes entirely willing that a judgment should be obtained exonerating the bank from liability and indirectly charging the firm of which he was a member therefor. Other circumstances connected with a change of creditors and debtors also enter into the question of interests to be affected by the judgment as evidence in another action. Says NORVAL, J., in *Kroh v. Heins*, 48 Nebr., 691, 698: "It is not material on which side of the case her greater interests lie, since her competency as a witness is not to be determined by the weighing of her conflicting interests. A direct legal interest in the event of an action disqualifies a witness from testifying to transactions or conversations with the deceased, whether such interest be great or small." *Wylie v. Charlton*, 43 Nebr., 840.

In an action against the firm of Russell & Holmes on their liability for the money paid them, or for their use in canceling certificates of deposit held by defendant bank, claimed to have been the amount deposited by Harmon, the judgment in the present case would be competent evidence for the purpose of proving its rendition in favor of Harmon's representative, and its satisfaction by the bank. 2 Greenleaf, Evidence, sec. 116; 1 Green-

leaf, Evidence, sec. 525; *Eisenlord v. Clum, supra.* Says Greenleaf, first volume, section 538, speaking of the admissibility of judgments as evidence in a case: "It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered as evidence." And in 1 Wharton, Law of Evidence, sec. 823, illustrating the rule as to the admissibility of judgments as evidence and for what purpose: "A judgment by A against B, for instance, in a private claim, is not admissible in a suit by A against C, as proof of any direct indebtedness from C to A; but if in A's suit against C it becomes relevant to show that A had obtained and collected a judgment against B, then the record of the judgment in the suit of A against B is admissible for this purpose. * * * Thus, a judgment establishing the relationship of debtor and creditor between A and B may be afterwards used collaterally to show *prima facie* such relationship." And in 2 Black, Judgments, sec. 604, it is said: "And so when the money sought to be recovered under a count for money paid has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the fact of the judgment and the amount so recovered." To the same effect are Freeman, Judgments, sec. 416; 7 Am. & Eng. Ency. Law, p. 76. The conclusion proper to be reached, therefore, is that the witness, by reason of being a member of the firm of Russell & Holmes, had such a direct legal interest in the result of the suit as would render his testimony incompetent under said section 329 of the Code, and its exclusion by the trial court was without error.

The defendant also offered to prove by two other officers and stockholders of the bank, one the president and the other the cashier, that they heard a conversation between Holmes, then president, and the deceased, in which Holmes stated to the deceased that he, the deceased,

knew that the loan was made to Russell & Holmes, and that the Tecumseh National Bank had nothing to do with it; and that the deceased made no denial thereto during the entire conversation. An examination of the record discloses that the purported conversation was between the officers and stockholders of the bank, on the one side, and the deceased on the other, in which different ones took part, and as to the officers of the bank, all should be regarded as participants. Being stockholders and officers in the bank, they had a legal interest in the action, and they were rendered incompetent to testify regarding such conversation. Whether the statement alleged was made by Holmes or other members of the party who were present at the time, all, so far as the record goes, stood in a representative capacity, acting in the interest and on behalf of the bank, so that their right to testify to the conversation does not come within the rule laid down in *Kroh v. Heins*, *supra*, where it is said: "Within the light of the authorities already mentioned, the conclusion is irresistible that Mr. Morton had such an interest in the outcome of the suit as to disqualify him from giving the contents of the letters written to himself by Von Heilen, since the reception of such letters, within the meaning of the statute, constituted transactions between the witness and the deceased. Doubtless, his testifying to the contents of the letter alleged to have been received by Mrs. Heins was not an infringement of the statute, as it merely excludes proof of transactions and conversations between the witness and the deceased. The provisions of section 329 do not apply where the transaction or conversation was not between the witness and the decedent, but between the latter and a third person"; citing a number of cases. It was not error to sustain the objections interposed to the admission of the testimony of the witnesses regarding the alleged conversation with the deceased.

It is further claimed that the evidence should have been admitted, because during the trial certain of the

testimony given by the deceased during his lifetime, when on the first trial of the case, was received in evidence. It appears that the defendant, for the purpose of proving certain parts of its defense, offered in evidence some of the testimony given by the deceased on the former trial. For the purpose of cross-examination only the plaintiffs offered certain other portions of the testimony of the deceased witness, but not regarding the transaction inquired about. In rebuttal some further of the same testimony was offered. None of the evidence offered by reading portions of the testimony of the deceased as cross-examination or in rebuttal can be said to come within the provisions of the Code, excluding the testimony of those having a direct legal interest in the result of the action, "unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation." We are disposed to the view that the introduction of this testimony, in the manner it was introduced, did not open up the subject, or remove the bar of the statute, so as to permit the introduction of the testimony sought, for the purpose of proving the transaction originally had with the deceased, or the purported conversation with relation thereto.

Complaint is made because the court instructed the jury that "unless you find further that the defendant has proved by a fair preponderance of the evidence that defendant has paid to George W. Harmon or the bank of Russell & Holmes on the authority of George W. Harmon the sum of $5,000 and interest, if you find that interest was to be paid by defendant bank, you must find for the plaintiff." We find nothing worthy of severe criticism in this instruction. In substance, it required the defendant to prove, by a fair preponderance of the evidence, the defense pleaded in its answer. This, under the issues, was entirely proper.

Other instructions given, which were excepted to, are also criticised as being prejudicially erroneous to the defendant. These instructions were pertinent to the issues as presented by the pleadings, and we find no substantial merit in the criticisms thus made. The objections are based primarily upon the assumption by defendant's counsel that the question of whether a contract of deposit between the defendant bank and the deceased was actually entered into, is one of the issues in the case. According to the argument of counsel, the defendant bank never received the money as a deposit, acting only as the agent of the deceased in transferring his money in the Carson National Bank to the firm or bank of Russell & Holmes, to whom, it is claimed, he loaned the money. This view of the case can not be maintained, and is a wrong conception of the issues as made by the pleadings. This question was disposed of in the former opinion, in which it was held that the answer presented a plea of payment, which has become the settled law of the case. It is now too late to urge that the issue is different. The instructions conformed to the pleadings, as construed heretofore in this court, and were properly given. The pleadings and the evidence established a contract of deposit with the defendant bank, and to avoid its liability it was incumbent on the bank to prove payment to the firm or bank of Russell & Holmes, as alleged, under the authority and at the instance and request of the deceased.

Some complaint is made because of the wording of some of the instructions, it being claimed that they evidence a feeling upon the part of the trial court favorable to plaintiff and prejudicial to the defendant. It is very difficult to draw an instruction that is entirely satisfactory to both parties to the case, and we think in this instance no more reason exists for objection to the instruction than is ordinarily the case where the law is construed to be other than that contended for by counsel.

Some other objections are presented, not, however,

well taken, regarding both the instructions and the evidence, which we have considered, but which we deem of minor importance, and have not reviewed them in detail.

Finally, it is insisted that the evidence does not support the verdict. From an examination of the record in the case, we think the evidence under the issues justifies the finding of the jury and supports the judgment in favor of the plaintiff. Briefly, it is disclosed that the deceased deposited with the defendant bank $5,000. Whether the deposit of the check for $5,000, drawn in defendant's favor against the Carson National Bank, is construed as for collection, or a deposit, we regard as immaterial under the evidence, which conclusively shows that the money on the check was received and credited to the defendant bank, and of the entire proceeds of which it had the benefit. This is practically admitted by the pleadings, and regarding which there is no conflict in the evidence. The defendant, however, contends, that at the request and on the authority of the deceased, it paid the money to the firm or bank of Russell & Holmes. Holmes was at the time the president of the defendant bank, as well as one of the parties concerned in the other institution to which the defendant bank was successor. On this phase of the controversy, the burden was on the defendant to establish its rightful disposition of the deposit as contended by it; and on this issue the case was fairly submitted to the jury, who found against its contention. We are of the opinion that the evidence, if anything, preponderates in favor of the finding of the jury. The circumstances clearly point to the defendant bank as being alone the party with whom the deceased dealt at the time of the making of the deposit, and justifies the inference that with it alone the entire transaction related; that the firm of Russell & Holmes was regarded as a defunct institution after it was merged in the defendant bank, which became its successor, or that it existed only for the purpose of winding up its affairs.

While considerable stress is laid on the fact that after the deposit the deceased received an ordinary bank deposit book of the kind used by the firm or bank of Russell & Holmes, it was only a circumstance to be given due weight, which was doubtless done, as tending to confirm the theory of the defense. The jury might very properly, as they doubtless did, conclude that this book was used as evidencing the deposit, because the stationery, blanks, books, etc., had passed to the defendant bank as successor of the firm of Russell & Holmes. That this circumstance was considered as but slight evidence may be fairly concluded from the fact that the deceased was illiterate, and scarcely able to read or write. It is not at all improbable that he would fail to closely scrutinize the additional evidence given him of his deposit, or attach special importance to its form, but rather depend upon the officers of the bank to do what was required to effectuate and carry out the agreement of deposit according to its terms.

The evidence justifies the verdict, and no prejudicial error being apparent on the record, the judgment should be, and is, therefore,

AFFIRMED.

CHARLES D. CUMMINS V. PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION.

FILED MAY 22, 1901. No. 9,378.

Mere Retention of a Thing Lawfully Obtained is Not Conversion. The mere retention of possession of a certificate of stock belonging to another, which came to the possessor rightfully, does not constitute a conversion of either the stock or certificate.

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

D. O. Dwyer, for plaintiff in error.

Robert B. Windham, contra.

NORVAL, C. J.

Charles D. Cummins purchased of one Sallie Thomas certain shares of stock in the People's Building, Loan & Savings Association, of New York, the certificate therefor being by Thomas duly indorsed and delivered to him. He transmitted the certificate, together with the proper fee, to the secretary of the association and demanded that he enter the transfer upon the books of the corporation. To this demand the secretary replied as follows: "We have your favor of the 3rd enclosing certificate No. 3565 for transfer from Sallie Thomas to yourself. This certificate is security, under the articles of ass'n and by-laws for the payment of the mortgage given by Sallie Thomas to the Ass'n for $500 and we cannot transfer it to you except subject to our prior interest, until the indebtedness under said mortgage is paid." Without making any demand for the return of said certificate, Cummins sued the corporation for conversion of said certificate and shares of stock. Defendant answered, denying the conversion and setting up the foregoing facts, also that after suit was commenced, it tendered back to plaintiff said certificate of stock, together with the postal notes by means of which the transfer fees, and certain dues on said stock had been transmitted to it by plaintiff, which tender was refused; and on trial it again tendered them in open court. Trial was without a jury. Judgment was for defendant, from which plaintiff prosecutes error.

The judgment was right, and must be affirmed. There was no evidence to sustain a finding of even a technical conversion of either the stock itself, or of the certificate which evidenced it. There is no claim that plaintiff has ever been deprived of any of his rights as a shareholder in the corporation. There could be no conversion of the stock itself, though defendant had the certificate in its possession, for it was indorsed from Thomas to plaintiff, and defendant could, therefore, not make use of it, for it did

not have plaintiff's indorsement. Defendant came rightfully into possession of the certificate, and could not have converted it, for no demand or refusal was pleaded or proved, nor was any other evidence offered tending to show a conversion of the certificate or of the stock itself. *Daggett v. Davis*, 53 Mich., 35, and cases there cited. As the case was for the conversion of the stock and certificate, plaintiff's claim that he should have recovered at least for the money advanced defendant for transfer fee and dues is not well taken. That question was not in issue, the suit being strictly for conversion of the certificate and stock.

The judgment of the lower court is, therefore,

AFFIRMED.

CHARLES M. CHAMBERLAIN ET AL. V. FLORENCE M. BUTLER.

FILED MAY 22, 1901. No. 9,406.

Insurance: WAGER POLICY. One may lawfully insure his own life and afterwards assign the policy to another having no insurable interest, if done in good faith and not by way of cover for a wager policy.

ERROR from the district court for Johnson county. Tried below before STULL, J. *Reversed.*

Edward C. Hall, M. E. Cowen, J. W. Deweese, Isham Reavis and *Davidson & Giffin*, for plaintiffs in error.

Frank Irvine, for the insurance company: The interest of the client I represent is such that it can not well permit an adjudication of the questions of law argued in the briefs without an effort to protect its own position. This interest is twofold. In the first place, having been compelled to pay its policy to Crandall, the last assignee, by virtue of a judgment in New York, if this court should adopt the theory of the defendant in error and hold the

assignments void, then the company, after it supposed its liability was discharged, would be subject to the peril of a double liability from litigation in Nebraska. Secondly, the peril of double liability might arise at any time from a conflict of jurisdictions.

It has been settled ever since the decision in *Dalby v. India & London Life Assurance Co.*, 15 C. B., 365, that a policy of life insurance differs in its nature from one of fire or marine insurance. The latter are contracts of indemnity, and liability ceases with the cessation of insurable interest, whereas a contract of life insurance is an absolute agreement to pay a stated sum on the death of the insured, and, if valid in its inception and if the premiums are paid, the company, must, upon the death of the insured and compliance with the terms of the policy, pay this sum to the persons entitled thereto, although the insurable interest no longer exists. This doctrine has been recognized throughout the United States and was emphasized in *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S., 457.

William H. Kelligar and *Edgar Ferneau, contra:*

A wager policy is defined to be: A pretended insurance founded on an ideal risk, where the insured has no interest in the thing insured, and can, therefore, sustain no loss by the happening of any of the misfortunes insured against. Beach, Insurance, 1142; Bouvier's Law Dictionary, vol. 2, 694; 3 Kent, 225. Wager policies are so universally condemned that it would be useless to cite authorities. The principle upon which the condemnation is founded is that the policy-holder has no interest in the insured, except in his early death.

The theory of Chamberlain's counsel is that since the policy is valid in its inception, it could be transferred like a chose in action. That policies of life insurance are assigned for proper motives and sound consideration, is not to be denied. Our claim is that Butler had a right to insure his life. The policy was valid; and he had a

right to assign it as collateral. Chamberlain had a right to agree to pay Butler's premium and to take an assignment as security. But the law will not allow him to go further and acquire an interest in the death of the assured. Such speculation in human life is against public policy. *Cammack v. Lewis*, 82 U. S., 643; *Warnock v. Davis*, 104 U. S., 775; *Franklin Life Ins. Co., v. Hazzard*, 41 Ind., 116; *Alabama Gold Life Ins. Co. v. Mobile Mutual Ins. Co.*, 81 Ala., 329; *Bayse v. Adams*, 81 Ky., 368; *Seigrist v. Schmoltz*, 113 Pa. St., 326; *Tate v. Commercial Building Ass'n*, 45 L. R. A. [Va.], 245; *Long v. Meriden Britannia Co.*, 94 Va., 594; *New York Life Ins. Co. v. Davis*, 96 Va., 737; *Corson's Appeal*, 113 Pa. St., 438.

The assignee of a policy of insurance having no insurable interest in the life of the insured, can collect only the amount of his debt or advances. *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan., 146; *Helmatag v. Miller*, 76 Ala., 183; *Price v. Knights of Honor*, 68 Tex., 361; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex., 338; *Exchange Bank v. Loh*, 44 L. R. A. [Ga.], 372; *Crotty v. Union Ins. Co.*, 144 U. S., 621; *Morris v. Georgia Loan, Savings & Banking Co.*, 46 L. R. A. [Ga.], 506; *Schonfield v. Turner*, 12 S. W. Rep. [Tex.], 626; *Cheeves v. Anders*, 87 Tex., 287; *Clement v. Insurance Co.*, 101 Tenn., 22; *Trinity College v. Travelers' Ins. Co.*, 22 L. R. A. [N. Car.], 291.

Where the disproportion between the amount of a policy taken out by a creditor on the life of a debtor, and the debt thereby secured, is very great, as where the insurance is $3,000 and the debt $100, it is the duty of the court to declare the transaction a wager. *Cooper v. Shaeffer*, 11 Atl. Rep. [Pa.], 548; *Cammack v. Lewis*, 15 Wall. [U. S.], 643; *Gilbert v. Moose*, 104 Pa. St., 74; *Corson's Appeal, supra; Grant v. Kline*, 9 Atl. Rep. [Pa.], 150.

One claiming an insurable interest in the life of another must plead and prove such interest. *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y., 422; *Burton v. Connecticut Mutual Life Ins. Co.*, 119 Ind., 207; *Continental Life Ins.*

Co. v. Volger, 89 Ind., 572; *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo., 63.

Where there has been an actual conversion, no demand is necessary. *Wright v. Greenwood Warehouse Co.*, 7 Nebr., 435; *Miller v. Wilson*, 98 Ga., 567; *Union Stock Yards Co. v. Mallory*, 157 Ill., 554; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St., 489; *Ensley Lumber Co. v. Lewis*, 25 So. Rep. [Ala.], 729; *Mohr v. Langan*, 77 Mo. App., 481; *Rushin v. Tharpe*, 88 Ga., 782.

The defendant below made the defense that the policy was actually his property by virtue of an absolute sale. This defense rendered a tender unnecessary. *First Nat. Bank v. Kickbush*, 47 N. W. Rep. [Wis.], 267; *Davis v. Winona Wagon Co.*, 52 Pac. Rep. [Cal.], 487.

A. M. Appelget, also for defendant in error:

If the allegation of the answer was true, to-wit, that the assignment was absolute in the sum of $75, the contract was a reality, a gambling transaction, a mere wager policy. *Warnock v. Davis*, 104 U. S., 775.

The question in trover is: Does the defendant exercise a dominion over the property in exclusion or in defiance of the plaintiff's rights? *Liptrot v. Holmes*, 1 Kelly [Ga.], 381, 391; *Thompson v. Currier*, 24 N. H., 237.

NORVAL, C. J.

Florence M. Butler, as administratrix of the estate of Robert L. Butler, brought action in the district court of Johnson county against Charles M. Chamberlain and the Chamberlain Banking House, alleging in her petition, substantially, that said Robert L. Butler in his lifetime procured to be issued to him a policy of insurance on his life by the Home Life Insurance Company of New York, in the sum of $5,000, payable to his executors, administrators or assigns; that after the issuance of this policy said Robert assigned it to Chamberlain as security for the payment of a loan of $75 made by defendants to said

Butler; that afterward Butler died, the insurance policy being at that time in full force, and that plaintiff, as the duly appointed administratrix of his estate, made due proof of the death of Butler, but the company refused to pay the amount of the policy to her, and had in fact paid it to one Crandall, to whom the policy had been assigned by Chamberlain, and that the latter had converted the policy and insurance to his own use; and she prayed for judgment against the defendants in the sum of $4,925, with interest and costs. Chamberlain answered, alleging that the policy was by Butler sold and assigned to him absolutely, for the sum of $75 paid Butler by defendant, and that by such sale and assignment Chamberlain became the owner thereof, and paid all premiums and dues thereon from the time of assignment to the death of Butler; that after such death defendant assigned the policy to one Crandall, of New York, who prosecuted a suit in said state against said company on said policy, secured judgment for the amount thereof, which was by the company paid to Crandall in full; that when suit was commenced the insurance company gave due notice thereof to plaintiff, who failed to appear therein. To this answer a reply in the nature of a general denial was filed. On trial in the district court the following statement of facts (not copying unnecessary documents) was agreed upon:

"It is agreed that on the 8th day of December, 1891, the policy in controversy then being in force and subsisting was sold and assigned to defendant Charles M. Chamberlain for the agreed price of $75.00; that an assignment thereof was then made and executed by said Robert L. Butler in due form, which was immediately forwarded to the insurance company to be examined, and if approved, recorded by the company in the office of its secretary; that afterwards said assignment was so approved and recorded. The assignment in the first place, being executed in duplicate, both copies of the assignment being sent to the insurance company; and after the same was approved and recorded one copy was returned to the de-

fendant Chamberlain with an indorsement upon it that it had been recorded by the company, and immediately upon the receipt of the assignment thus approved and recorded the said seventy-five dollars was paid to said Butler by Charles M. Chamberlain; that said Chamberlain continued to hold and own said policy which was turned over to him with the assignment until the 12th day of November, 1895, when the same was sold and assigned and delivered to one Elbert Crandall, of the city of New York, by said Chamberlain by written assignment duly and properly executed at that time; which assignment is in words and figures as follows: [Here copy of assignment follows.]

"That on the 12th day of November, 1895, said policy with said assignment to Crandall was forwarded to said Elbert Crandall at New York city, who thereafter brought suit in his own name in the supreme court of the county of New York in the state of New York and recovered a judgment against the insurance company for the amount of the policy, interest thereon and costs; that after the commencement of said suit and before the trial thereof and before answer by the plaintiff in this case was notified by the said insurance company of the pendency of said suit and she was requested to intervene and assert whatever interest she had in and to said policy. This she declined to do, alleging as her reason that she was financially unable to go to the state of New York and maintain her case. This plaintiff was not made a party defendant in the suit brought in the supreme court of New York and no service of summons was made upon her in that suit. After said judgment was rendered against said insurance company the same was collected by said Crandall, no part of the amount of which has ever been paid to or received by these defendants, or either of them. After the original assignment of said insurance policy to said Charles M. Chamberlain and while he remained the holder thereof under said assignment, he paid the annual premiums thereon as follows, to-wit: $135.95

about the 12th day of December, 1891, $135.95 on November 26, 1892, $135.95 on November 26, 1893, $135.95 on November 26, 1894.

"It is further agreed that after the death of said Robert L. Butler, which occurred on the 29th day of October, 1895, the plaintiff in this case notified the insurance company not to pay the amount of said policy to defendant Chamberlain, as administratrix of the estate of her husband. Both said Elbert Crandall and this plaintiff, as administratrix of the estate of her husband, made proof of the death of said Robert L. Butler and forwarded the same to the insurance company at its office in New York city and each demanded the payment of the amount of the policy from the company. After the death of said Robert L. Butler, the insurance company notified the plaintiff that as the assignment to Chamberlain of the policy was recorded in their office that she was not the proper party to make the proof of death. That the said insurance company did not deny its liability to pay the amount mentioned in the policy.

"It is also mutually agreed that Mr. Charles M. Chamberlain and Mr. Elbert Crandall are cousins."

On trial the court found in favor of the Chamberlain Banking House, and rendered judgment against the defendant, Charles M. Chamberlain, and in favor of the plaintiff, for the value of the policy, less premiums paid, and the money paid by him to Butler. Chamberlain brings the judgment here for review.

Several interesting questions are presented in the briefs of counsel, but we think it unnecessary to decide more than one, owing to the position we shall take on it. While the petition alleges that the policy was merely pledged, it is agreed by the stipulation quoted that it was in fact sold and assigned absolutely by Butler to Chamberlain. If such assignment was valid, then the latter was the owner of it, and had the right to dispose of it as he saw fit. We think the law is that under the facts it was lawful for Butler to dispose of the policy. We are

aware that there is a sharp conflict of authorities in the several American courts relative to the validity of a sale of a life insurance policy by one having an insurable interest to one not having such interest. In all the states, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the states it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the states such a transaction is prohibited by express legislative enactment. But the question to be decided here is, assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid and taken out in good faith by Butler, with no intention or design on his part of assigning it subsequently to Chamberlain? Those courts which hold such a transaction void proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few; but the tendency is now reversed, and those not assignable are the exception rather than the rule. The modern policy being then as above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of distinct demarcation, and may readily lend its aid to a court anxious to make a good case, rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability. Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of the insured is

so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same desire would exist on the part of a creditor who has an insurable interest, or of one who advanced money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder or other acquisition which may not be had until the death of another. Another reason sometimes assigned for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who in the first instance takes out a wager policy. But we think not. If an insurable interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained (16 Am. & Eng. Ency. Law [2d ed.], 846); and there is no reason to apply the rule to policies taken out in good faith and afterwards assigned in good faith than there would be were the assured to retain it in his own hands.

Counsel rely upon *Warnock v. Davis*, 104 U. S., 775, as an authority to uphold the judgment of the lower court. That case and this present two very different questions. In that case the insured took out the policy in pursuance of an agreement that a third party, having no insurable interest in his life, should, in consideration of certain payments to be made by it, receive at his death nine-tenths of the insurance money. In the opinion Justice Field says: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." Under the facts in-

volved in that case, the language was appropriate, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount hereinbefore mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain, at the time the policy was procured, that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be applicable, otherwise not. That this is the meaning of the words, is clear when we read *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S., 457, and *Ætna Life Ins. Co. v. France*, 94 U. S., 561, 567. In the *France Case* that court lays down the rule applicable to the facts in this case, viz., that any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the *Schaefer Case* the court held that a life insurance policy, originally valid, does not cease to be so upon the intermission of the assured party's interest in the life insured. It was certainly not intended in the *Warnock Case* to overrule or modify either of them. They are not in conflict with that case, when the facts are remembered. The language of the court in the *Warnock Case* is, unfortunately, somewhat misleading in several instances, although the ultimate conclusion reached is right. The comments therein on the New York cases (*St. John v. American Mutual Life Ins. Co.*, 13 N. Y., 31, and *Valton v. National Fund Life Assurance Co.*, 20 N. Y., 32) are uncalled for and not involved in the issues, for the questions of law decided in those cases are very different from, and not necessarily conflicting with the law involved in the *Warnock Case*. We are aware that several eminent American courts disagree with the New York cases cited, and with other courts

of this country which agree with the latter. It seems that to hold contrary to that rule would have the effect mentioned in *St. John v. American Ins. Co.*, *supra*, "without the right to assign, insurance on lives lose half their usefulness," a fact that should not be lost sight of in this day when almost every person carries life insurance of some character, the commercial value and usefulness of which should be fostered rather than crippled or minified. If such choses in action may be legally sold absolutely, it is plain that more can be realized from them, in the day of need, than if valuable only as security for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely, crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient.

Chamberlain then, being, under the facts agreed on, the absolute owner of the policy, had the right to transfer it to Crandall, and such act was not a conversion of the policy or insurance; for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff, or the estate of deceased. The judgment is, therefore,

REVERSED.

NOTE.—One who agrees to insure his life for the benefit of an association of which he is a member is not *in pari delicto*. Hence the court will not interfere to compel the association to account in case it receive the benefit of the insurance. *Tate v. Commercial Building Ass'n*, 97 Va., 74, 45 L. R. A., 243.

A college supported by a church has no insurable interest in the life of a member of that church which will sustain a policy of insurance on his life in favor of the college, although the college paid the premiums, while the application was made by the person whose life was insured. *Trinity College v. Travelers' Ins. Co.*, 113 N. Car., 244, 22 L. R. A., 291.

As a rule, a grandfather is under no legal obligation to support or provide for his granddaughter, and in an action by the latter upon a policy of insurance issued directly to her upon the life of her

grandfather, the court can not infer, as a matter of law, from an averment of the relationship between the parties, such an insurable interest in the life of the grandfather as will uphold the policy. *Burton v. Connecticut Mutual Life Ins. Co.*, 119 Ind., 207.—REPORTER.

OMAHA SAVINGS BANK, APPELLEE, V. E. W. SIMERAL ET AL., APPELLEES, IMPLEADED WITH JAMES J. BROWN, APPELLANT.

FILED MAY 22, 1901. No. 9,424.

Statute of Limitations: PROMISSORY NOTE SECURED BY MORTGAGE. A promissory note is barred after five years from its maturity, though the same is secured by a real estate mortgage, and the statute of limitations is a complete defense to the recovery of a personal judgment upon the note against a maker, other than the mortgagor.

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

George W. Cooper and *W. W. Morsman*, for appellant.

W. A. Redick and *Crofoot & Scott, contra.*

NORVAL, C. J.

Suit by Omaha Savings Bank against E. W. Simeral to foreclose a real estate mortgage. J. J. Brown, having a second mortgage upon the premises, was made a party defendant, who on August 22, 1896, filed a cross-petition in said cause, setting up a mortgage given by Simeral to secure the payment of a promissory note for $1,000 given by him and one John I. Redick, dated December 18, 1886, and payable one year thereafter, and praying the foreclosure of said last mentioned mortgage. To said cross-petition Redick was made a party defendant, the purpose being to secure a deficiency judgment against him. Summons was issued and served upon Redick, who appeared and filed an answer to the cross-petition, alleging, in effect, that he signed the note as surety for Simeral; that

the payment indorsed upon the note was made by the latter on his own behalf without Redick's authority, knowledge or consent; that on October 12, 1892, Brown, upon sufficient consideration, extended the time of payment of the note said mortgage was given to secure to December 12, 1892, without the knowledge or consent of Redick, whereby the latter was released and discharged as surety; that "the cause of action of said J. J. Brown did not accrue against this defendant within five years next before the filing of the cross-petition in this case, and said claim is barred by the statute of limitations." The reply consisted of a general denial. The court found the issues in favor of Redick as to both of his defenses, and a decree was entered foreclosing the mortgage of Brown, as well as that of plaintiff, and dismissing the cross-petition as to the defendant Redick. Brown appeals.

We shall consider the defense of Redick only, relative to the statute of limitations. Section 849 of the Code of Civil Procedure provides: "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 as against such other person as the mortgagor, and may enforce such decree as in other cases." It is argued that under such section Brown had the same time to make Redick a party defendant for the purpose of obtaining a deficiency judgment against him that he had against Simeral to foreclose the mortgage in question. To the proposition we are unable to assent. The statute quoted is not one fixing the limitation of actions like the present one. Another statute designates ten years as the period within which a suit to foreclose a mortgage must be brought. Code Civil Procedure, sec. 6. Still another statute designates five years as the time within which an action upon a promissory note shall be instituted. Code Civil Procedure, sec. 10. The statute

quoted above, it is true, permits a deficiency judgment to be rendered against the mortgagor and other persons liable for the debt, in the suit to foreclose. The object of this is to prevent a multiplicity of actions, and to permit both the foreclosure and a deficiency judgment to be obtained in the same suit. But section 10 of the Code of Civil Procedure governs as to the time within which suit must be commenced when a personal judgment for a deficiency is sought, at least against a person other than the mortgagor. Had Brown brought an action at law on this note against Redick, five years after the maturity of it, the suit would have been barred, and the rule is not different merely because a personal judgment is sought against him in a suit to foreclose a mortgage given to secure the same note. The right to foreclose the mortgage exists after the note it was given to secure is barred by the statute of limitations. *Wiswell v. Baxter*, 20 Wis., 713; *Whipple v. Barnes*, 21 Wis., 327; *Cleveland v. Harrison*, 15 Wis., 741; *Fisher's executor v. Mossman*, 11 Ohio St., 42.

Counsel for Brown cite *Cheney v. Woodruff*, 20 Nebr., 124, and *Cheney v. Janssen*, 20 Nebr., 128, in support of their contention. These decisions are not in point on the question. Each was a suit to foreclose a mortgage and the defense of five years limitation was interposed. It was held that although the note the mortgage was given to secure was barred, suit on the mortgage was not. The question whether a personal judgment could be recovered on the note was not involved, nor was any opinion expressed by the court on that subject in either case.

It is also insisted that the answer to the cross-petition does not sufficiently plead the statute of limitations as a defense for the alleged reason that the part of the answer already quoted states a mere conclusion. We do not think so. It states as an ultimate fact that "the cause of action of said J. J. Brown did not accrue against this defendant within five years next before the filing of the cross-petition." This was a good plea of the five years statute of limitations. *Searls v. Knapp*, 58 N. W. Rep.

[S. Dak.], 807. This conclusion does not conflict with the holding in *Barnes v. McMurtry*, 29 Nebr., 178. There the ultimate facts were not pleaded. The time when the statute began to run was not averred, but it was merely alleged that the action was barred, which does not constitute a good plea. Here it is alleged that the cause of action did not accrue within five years next before the cross-petition was filed.

The note matured December 18, 1887, and the cross-petition was filed eight years, eight months and four days thereafter. No payments were made on the note by Redick. Simeral, the principal on the note, made several payments, which were without the knowledge or consent of Redick, the surety. The payments so made did not toll the statute as to Redick. *Mayberry v. Willoughby*, 5 Nebr., 368. For the reasons stated, the decree is

AFFIRMED.

PAUL HENNI ET AL. V. FIDELITY BUILDING & LOAN ASSOCIATION.

FILED MAY 22, 1901. No. 9,432.

1. **Foreign Building and Loan Association:** CONTRACT: FOREIGN STATUTE: STIPULATION: VOID AND UNENFORCEABLE. A contract made in this state, with a resident thereof, by a foreign building and loan association, which has failed to first procure a certificate of approval and authorization from the proper officers for transacting business in this state, is void and unenforceable, though the parties to such contract may have stipulated therein that it should be governed by the laws of the state where the offending association is resident.

2. ———: POLICY OF THIS STATE. The policy of this state, as announced by the legislature, is to prohibit the transaction of business by foreign building and loan associations, unless duly authorized by the proper authorities. *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Nebr., 636, and *Barbor v. Bochm*, 21 Nebr., 450, followed.

3. **Comity:** PUBLIC POLICY. Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

Lane & Murdock, for plaintiff in error:

A premium note given for insurance in a foreign company that had not complied with the law, is void. *Barbor v. Boehm*, 21 Nebr., 450; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill., 85; *Pennsylvania Co., etc., v. Bauerle*, 33 N. E. Rep. [Ill.], 166; *Rose v. Kimberly & Clark Co.*, 62 N. W. Rep. [Wis.], 526; *Seamans v. Temple Co.*, 63 N. W. Rep. [Mich.], 408.

McGilton & Herring, contra:

Even a contract *malum in se* will be enforced, if valid under the law of the place of performance or other proper law of the contract. *Kittle v. DeLamater*, 3 Nebr., 325, 332; *Kling v. Fries*, 33 Mich., 275; *McIntyre v. Parks*, 44 Mass., 207.

Charles S. Lobingier, also for defendant in error.

NORVAL, C. J.

The Fidelity Building & Loan Association, a corporation organized under the laws of Colorado, commenced suit in Douglas county to foreclose a mortgage on real estate situate in that county, executed to it by Paul Henni to secure the payment of a certain loan made by the former to the latter. In the contract it was stipulated that it should be considered as having been made under and construed by the laws of the state of Colorado. Plaintiff, a foreign building and loan association, had not, at the time the contract was made, complied with section 17, chapter 14, Session Laws, 1891, which, among other things, declares that it shall not be lawful for a foreign building and loan association, directly or indirectly, to transact any business in this state without first procuring a certificate of approval and authorization

from the auditor of public accounts, state treasurer and attorney general, or any two of them, etc. In the absence of compliance with this law in the particular mentioned, is this mortgage enforceable? We can hardly, since the decision in *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Nebr., 637, consider this question open to dispute; for while there the policy of a foreign insurance company was under consideration, the same questions of law were involved. The following language employed by Mr. Justice SULLIVAN in that case is also applicable to building and loan associations organized outside this state: "The statute prescribing the conditions upon which foreign insurance companies may do business here is a police regulation designed to protect our people against irresponsible insurers. It forbids them to do any insurance business, directly or indirectly, in this state, until they have complied with its terms; and the principle of judicial comity does not require our courts to actively aid in the enforcement of contracts which interfere with, and tend to frustrate, the policy established by the legislature." In *Barbor v. Bochm*, 21 Nebr., 450, we held that a premium note given for insurance to a foreign company that had not complied with the law is void, and can not be enforced.

It it is against the settled policy of this state, as announced by legislative enactments, to permit foreign associations or corporations like the plaintiff to transact business in this state without first complying with the requirements of the statutes—a law with which, presumably, a worthless or irresponsible organization could not comply—it is not in the power of the contracting parties to avoid such compliance by stipulating in their contract that it shall be construed by the laws of some other state.

We are fully aware of the criticism of *Barbor v. Boehm* made by Mr. Justice POST in *American Building & Loan Ass'n v. Rainbolt*, 48 Nebr., 434. What was there said was mere dictum, and it is expressly stated in the opinion that it was not the opinion of the other members of the

court. The decisions of this court cited in that connection as in conflict with the *Boehm Case* are readily reconcilable with it, and with the latter we are well content. In the act of 1891 the legislature clearly outlined the policy of this state relative to foreign building and loan associations. It was clearly the intention of the legislature that such associations as refused to comply with the conditions there imposed upon them should be excluded from doing business in this state, and that any business so transacted by them should be unlawful, which latter seems to us quite as strong a word as void. It is not enough to say that, because the legislature denounced a penalty upon those who transgressed the prohibition, it was the intention of that body that the business transacted by such associations should not be void. It was plainly the intention of the legislature to go further than merely to punish those who transgressed the statute, and to render all contracts made by the associations of that character "unlawful"—nugatory, void.

In further reply to the contention that this is a Colorado contract, because the parties so stipulate, is payable in Colorado, and one of the parties is resident in that state, we might say that the business which resulted in the defendant Henni becoming a member of this association, as well as that which resulted in the making of the loan, was all transacted in Nebraska, in violation of the statute, by an agent of the association resident in this state. *Building & Loan Ass'n v. Bilan*, 59 Nebr., 458.

The judgment of the lower court in favor of the plaintiff is therefore reversed, and the cause is remanded with instructions to enter a judgment in favor of the defendants.

REVERSED.

WILLIAM H. MALE ET AL., APPELLEES, V. ANNIE WINK ET AL., APPELLANTS.

FILED MAY 22, 1901. No. 9,453.

1. **Defense of Usury:** PURCHASER BONA FIDE: BURDEN OF PROOF. Where the defense of usury is established, the burden of proof is upon the plaintiff to show that the note was indorsed before maturity to a purchaser *bona fide* for value, without notice.
2. **Evidence.** The mere introduction of a promissory note duly indorsed, where the defense of usury is established, is insufficient to prove that plaintiff is an innocent holder for value before maturity, of the paper.
3. **Defense of Usury Personal.** The defense of usury is personal to the maker, and his sureties and privies.
4. **Purchaser of Equity of Redemption.** A purchaser of the equity of redemption, being neither surety or privy, who assumes a mortgage on the premises, can not put up the usurious contract of his grantor as a defense.
5. **Defense of Usury:** The defense of usury is available to the mortgagor, nothwithstanding he has sold the mortgaged premises, if made a party to the suit and under the petition a deficiency judgment could be rendered against him.
6. **Amount of Recovery.** Where the defense of usury is established, the plaintiff is entitled to no interest, and can recover only the actual amount loaned, diminished by all payments of principal and interest paid on the debt.

APPEAL from the district court for Antelope county. Heard below before ROBINSON, J. *Reversed.*

N. D. Jackson, A. A. Williams and *William V. Allen,* for appellants.

Flansburg & Williams, contra.

NORVAL, C. J.

This was a suit to foreclose a real estate mortgage executed by Dewalt Wink and Annie Wink, to secure payment of a promissory note of said Dewalt to P. O. Refsell, in the sum of $500 borrowed by the former. The note is dated April 17, 1886, payable December 1, 1890,

and draws interest from date at eight per cent per annum, payable semi-annually, according to nine interest coupon notes thereto attached. The note has this indorsement:

"For value received, I hereby assign and transfer the within bond, together with all my interest in and all my rights under the mortgage securing the same to ——— without recourse. P. O. REFSELL."

The defense interposed is usury. The clear and undisputed evidence is that Dewalt Wink borrowed the sum of $500, of which $50 was at the time retained by the lender as commissions and interest, and that the borrower received $450 and no more. If the note had matured five years from date thereof the contract would not have been tainted with the vice of usury, since the $50 reserved added to eight per cent interest specified in the note on the sum loaned for that time would amount to $250, or ten per cent interest on $500 for five years. But the note by its terms was to mature in four years, seven months and fourteen days from its date. As the interest on the face of the note for that period at ten per cent gives $231.11, while the amount reserved and deducted from the loan, added to the eight per cent interest from date of the note, amounts to $234.89, it is clear that $3.78 interest in excess was contracted to be paid on this loan.

But it is argued that the defense of usury is not available, because the note was transferred to a good-faith purchaser for value, before maturity, and without notice. This contention is not borne out by the record. Plaintiff introduced in evidence the note containing the indorsement thereon, above set out. There is no other evidence offered to show that the note in question was indorsed before maturity, and without notice. The introduction of the note and indorsement as evidence did no more than make out a *prima facie* case for plaintiff. *McDonald v. Aufdengarten*, 41 Nebr., 40. The defense of usury having been established, the burden was thereby cast upon

the plaintiff to establish that he was the *bona fide* holder for value without notice. *McDonald v. Aufdengarten, supra; Wortendyke v. Meehan*, 9 Nebr., 221; *Colby v. Parker*, 34 Nebr., 510; *Suiter v. Park Nat. Bank*, 35 Nebr., 372; *Vail v. Van Doren*, 45 Nebr., 450.

But it is also insisted that the defense interposed is not available because Dewalt Wink conveyed the mortgaged premises to his wife, Anna Wink, that the latter joined with her husband conveyed the property to J. F. Curtis, who in the deed assumed payment of the mortgage in question, and that Curtis subsequently conveyed the premises to the defendant Anna Wink, who likewise assumed the mortgage. The defense of usury is personal to the borrower, and his sureties and privies. A purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor. *Cheney v. Dunlap*, 27 Nebr., 401; *McKnight v. Phelps*, 37 Nebr., 858. Curtis therefore could not have set up the defense of usury. But Dewalt Wink, being a party to the usurious contract, had the legal right to interpose the defense in his own behalf since under the petition a deficiency judgment could be rendered against him. The evidence discloses that Wink has paid on those loans as interest $384.88, which sum must be deducted from the face of the note. Plaintiffs are entitled to a decree of foreclosure for the sum of $115.12, and for the amount of taxes by them paid on the mortgaged premises, with ten per cent interest thereon from the date of such payment. The decree is accordingly reversed, and the cause remanded with directions to enter a decree in favor of the plaintiffs in accordance with this opinion, without costs to them.

REVERSED AND REMANDED.

NOTE.—Where the borrower seeks affirmative relief against a usurious contract, he must first tender the full amount of principal and lawful interest. *Eiseman v. Gallagher*, 24 Nebr., 79, mentioned with approval in *Frenzer v. Richards*, 60 Nebr., 131. But read opinion in *Brewster v. Bank of Ainsworth*, 43 Nebr., 79.—REPORTER.

CHARLES P. KELLOGG COMPANY v. JOSEPH HORKEY ET AL.

FILED MAY 22, 1901. No. 10,382.

1. **Mortgagee from Fraudulent Vendee is Innocent Purchaser to the Extent of His Debt.** When goods obtained by fraud have been mortgaged by the fraudulent vendee to secure a present indebtedness, to a mortgagee in good faith, without notice of such fraud, the latter stands in the position of an innocent purchaser *bona fide* of property from a fraudulent vendee, but to the extent of the mortgage debt only.

2. **Notice of Rescission:** DUTY OF MORTGAGEE. When a mortgagee of chattels receives notice of the rescission of a fraudulent sale, before sale of the property included in his mortgage, it is his duty, if there be also included in the mortgage goods not involved in such fraudulent sale, to sell the latter before having recourse to those claimed by the vendor.

ERROR from the district court for Knox county. Tried below before ROBINSON, J. *Reversed.*

Montgomery & Hall and *William M. Robertson*, for plaintiff in error.

W. L. Henderson, J. H. Berryman, Soloman Draper and *Michael F. Harrington, contra.*

NORVAL, C. J.

In 1896 the plaintiff sold and delivered to one Joseph Horkey clothing to the value of about $1,000. Subsequently Horkey executed chattel mortgages on his whole stock of goods, including a portion of those sold him by plaintiff (the remainder having been sold in the usual course of business), to the defendants, the Security Bank, and Henry E. Bonesteel. The mortgage to the bank was for over $3,000, all but $1,126.34 of which was an indebtedness incurred prior to the making of such mortgage. Bonesteel's mortgage was given to secure a pre-existing debt, wholly. Some time afterwards the bank and Bonesteel took possession of the goods under their

mortgages, and proceeded to foreclose, their notices fixing the same time and place of sale. The plaintiff, in making its sale to Horkey, relied upon a false statement of assets and liabilities made by him to a commercial agency to secure credit, and immediately after learning of the falsity of such representations rescinded the sale, and notified the bank and Bonesteel of such rescission before sale was had under such mortgages. At the sale all the stock was sold, including that of plaintiff, to Bonesteel, the bid being far in excess of the amount due the bank on its mortgage. The residue remaining after satisfying the demands of the bank was applied by Bonesteel on his mortgage. The plaintiff sued the bank, Bonesteel and Horkey for conversion of its goods. On trial, after the evidence was in, the court on its own motion instructed the jury as follows: "You are instructed in this case to return a verdict in favor of the plaintiff and against the defendant, Joseph Horkey, of $1,020.08; and in favor of the defendants, Henry E. Bonesteel and the Security Bank." A verdict was returned in accordance therewith, and the plaintiff brings the judgment rendered thereon here for review, and complains that the court erred in instructing the jury to return a verdict in favor of the defendants, the bank and Bonesteel. In that respect we think the court erred. There was evidence introduced from which the jury could have legitimately inferred that these goods were obtained through fraudulent representations, which entitled the plaintiff to rescind the sale if due diligence was shown, and evidence to that effect appears of record. There was further evidence from which the jury could have likewise inferred that the goods were sold by the bank and Bonesteel in a lump. Among the goods sold were those which belonged to plaintiff, if it had a right to rescind the sale. To such goods Bonesteel was in no position to make claim, as against plaintiff, as he did not occupy the place of an innocent purchaser, none of his debt having been created at the time the mortgage was executed. *Tootle*

v. First Nat. Bank of Chadron, 34 Nebr., 863; *Phenix Iron Works v. McEvony*, 47 Nebr., 228. The bank, to the extent of the $1,126.34 advanced to Horkey at the time its mortgage was executed, was an innocent purchaser, but it was such only to the extent of its mortgage lien; and as there was much more than sufficient property to pay its debt, it became guilty of conversion so soon as it sold more than sufficient to satisfy this debt. *Omaha Auction & Storage Co. v. Rogers*, 35 Nebr., 61. It owed to plaintiff the duty to sell goods other than those to which the former was entitled, sufficient to pay its debt, before having recourse to plaintiff's property. Having failed to do this, it was guilty of conversion if it sold them under its mortgage. And as there was evidence introduced from which the jury could have deduced the conclusion that the bank and Bonesteel together sold the whole of the goods, including those of plaintiff, and divided the avails between them, there was evidence which would have sustained a verdict of conversion against both of them. For that reason the court erred in giving the instruction quoted, and the judgment is therefore

REVERSED.

ALBERT STENGER, APPELLEE, V. DAVID CARRIG ET AL., APPELLANTS.

FILED MAY 22, 1901. No. 11,342.

Decree of Foreclosure: INTEREST. A decree foreclosing a mortgage draws interest from the date of its rendition until the same is paid.

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

Virgil O. Strickler, for appellant.

McAllister & Cornelius, contra.

NORVAL, C. J.

Albert Stenger brought suit in the court below to foreclose a real estate mortgage given by David Carrig and wife. The Home Fire Insurance Company of Omaha intervened and set up a prior mortgage given by them on the same premises, and prayed a foreclosure thereof. A decree was entered on April 25, 1896, foreclosing both mortgages, giving the intervener a first lien for the sum of $5,557, and plaintiff a second lien for $4,091.10. An order of sale was issued, and the premises were sold to plaintiff on May 17, 1897, for $7,578. Objections to the confirmation were overruled and the sale was approved and confirmed on June 5, 1897. David Carrig, one of the mortgagors, appealed to this court, which appeal was dismissed at the January, 1899, term, and a mandate issued to the trial court on April 3, 1899. On or about June 6, 1899, Stenger paid to the clerk of the district court of the purchase price the sum of $6,320.01, of which $351.45 was applied on costs and the remainder, $5,968.56, was paid to the Home Fire Insurance Company on its decree, but which was insufficient to pay the amount of its lien, computing interest at 7 per cent from the date of the decree until the payment was made. On June 27, 1899, Stenger filed a motion in the court below for an order directing the present sheriff to execute and deliver to him a deed for the mortgaged premises, the sheriff who made the sale having gone out of office. At the same time the intervener filed a motion for an order requiring plaintiff to pay into court the amount of his bid, or so much thereof as would satisfy the lien of intervener, with interest thereon from the date of the decree at 7 per cent. This motion was overruled, and plaintiff's motion was sustained. Intervener appeals.

A single question is presented, which is, up to what time did the decree in favor of the Home Fire Insurance Company draw interest? This is answered by section 3, chapter 44, Compiled Statutes, which provides that "in-

terest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." Intervener was entitled to interest on its decree until the same was paid. *Trompen v. Hammond*, 61 Nebr., 446. The court below therefore erred in not requiring plaintiff to complete his purchase by paying into court a sufficient sum to pay intervener's claim, not exceeding the amount of the bid.

REVERSED.

SUEL C. RUMERY, APPELLANT, V. STEPHEN S. LOY ET AL., APPELLEES.

FILED MAY 22, 1901. No. 9,550.

1. **Priority of Liens:** REGISTRY ACT. Ordinarily, the right of priority as between persons claiming liens upon real property is to be determined by the registry act.

2. **Registry Act:** ASSIGNEE OF JUNIOR INCUMBRANCE. The law providing for the registration of instruments affecting land titles gives to the assignee of a junior incumbrance priority over a senior incumbrancer only in case his assignment is in registerable form and recorded before the senior incumbrance.

APPEAL from the district court for Custer county. Heard below before GRIMES, J. *Reversed.*

Henry M. Kidder, for appellant.

Lester E. Kirkpatrick and *John S. Kirkpatrick, contra.*

SULLIVAN, J.

This is a contest for priority between the appellant, Suel C. Rumery, and the appellee, William Fennimore, each of whom has a mortgage lien upon the northeast quarter of section 21, township 16 north of range 18 west, in Custer county. The trial court found

in favor of Fennimore and rendered a decree establishing his mortgage as a first lien upon the property. The decision seems to be grounded upon the following facts which the evidence tends to prove: The Rumery mortgage was executed on June 19, 1894, about eight o'clock in the forenoon. Afterwards on the same day the mortgagor, Stephen S. Loy, executed to H. W. Dickinson the mortgage of which Fennimore is now the owner. Dickinson was not an innocent purchaser, but his mortgage, which was first recorded, was assigned to Fennimore, who took it in good faith for an adequate consideration and without actual notice of Rumery's superior right. Both mortgages were of record in the office of the register of deeds at the time of the assignment to Fennimore. The Rumery mortgage professed to be a first lien, but the one to Dickinson made no sort of claim with respect to rank or priority. Upon these facts the district court held that Fennimore was an innocent purchaser of the Dickinson mortgage and therefore entitled to a first lien on the premises therein described. In our opinion the conclusion can not be sustained.

The rights of rival claimants in cases of this kind are not to be determined by the law of negotiable instruments, as counsel seem to think, but by the registry act, which was designed to protect those who are interested in knowing the state and condition of land-titles. It is clear, of course, that the Rumery mortgage, having been first executed, became a first lien on the property. And, since Dickinson was not an innocent purchaser, it is equally evident that it continued to be a first lien up to the time of the assignment of the second mortgage. Whether the assignment operated to make the first lien second and the second first, is a point that must be settled by consulting the registry law. There being no question of estoppel in this case, it is manifest that if a mortgage which is in truth a junior lien is to be given priority and enforced as a senior lien it must be by virtue

of the statute providing for the registration of every instrument affecting the title to any real property.

Section 16, chapter 73, of the Compiled Statutes of 1899, is as follows: "All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded: *Provided*, That, such deeds, mortgages, or instruments shall be valid between the parties." It can not be doubted that under the provisions of this section the first mortgage was valid between the parties thereto and invalid only as to creditors and subsequent purchasers in good faith without notice, whose deeds, mortgages, or other instruments should be first recorded. *Galway v. Malchow*, 7 Nebr., 285; *Mansfield v. Gregory*, 8 Nebr., 432; *Sheasley v. Keens*, 48 Nebr., 57; *Blair State Bank v. Stewart*, 57 Nebr., 58. Fennimore was, according to the findings of the court, a subsequent purchaser in good faith without notice (Compiled Statutes, 1899, ch. 73, sec. 45), but the instrument by which his right to a lien was acquired was not first recorded. Indeed it does not appear that he ever obtained an assignment in registerable form. To bring himself within the provisions of section 16 aforesaid it was necessary for Fennimore to show (1) that his ownership of the Dickinson mortgage was evidenced by an instrument entitled to be recorded; and (2) that such instrument had in fact been first placed upon the public records. *Galway v. Malchow, supra; Burns v. Berry*, 42 Mich., 176; *Fort v. Burch*, 5 Denio (N. Y.), 187; *Decker v. Boice*, 83 N. Y., 215; *Westbrook v. Gleason*, 79 N. Y., 23; *Smyth v. Knickerbocker Life Ins. Co.*, 84 N. Y., 589; *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Ill., 350. The first mortgage was therefore valid

as to Dickinson because he was not a subsequent purchaser in good faith without notice; and it was likewise valid as to Fennimore because it was of record in the office of the registrar at the time the assignment was made. In this state the law plainly provides for the registration of mortgage assignments (Compiled Statutes, 1899, ch. 73, secs. 39, 46), and gives to the assignee of a junior mortgage priority over a senior incumbrancer only in case the assignment reaches the registrar's office before the first mortgage. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

N. B. HOGG V. GEORGE P. REYNOLDS.

FILED MAY 22, 1901. No. 9,604.

1. **Lease:** ASSIGNMENT: LIABILITY FOR RENT. Where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease.

2. ———: ———: PRIVITY OF ESTATE. Whether a transfer of the lessee's interest destroys the privity of estate subsisting between him and the landlord and creates that relation between the landlord and the transferee, depends upon the estate demised and the estate transferred being precisely identical.

3. **Assignment of Lease:** PRIVITY OF ESTATE: LIABILITY OF ASSIGNEE. One who acquires by assignment the lessee's entire interest in a distinct part of leased land is, as to such part, in privity of estate with the lessor and liable to him for a proportionate share of the rent. But such assignee is not in privity of estate with the lessor as to the portion of the land not covered by the assignment, and is, therefore, not liable for the entire rent reserved in the lease.

ERROR from the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

Steele Bros. and *Hastings & Hall,* for plaintiff in error.

George P. Sheesley, Matt Miller and *C. H. Aldrich, contra.*

SULLIVAN, J.

This was an action brought by N. B. Hogg against George P. Reynolds to recover the sum of $100 claimed to be due as rent upon a farm lease. The jury found in favor of the defendant and judgment was rendered on the verdict. The facts essential to an understanding of the case may be compressed into a few sentences: George E. and N. B. Hogg owned a section of land in Butler county which they leased to D. M. Frey and T. A. Kirkpatrick for five years at an annual rental of $500. Afterwards, the lessees having made a division between themselves of the demised premises, Frey, to whom had been assigned the exclusive right to use and occupy the west half of the section, made a transfer of his interest to the defendant by the following indorsement upon the lease:

"Know all men by these presents, that I, D. M. Frey, do hereby sell, assign and set over to Geo. P. Reynolds, all my right, title and interest in the within lease, the same being the privilege of paying ½ half of the sum named in the within lease, and the undivided use of the west half of said section 29, town 13, range 3 east, for the unexpired part of the five years named within. Witness my hand this the day and year last written above,

"Witnessed by H. S. CRAIG. (Signed) D. M. FREY."

Under this arrangement the defendant entered into possession of the west half of the leased land and occupied the same during the life of the lease, paying to the plaintiff, who is now the sole owner of the reversion, one-half of the entire rent as the several installments became due. Kirkpatrick, who held exclusive possession of the east half of the section, having failed to pay his share of the last installment of rent due to the plaintiff, this action was instituted against Reynolds on the theory that he had, by the assignment, succeeded to the rights and assumed the liabilities of Frey.

The doctrine of the authorities undoubtedly is that

where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. The covenant to pay rent runs with the land, and the assignee, being in privity of estate with the landlord, is directly liable to him for the installments accruing while that relation exists. *Sexton v. Chicago Storage Co.*, 129 Ill., 318; *Trask v. Graham*, 47 Minn., 571; 2 Taylor, Landlord and Tenant [8th ed.], sec., 436; 12 Am. & Eng. Ency. Law [1st ed.], 738. Whether a person claiming an interest in real property under a lessee is liable upon the covenant to pay rent, or upon other covenants running with the land, depends upon the existence of privity of estate between such person and the lessor. In other words, whether a transfer of the lessee's interest destroys the privity of estate subsisting between him and the landlord and creates that relation between the landlord and the transferee, depends upon the estate demised and the estate transferred being precisely identical. *Sutliff v. Atwood*, 15 Ohio St., 186; *Woodhull v. Rosenthal*, 61 N. Y., 382; 1 Parsons, Contracts [8th ed.], *231; Tiedeman, Real Property, sec. 182; 1 Washburn, Real Property [5th ed.], 541. The estate vested by the lease in Frey was an undivided interest for a term of years in the whole of the land. The estate transferred by Frey to Reynolds was an exclusive right for a limited period to use and occupy the whole of the west half of the land. The legal effect of the division of the property between the lessees was to make each, during the term, the sole owner of a specific moiety. Frey, by the arrangement between himself and Kirkpatrick, became possessed of the entire interest of both lessees in the west half of the section; and the assignment of this interest to the defendant established between him and the plaintiff a privity of estate as to a distinct part of the land. Having previously relinquished his interest in the east half of the section, it is quite evident that Frey had neither the power nor purpose, by the assignment written on the lease, to transfer

to the defendant any right or interest in that part of the demised premises. Being possessed of the whole estate of both lessees in part of the land the defendant was liable to the plaintiff for a proportionate share of the rent. *Fulton v. Stuart*, 2 Ohio, 216; *Curtis v. Spitty*, 1 Bing., N. Cas., 756; *Van Rensselaer v. Bradley*, 3 Denio [N. Y.], 135; *Woodhull v. Rosenthal, supra; Babcock v. Scoville*, 56 Ill., 461. In the last mentioned case it is said, page 467: "Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*, and the assignee will be answerable for his proportion only of any charge upon the land, which was a common burden upon the whole." In *Van Rensselaer v. Bradley, supra*, the rule with respect to the apportionment of rent in cases like the one before us is thus stated by Mr. Justice Jewett, page 143: "The rent must be apportioned, when the landlord seeks to recover of an assignee for a part of the premises according to the value of the land, and it is the business of the jury upon evidence produced to apportion the rent to the value of the land." No case holding a contrary doctrine has been brought to our attention and it is believed none can be found. The defendant having paid one-half of each installment of rent maturing after the assignment was executed, and there being no evidence to show that he was liable for more, the verdict was necessarily right and the judgment must, therefore, be

AFFIRMED.

FRED C. MATTESON, TRUSTEE, ET AL., APPELLEES, V. WILLIAM B. SMITH ET AL., APPELLANTS.

FILED MAY 22, 1901. No. 9,625.

1. **Deed:** DELIVERY. A deed or other similar instrument placed in the hands of a third person for delivery to the grantee when he shall perform some condition, is not legally effective, but is

a mere nullity, if delivered by the depositary, or obtained from him in any way, without full complance with the condition specified.

2. **Evidence:** ESCROW. Evidence examined, and found to warrant a judgment enjoining the registration of a mortgage-release claimed to have been delivered as an escrow.

APPEAL from the district court for Clay county. Heard below before HASTINGS, J. *Affirmed.*

Hurd & Spanogle, Leslie G. Hurd and *S. W. Christy,* for appellants.

Thomas H. Matters, contra.

SULLIVAN, J.

This action was instituted in the district court of Clay county by Fred C. Matteson, trustee, and the Sutton National Bank to prevent the registration of a formal certificate acknowledging satisfaction of a real estate mortgage and for other relief. The plaintiffs obtained judgment below in accordance with the prayer of their petition and the case was then brought here for review by appeal. The one controlling question in the case is whether the delivery by Matteson to Schaeffle of a mortgage release was absolute or only conditional. This is a question of fact and not of law. The trial court found that the instrument was delivered as an escrow and the finding is, in our opinion, fully sustained by the evidence. Authorities need not be cited to show that a deed placed in the hands of a third person for delivery to the grantee when he shall perform some condition, is not legally effective, but is a mere nullity, if delivered by the depositary, or obtained from him in any way, without full compliance with the condition specified. The release in question was still-born and its registration was properly enjoined. The judgment is

AFFIRMED.

HARRY HICKSON V. STATE OF NEBRASKA.

FILED MAY 22, 1901. No. 11,916.

1. **Subject of Forgery: FORM OF INSTRUMENT.** An instrument in the following form is the subject of forgery: "Mr. Sage: Please let this boy have a single rig, a good one, and oblige. I will bring it back myself. [Signed] George Klinger."

2. **Order of Delivery: WRITING OBLIGATORY.** Such instrument is not only an order or request for the delivery of chattels over which Klinger had no control, but is also a writing obligatory within the meaning of section 145 of the Criminal Code.

ERROR from the district court for Cass county. Tried below before JESSEN, J. *Affirmed.*

A. N. Sullivan, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

SULLIVAN, J.

Harry Hickson, the plaintiff in error, was convicted of the crime of forgery and sentenced to imprisonment in the penitentiary for a term of one year. The information upon which he was tried alleges: "James Sage now is, and for more than one year last past, has been engaged in the livery business, in the city of Plattsmouth, Cass county, Nebraska, and letting for hire, horses, harness and carriages; that in and by the words 'single rig' are meant, in said business, a horse harnessed to a carriage, and such is the custom, usage and understanding in said business; that one George Klinger, a resident of said city for more than one year last past, has been, during all of said time, a customer of said James Sage; that one Harry Hickson, late of the county aforesaid, in the county of Cass and state of Nebraska, on the 18th day of July, A. D. 1900, then and there being, then and there did unlawfully, feloniously, maliciously and falsely, and with

intent to defraud, make, forge and counterfeit a certain paper writing, purporting to be an order for the delivery of certain goods and chattels, and being of the tenor and effect following, to-wit: 'Mr. Sage: Please let this boy have a single rig, a good one, and oblige. I will bring it back myself. George Klinger.' (Meaning thereby an order to said James Sage to deliver a horse, harness and carriage to the bearer of said instrument, for the temporary use of said George Klinger, and that said George Klinger would return said horse, harness and carriage to the said James Sage, when through with the use thereof) all contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska."

It is, on behalf of Hickson, contended that this information does not charge a public offense, and that the judgment of the district court should be, therefore, reversed. "Forgery," says Mr. Bishop, "is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bishop, New Criminal Law, sec. 523. The instrument in question meets the requirements of this definition and is fairly within the meaning of section 145 of the Criminal Code. If the order had been genuine; if it were what it purported to be, it would doubtless have enabled the defendant to obtain possession of a horse and vehicle, and it would have imposed upon George Klinger the legal duty of returning the same to the liveryman.

The authorities are not in entire accord as to the character of instruments which may be the subject of forgery, but according to all the decisions, both English and American, the writing fabricated by the defendant was within the inhibition of the statute. It possessed not only apparent, but real legal efficacy. In addition to being apparently capable of effecting a fraud, it would, if it were genuine, have created a legal liability. It was not only an order or request for the delivery of chattels

over which Klinger had no disposing power, but it was also a writing obligatory within the meaning of the law.

The judgment is

AFFIRMED.

OLIVER S. BROWN, APPELLANT, V. O. A. NEILSON ET AL., APPELLEES.

FILED MAY 22, 1901. No. 9,354.

Lease: LIEN: PROPERTY NON IN ESSE. A stipulation in a lease of a farm for a term of years, as follows: "And it is further expressly agreed and understood by and between the parties hereto, that all property of every name, character and description, belonging to said parties of the second part, that shall be on said premises or brought thereon by said second parties during the term of this lease, shall be holden as security for the payment of the rents above reserved until all be paid and the same shall be and remain a lien upon the same from year to year until said payments of the rents for said entire term have been fully discharged and paid," is ineffectual to create a lien, legal or equitable, in favor of the lessor for rents due and in arrears, on the crops grown thereafter on the leased premises and other property not *in esse* at the time and afterwards brought thereon by the lessee.

APPEAL from the district court for Sarpy county. Heard below before SLABAUGH, J. *Affirmed.*

John P. Breen and *Charles S. Lobingier*, for appellant.

Duffie, Gaines & Kelby, contra.

HOLCOMB, J.

Suit was instituted by the plaintiff below, appellant here, for the recovery of the sum of $900, alleged to be due as rental for the use of a farm occupied by defendants Neilson, appellees, as tenants under a written lease for a term of years. The rent claimed to be due was for the full year beginning March 1, 1895, and the first half of the year beginning March 1, 1896. The lease of the premises, upon which plaintiff based his right of action,

was executed October 30, 1893, and being for the term of four years, commencing on the 1st day of March, 1894. In the petition, joined with the allegations for a recovery of a money judgment, the plaintiff pleaded a certain stipulation contained in the lease which, it is averred, gave to him a lien in equity on all the property of whatsoever description on the leased premises or brought thereon and belonging to the lessees, as security for the rent due and in arrears under the terms of the lease; and prayed a decree establishing a lien upon all such property for the amount for which judgment should be rendered in the action. On plaintiff's application a restraining order was also issued enjoining the lessees from transferring or removing any of their property from the leased premises. The answer denied the right of the plaintiff to a lien on any of the defendants' property for any sum, and raised other issues not here necessary to further notice. On the trial of the case the plaintiff recovered a judgment for the amount prayed, with interest, but was denied any relief on his application to have the amount found due to be a lien on the defendants' personal property, as prayed for in his petition. From the finding and decree denying him a lien, he appeals.

The clause in the lease, which is made the foundation for the plaintiff's claim to the enforcement of a specific lien in his favor on all the property of the defendants Neilson on the leased premises, is as follows: "And it is further expressly agreed and understood by and between the parties hereto, that all property of every name, character and description, belonging to said parties of the second part, that shall be on said premises or brought thereon by said second parties, during the term of this lease, shall be holden as security for the payment of the rents above reserved until all be paid, and the same shall be and remain a lien upon the same from year to year, until said payments of the rents for said entire term have been fully discharged and paid." Under these sweeping provisions the plaintiff contends that he is en-

titled to have a lien decreed in his favor for the amount for which he obtained judgment, on all personal property of all kinds belonging to the lessees, which they had belonging to them on the leased premises at the time of the service of the restraining order, issued as aforesaid. Just what this property is, is more or less involved in doubt, but it is claimed by appellant that a schedule of property and claim of exemption, filed by the lessee with the sheriff of the county, who appears to have been about to levy an execution thereon in another action, furnishes sufficient evidence as to the description and identity of the property to which his lien should attach. The claim of exemption was made by the lessee as the head of a family, and filed with the sheriff after the issuance of the restraining order in the case at bar. In it the defendant claimed his specific exemptions allowed him by statute, and in addition thereto property of the value of $500, he being, as alleged, the head of a family engaged in the business of agriculture and having no lands or town lots. The schedule of property showed items of personal property ordinarily belonging to one engaged in agriculture, such as cattle, horses, agricultural implements and household goods; also about 50 acres of growing corn and about 1,300 bushels of corn in the crib.

It is suggested by counsel for defendants that a stipulation of the character under consideration can not in equity be extended to cover and include the exempt property of the defendant allowed by law as the head of a family engaged in the business of agriculture, citing in support thereof, *Vinson v. Hallowell*, 10 Bush [Ky.], 538, and *Seiling v. Gunderman*, 35 Tex., 544. We prefer to address ourselves to the principal question presented by the appeal, and that is, whether a valid lien may be created on any property by the method adopted in this case; and, if so, in what manner can the lien be made effective? Whether any of the property was in existence at the date of the execution of the lease, is doubtful. Certain it is that all of it was unidentified and in no way described

in the instrument, except as it might afterwards be brought on the leased premises; and for the most part the property consisted of growing corn and corn in the crib, not in existence until some time after the defendant occupied the leased premises, under the lease by which plaintiff claims.

Plaintiff's counsel, in his opening brief, concedes that the instrument conveyed no present lien on the property of the lessee afterwards raised or brought on the demised premises; but contends that the stipulation quoted should be construed as an agreement by the lessee to give a lien on all such property, after being brought on the premises, which ought to be enforced in equity in a suit to collect the rents in arrears, by a decree in the nature of specific performance, in pursuance of the familiar maxim that "equity regards as done that which ought to be done." In the reply brief by different counsel it is argued that the rule first stated is not broad enough, and that the instrument itself, and by virtue of its own force, should be treated as creating a lien or mortgage on the property, although not in existence at the time of the execution of the lease, and which attaches as an equitable lien when the property comes into being and within the terms of the stipulation, and that the lien is capable of enforcement in a court of equity. The stipulation does not comprehend, within its meaning, that the lessee will, after the property is acquired, execute a mortgage or other instrument incumbering the property for the benefit of the lessor. No original and independent contract creating a new lien can be inferred as the intention and contemplation of the parties, without doing violence to the language used. It does not purport to be an agreement to give, in the future, a lien on the property then owned by the lessees on the leased premises; but, by its own terms and provisions, the instrument evidences an attempt to establish a lien in future on property at the time not *in esse*. It is a contract, or attempt at contract, for a sale and transfer by way of mortgage, and not a contract to

give a mortgage. If it is ineffectual to create a lien on the after-acquired property, we are of the opinion that it can not, under any well recognized rule, be made the foundation for a decree in the nature of specific performance, conceding that, in a proper case, a court of equity will decree specific performance of a contract of a sale of, or to give a mortgage on, chattel property. Unless the stipulation under consideration in the instrument can be upheld as creating, in favor of the lessor, a lien, legal or equitable, on the crops grown on the leased premises, or on property brought thereon after the execution of the lease, we think it must entirely fail as having any vitality or force for any purpose. It is not argued, nor will it be seriously contended, that the clause quoted conveys any legal interest in or lien on the property of the lessee not then in existence or owned by him, but which was afterwards brought into existence and on the leased premises. The authorities are unanimous that a legal estate or interest can not be conveyed in property which has no existence. The question then is, will such an agreement create a lien of an equitable character, attaching to the property when it comes into existence and is brought within the terms of the stipulation in other respects? On this the authorites are divided. The exact nature of the contract, therefore, becomes material in arriving at a proper conclusion. Such a contract is usually defined as executory in character, requiring something further to be done in the future by the parties thereto, before a good title will pass to and be perfected in the lessor or mortgagee.

In an early case, and one that is frequently cited by the courts holding to the doctrine that property not *in esse* is not the subject of transfer by way of mortgage, it is said, regarding the nature of such a contract: "A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character that the creditor with whom it is made may, under it, take the property into

his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good."—*Moody v. Wright*, 13 Met. [Mass.], 17, 32.

In deciding the validity of a contract executory in character, under which a lien was claimed, this court, in an early case (*Lanphere v. Lowe*, 3 Nebr., 131, 138), citing with approval a decision of the supreme court of Massachusetts, held that a valid lien could not thus be created. GANTT, J., speaking of a stipulation in a lease of real estate similar to the one under consideration, says: "But it was an effort on the part of the defendant to create a lien, somewhat in the nature of a chattel mortgage, upon a something not *in esse*. Can a valid charge be made upon a thing not in existence? I think it can not. It is a very ancient rule of law, that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. [Mass.], 488, it is said that this 'is a maxim of law too plain to need illustration, and which is fully supported by all the authorities.' Bac. Abr., Grants, D, 2. *Codman v. Freeman*, 3 Cush., 309. 2 Kent Com., 703. *Head v. Goodwin*, 37 Maine, 187. *Robinson v. Macdonnell*, 5 Mau. and Sel., 228. *Chynoweth v. Tenney*, 10 Wis., *400. This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied to sales of personal property, and rights of property.

Chesley v. Josselyn, 7 Gray, 490; *Rice v. Stone*, 1 Allen, 569."

And again, after mature consideration, the doctrine enunciated in the *Lanphere Case* was approved, followed and reiterated in *New Lincoln Hotel Co. v. Shears*, 57 Nebr., 478. Speaking on the same subject, says COBB, J., who delivered the opinion of the court in *Cole v. Kerr*, 19 Nebr., 553, 555: "There is, to say the least of it, great confusion of the authorities on the point being considered, but after a careful examination of those cited on either side in this case I have reached the conclusion that as a question of law the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. of L. Cases, 191, 'a new intervening act.' Until then it remains a mere license, and until acted upon it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor."

The authorities appear to be almost, if not entirely, unanimous in support of the rule announced in the case last cited, to the effect that no legal estate or interest in or lien upon property, not in existence at the time of the execution of the instrument, passes to the grantee therein named by virtue of the instrument itself; and that the agreement, purporting to convey the property or give a lien on such property, when not in existence, is executory in character, in the nature of a license or continuing agreement requiring a further and new act in order to transfer any legal title or lien to the grantee or mortgagee. In addition to the authorities cited in the two decisions of this court, heretofore quoted from, the following are directly in point: *Chapman v. Weimer*, 4 Ohio St., 481; *Long v. Hines*, 40 Kan., 220; *Lunn v. Thornton*, 50 Eng. C. L. [1st Man., Gr. & S.], 379; *Williams v. Briggs*, 11 R. I., 476, and cases therein cited.

The more difficult question, as heretofore stated, arises with respect to an equitable lien being thus created, which attaches to the property when it comes into being and title thereto is acquired by the grantor, and regarding which there exists an irreconcilable conflict in the authorities. It is contended by counsel for plaintiff in the case at bar, and held by many respectable authorities, that notwithstanding the property, on which he seeks a lien, was not *in esse* when the lease was executed, that after the crops were raised on the demised premises, belonging to the lessor, and still remaining thereon, a lien in equity attached thereto, the enforcement of which should be permitted by resort to and the application of equitable rules and principles. The same argument, of course, applies to the other personal property afterwards acquired and subsequent to the execution of the lease brought on the premises. What counsel contends for amounts substantially to the enforcement of a landlord's lien, not only on the crops grown on the leased premises, but also on all the personal property of the lessee brought thereon after the execution of the lease, without any statutory authority therefor. This is sought to be accomplished by the very general terms of the stipulation in the lease heretofore quoted. It is admitted that no legal title passed when the lease was signed, and that there then existed no property on which a lien could operate. But it is said that the stipulation will in equity establish what in law it is incapable of doing, that is, although under the law no valid interest or lien passes to the lessor, yet an equitable lien arises in his favor and attaches to the property when it comes into existence; that, notwithstanding it is void in law—without a new act—it is valid in equity; that, by the application of the equitable doctrine contended for, a valid equitable lien may be created, not only on the crops raised on the leased premises for the year in which the lease was executed, but also as many years thereafter as the term of the lease covers—two, five, ten, or a quarter of a century;

and that such lien covers not only the crops raised on the premises, but as well all other property acquired and brought thereon by the lessee. We do not think this can be accomplished by the application of any sound equitable principle.

In the view of the case now under consideration, the expression of COBB, J., in *Cole v. Kerr*, *supra*, becomes pertinent: "Soil alone," says he, "does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil and seed, labor both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed —something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us."

In *New Lincoln Hotel Co. v. Shears*, *supra*, it was contended by those arguing for the validity of a clause in a lease, similar in its general terms to those in the present case, that the subsequent mortgagees of the property, who it is admitted had notice of the provisions for a lien in the lease, could not, therefore, question its validity. To this it is observed by RYAN, C.: "We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage or its equivalent can be made so as to affect future acquired property, is a question entirely dependent upon general principles independent of statute." In *Steele v. Ashenfelter*, 40 Nebr., 770, POST, J., speaking for the court on the same subject, says: "It will be seen from this statement that the question presented is, whether, as against Hale, the execution plaintiff, the mortgage includes the after-acquired property of the mortgagor. The question thus presented is one upon which the authorities are by

no means harmonious. The doctrine of *Holroyd v. Marshall*, 10 H. L. Cases [Eng.], 191, has been recognized by many of the courts in this country. In those jurisdictions the rule is that while at law a mortgage of after-acquired property confers no rights as against purchasers and attaching creditors, in equity it is effectual to charge the property, when acquired by the mortgagor, with an equitable lien, which will prevail not only as against the latter, but also as against attaching creditors. The distinction above noted between the rule at law and in equity can of course have no place under our practice where the two remedial systems are blended into one. Therefore, if the corporation, for which the plaintiff stands, by its mortgage acquired a lien which is enforceable in equity as against the execution plaintiff, such lien is available to him in this action. If the question was an open one in this state, the cases which recognize the rule in *Holroyd v. Marshall, supra*, would be entitled to great consideration, but we regard it as settled by the case of *Cole v. Kerr*, 19 Nebr., 553, in which it is distinctly held that a mortgage of a crop to be planted conveyed no lien upon crops subsequently raised by the mortgagor as against judgment creditors of the latter."

Says the supreme court of Wisconsin, in *Chynoweth v. Tenney*, 10 Wis., 341, 346: "But it is contended further that, although this interest may be inoperative at law, yet that it was effectual to establish an equitable lien, and the decision of Judge Story, in *Mitchell v. Winslow*, 2 Story, 630, and the authorities by him cited, are relied on to support this position. But we think the doctrine of this case had been so fully denied by subsequent cases that it can not be considered as law. [Citing a number of cases.] And in *Congreve v. Evetts*, 10 Ex. R., 307, Parke, B., says that such a conveyance 'gave no legal title, nor even equitable title, to any specific goods.' Other cases, to the same effect, might be cited, but we deem it unnecessary." The rule adopted by the Wisconsin court, just cited, has been approved and followed in

Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis., 215; *Single v. Phelps*, 20 Wis., 419; *Mowry v. White*, 21 Wis., 417; *Lemson v. Moffat*, 61 Wis., 153, and other cases. See, also, *Hutchinson v. Ford*, 9 Bush [Ky.], 318, and *Blanchard v. Cooke*, 144 Mass., 207.

Loftin v. Hines, 12 S. E. Rep. [N. Car.], 197, is a case involving the validity of a lien by virtue of an instrument in the nature of a mortgage on crops to be grown two or three years in the future, in which it is stated in the syllabus: "A mortgage executed in 1888 on crops to be cultivated during 1889, 1890, and 1891, conveys no title, legal or equitable, which can be enforced by claim and delivery." And in the opinion, says Clark, J., voicing the views of the court: "Unless said mortgage conveyed to the plaintiff either a legal or equitable title to the crop of 1889, the plaintiff can not recover. It is held by Davis, J., in *Wooten v. Hill*, 98 N. C. 52, 3 S. E. Rep. 846: 'The authorities do not warrant the conveyance of an indefinitely prospective unplanted crop, and we think it should be limited to crops planted, or about to be planted, as the crops next following the conveyance;' that is, the crops of the year current when the mortgage is executed. This case is to the same purport as the opinion by Pearson, C. J., in *Mastin v. Marlow*, 65 N. C. 695, and it has been cited and approved by Smith, C. J., in *State v. Garris*, 98 N. C. 733, 4 S. E. Rep. 633; by Shepherd, J., in *Smith v. Coor*, 104 N. C. 139, 10 S. E. Rep. 466; and by Avery, J., in *Taylor v. Hodges*, 105 N. C. 344, 11 S. E. Rep. 156. We think the mortgage was invalid as a conveyance of title, either legal or equitable, to the crop of 1889, and the proceeding by claim and delivery must fail." It seems in that state that a valid mortgage may be executed on unplanted crop for the current year.

In an early English case the rule is stated as follows: "That, if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant so as to prevent its passing to the assignees of the insolvent,

and then the assignment would make that equitable title a legal one; but, if it was only an agreement to mortgage furniture to be subsequently acquired—to give a bill of sale at a future day of the furniture and other goods of the insolvent—then it would cover no specific furniture, and would confer no right in equity." *Mogg v. Baker*, 3 Mees. & Wels., 194.

The natural and logical deduction to be made from the authorities above cited is that the agreement under which the plaintiff claims, being executory in its nature and not fully executed, is insufficient to pass any legal interest in, or equitable lien on, the property on which the lien is claimed, because not then in existence, and that the trial court committed no error in denying the plaintiff any relief by way of enforcement of a specific lien thereon for the amount for which he obtained judgment. Our court has long been committed to this doctrine, and there appears no sufficient reason to depart therefrom. Our Code has blended the remedies at law and in equity, both of which are now to be administered by one form of action, denominated a civil action. It is a familiar maxim that "equity follows the law." Applying this maxim, it is frequently held that a contract imposing no legal obligation can not be enforced in equity. Snell, Principles of Equity, p. 17. This rule, of course, having its proper application and limitations. The contract in the present instance is not the result of a mistake or failure of the parties to correctly express their intentions in the stipulation creating the alleged lien. It amounts only to a mere license, which to become effective for the purpose of creating a valid lien requires a change of possession of the property when or after acquired. Until a new act intervenes, no sufficient title passes to the lessor which he can enforce at law or in equity, nor is he entitled to relief by the application of any recognized rule of equity, under the doctrine of specific performance.

In the examination of the case we have not been un-

mindful of the authorities to which our attention has been directed, as well as many others examined in our consideration of the questions involved, in support of the plaintiff's contention that the stipulation creates in his favor an equitable lien which ought to be recognized. This line of cases is not in harmony with the doctrine of this court, as heretofore expressed, and must, for that reason, be disregarded as authority. The precedents which we have heretofore established should, in our judgment, be followed and adhered to.

It is claimed by appellant that the affidavit and claim of exemption made by the lessee, heretofore referred to, established a ratification and affirmation of the lien of the plaintiff under his lease. The affidavit was made in another case and in nowise was related to, or connected with, the contract of lease, except as it referred to it as being a paramount lien on the property. It was made and filed with the sheriff holding an execution to save the property from levy on the ground that it was exempt under the statute. After claiming his specific exemptions, which were enumerated, the appellee stated that certain growing corn, describing it, and a quantity of corn in the crib, was claimed under the statutory exemption of property of the value of $500, the affiant not being the owner of lands or lots, and that all of said property (*i. e.*, the property claimed under the exemption of $500 in value) "is incumbered by and subject to a lien for accrued rent due from me for the premises upon which the said corn was raised and is located, to the owner of the land in the sum of $900, and that the same is an incumbrance and a lien upon all of said property prior and paramount to any claim for exemptions which I now assert or claim against it. That the incumbrance and lien for said rent upon said property was created and established by myself and wife signing a written contract to that effect long prior to the levy of the execution levied by you on said property." While the affidavit was, perhaps, evidence of the construction the defendant

put upon the contract of lease, it in no way changes the legal relations of the parties, and so far as the statement, that a lien existed on the property by virtue of the stipulation in the lease, is concerned, it, at most, was only his opinion of its legal force and effect, which would not alter or change the principles of law involved and applicable under the issues joined in the present action. The lien referred to could only be perfected by a new act, which had not then been performed.

The judgment of the district court is

AFFIRMED.

MORRIS STEINBERG V. AUSTIN BUFFUM ET AL.

FILED MAY 22, 1901. No. 9,377.

1. **Preferred Creditor of Insolvent Debtor: INSTRUCTION.** In a contest between a preferred creditor and other creditors of an insolvent debtor wherein a sale of property to the preferred creditor is claimed to be fraudulent and void as to the other creditors, it is erroneous to instruct the jury that if it is shown the vendor was disposing of his property for the purpose of delaying and defrauding his other creditors and the vendee had knowledge or notice of such intention, the burden would be on the vendee to show that he made the purchase in good faith for the sole purpose of protecting himself.

2. **Fraud Never Presumed: BURDEN ON PARTY MAKING THE CHARGE.** Fraud is never presumed, but must be proven; and when it is claimed that a preferred creditor participated in the alleged fraudulent designs of the debtor to defraud, hinder and delay other creditors, the burden is on him making the charge to prove it by a preponderance of the evidence.

3. **Erroneous Instruction.** Instruction copied in the opinion, whereby the jury were authorized to infer a fraudulent intention on the part of a preferred creditor to hinder and delay other creditors because of his failure to point out to an officer holding an attachment writ the goods of the debtor, *held* erroneous.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Reversed.*

Morning & Berge, for plaintiff in error.

S. P. Davidson and *Daniel F. Osgood, contra.*

HOLCOMB, J.

One Descher. for some time prior to the beginning of the present action, was engaged in the retail grocery business in the city of Lincoln. The plaintiff in error, also plaintiff below, had been in the employ of Descher as a clerk in his grocery store from some time in the spring of 1895 until the time of the transactions hereinafter referred to. In June, 1896, Descher, being in failing circumstances and being pressed by his creditors and, as claimed by the plaintiff, being indebted to him in the sum of something over $700 for wages and borrowed money, sold, transferred and conveyed by a bill of sale to the plaintiff a part of the stock of goods of which Descher was possessed in satisfaction of such obligation. While the goods so claimed to be purchased were being separated from the remainder of the stock and when the work thereof was about completed the defendant in error, defendant below, caused to be levied thereon, as the property of Descher, a writ of attachment in a suit brought to recover a debt owing by the said Descher to the attachment plaintiff. The attached goods were replevied by the plaintiff, in which action verdict and judgment went against him, and from which he prosecutes error proceeding in this court to secure a reversal thereof.

On the trial of the replevin action in the lower court the plaintiff claimed the property in controversy by virtue of his alleged purchase thereof in satisfaction of a pre-existing debt it is claimed was due and owing him from the said Descher. The defendant contended that the alleged sale was fraudulent and void as to the creditors of Descher, and made to hinder, delay and defraud them in the collection of their demands. The evidence in the case was conflicting, fairly well balanced and would probably support a verdict in favor of either of the parties to the case. Several objections were made to the ruling of the trial court on the admission and rejection of evidence, which, upon only a passing examination of

the record, we are disposed to the view are without merit, although we do not undertake to decide the correctness of the rulings complained of in this respect. We mention the subject only as preliminary to a consideration of exceptions taken to the rulings of the trial court in the giving and refusal of certain instructions. The case, as it appears to us, was one largely of questions of fact and proper deductions to be made from the evidence, and the vital question is whether on the evidence the case was properly submitted to the jury under instructions correctly stating the law, when applied to the issues raised and the evidence in support thereof. The plaintiff's case, as stated, rested on a purchase alleged to have been made in satisfaction of a prior existing debt owing by the vendor. That the debt in fact existed appears to be fairly well established by the evidence, and that the goods sold were only in value reasonably proportionate to the amount of the alleged debt is not seriously questioned. The defendant's contention, as we conceive it to be from the record, is that the vendor was disposing of his property to hinder, delay and defraud his other creditors, including the defendant, which we think may be conceded, and that the plaintiff had notice of such fraudulent designs on the part of Descher and participated therein, thus rendering such sale and transfer fraudulent and void as to the other creditors, and especially the defendant, by reason of his attachment of the property. The plaintiff's standing, in the eye of the law, as claiming by virtue of the rights of a preferred creditor, was, therefore, of overshadowing importance, and to have the same correctly stated in the instructions to the jury would be the point on which the turning of the controversy would probably hinge. In the third instruction given by the court the law relative to this phase of the case is stated as follows: "The burden of proof is upon the plaintiff in the first instance to establish by a preponderance of the evidence all the material allegations of his petition. That is to say, in this case the burden

would be upon the plaintiff to show that at the commencement of the action he was the owner of the goods in controversy and had paid a good and sufficient consideration therefor. Such facts being shown by the plaintiff, then, inasmuch as the law presumes that persons transact their business honestly and in good faith, until the contrary appears, the burden would be upon the defendant to show that such purchase or bill of sale evidencing the same, if made, was done for the purpose of hindering, delaying or defrauding the creditors of Descher, and to show that the plaintiff had knowledge or notice of such intention upon the part of said Descher. These facts being shown by the defendant, then the burden would be upon the plaintiff to show that he made the purchase or took the bill of sale in good faith for the sole purpose of protecting himself." Its correctness is vigorously challenged by counsel for plaintiff in error. The instruction, we think, can not be upheld as a correct expression of law. In it the law is held to be that a creditor, who obtains satisfaction of a just demand from an insolvent debtor who is disposing of his property with fraudulent intent as to other creditors, having notice of such intent, must purge himself of fraudulent participation in the acts of the debtor by assuming the burden of proving that he purchased the property in good faith for the sole purpose of protecting himself. This is wrong and necessarily works a prejudice to the plaintiff in the submission of his claims to a jury. It is equivalent to saying that if in obtaining satisfaction of a debt he purchases property from a debtor having fraudulent designs as to other creditors, with notice thereof, the law presumes that he participated in such fraudulent intent, which presumption must be overcome by evidence of good faith on his part and that he acted solely for the purpose of securing the satisfaction of his debt. It raises a presumption that a transaction is had for a wrongful purpose without any evidence upon which to base the presumption. The instruction is in conflict with the principles stated in *Bank*

of Commerce v. Schlotfeldt, 40 Nebr., 212. It is there held first: "Fraud is never to be presumed. It must be proved. A creditor of a vendor, seeking to invalidate a sale upon the grounds of fraud, must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient"; and second: "In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest." RAGAN, C., writing the opinion says (page 214): "Fraud is never to be presumed. It must be proved. A creditor of a vendor, seeking to invalidate a sale upon the grounds of fraud, must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient. *Jaeger v. Kelley*, 52 N. Y., 274. In the absence of evidence to the contrary, honest and fair dealing in all transactions are to be presumed; and if any person claims there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest. *Long v. West*, 31 Kan., 298." The plaintiff in this action could only maintain his case by proof that he was a creditor of the vendor and purchased the property in satisfaction of the debt; this done, the law presumes the transaction was honest and fairly consummated. The defendant may disprove these facts and defeat plaintiff's right to the property or may, as he attempted to do, avoid the transfer by proving a fraud on the rights of other creditors in the sale of the property, and that the plaintiff, by reason of his action in connection with the transaction, was chargeable with such fraud. To succeed in this aspect of the case it was incumbent upon him to establish his defense by a preponderance of the evidence. Having charged the plaintiff

with fraudulent acts on his part sufficient to avoid the transaction, he was required to make the charge good by evidence in support thereof preponderating in his favor. It is not, we think, the law that when he proves the fraudulent intent of the vendor, and that the vendee had notice of it, the burden is on the vendee to prove that he did not participate in the fraud. The defendant is required to proceed one step further and prove also that the plaintiff was a participant in the fraud complained of. *Blumer v. Bennett*, 44 Nebr., 873. The rule is well settled in this state that as to a *bona fide* creditor of a fraudulent vendor, buying property or obtaining security for the satisfaction of his demand, that the transaction can not be avoided as to him by other creditors except it is shown that he shared in the fraudulent designs of his vendor and received the property or security for other purposes than protecting himself from loss by reason of his demand against the vendor. *Jones v. Lorce*, 37 Nebr., 816, 821; *Grosshans v. Gold*, 49 Nebr., 599; *Blair State Bank v. Bunn*, 61 Nebr., 464.

Instruction No. 8 is assailed as being prejudicially erroneous. In the paragraph it is stated: "Plaintiff's failure or refusal to point out which were his goods and which were Descher's, if you so find, are part of the facts and circumstances of the case from which you are to gather the intent of the parties in the transaction. It would be the duty of the plaintiff to do nothing to hinder creditors or not necessarily do anything to prevent officers from coming at the goods belonging to Descher that under their writs they were ordered to take." We think the instruction objectionable. From it the jury were at liberty to infer that, assuming it was the plaintiff's duty to point out the goods of the attachment debtor as stated, and having failed to do so and to discharge the duty devolving on him in that respect, he was hindering and delaying the creditors of Descher, and for that reason the transaction through which he claimed was fraudulent as to such creditors. This is giving a rather practical

application to the meaning of the word "hinder" and one not believed to be warranted by statute or by any rule of law. The logical effect is that if a preferred creditor does not assist an officer in serving process on the property of a fraudulent debtor, he is to be charged with hindering and defrauding the creditors, and the transaction by which he has obtained satisfaction is for that reason void. He was under no legal obligation to point out to the officers the property of the defendant in the attachment suit. As to such property, as is stated by counsel for plaintiff, he occupied a position of "armed neutrality." All that was said and done at the time is doubtless admissible as evidence throwing light on the transaction and for the purpose of ascertaining the truth of the issues involved; but his failure to point out to the officer the property of the common debtor would not, we apprehend, subject him to the charge of hindering the other creditors in the collection of their debts.

Numerous other instructions are excepted to and argued in brief of counsel which need not be noted in detail and which are not, in the light of the examination we have been able to give them, regarded as prejudicially erroneous. Several instructions requested by the plaintiff were refused and exceptions taken. The substance of these several instructions was given in the court's charge to the jury, and with the exceptions noted, we are of the opinion the case was fairly submitted under the instructions given.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

H. A. GREENWOOD v. B. F. INGERSOLL ET AL.

FILED MAY 22, 1901. No. 9,391.

1. **Pleading:** SUFFICIENCY OF PETITION IN INTERVENTION: FRAUDULENT CHATTEL MORTGAGE. In a contest between a mortgagee and other creditors of the mortgagor, an answer to a petition of intervention was presented, alleging that the mortgagee and mortgagor were "fraudulently colluding and conspiring together in the execution and filing of such chattel mortgages, for the purpose of hindering, delaying and defrauding these plaintiffs and other creditors in the collection of their just dues," and that the mortgages were given "without any existing valid indebtedness to be secured thereby." *Held*, To state facts sufficient to constitute a defense to the petition of intervention.

2. **Evidence:** FINDING: VALID LIEN: INDEBTEDNESS BONA FIDE. Evidence examined, and *held* not to support a finding that the mortgage under which intervener claims did not create a valid lien and was not given in good faith, in due course of trade, for a *bona fide* indebtedness, and was fraudulent and void as to the other creditors of the mortgagor.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

A. D. McCandless, for plaintiff in error.

Covell & Winter, contra.

HOLCOMB, J.

From the findings of the trial court, and a judgment thereon adverse to him, the intervener, Greenwood, by proceeding in error, seeks to secure a reversal in this court of the judgment rendered against him. But two questions are presented for consideration and determination. It is contended by plaintiff in error that the answer of defendants in error to his petition of intervention does not state facts sufficient to constitute a defense as to the new matter alleged, and that the findings and judgment of the trial court are not supported by the evidence and are contrary thereto.

The contest is between creditors of one Bridenthal. The plaintiff in error claims under and by virtue of a chattel mortgage, and the defendants under proceedings in garnishment. The subject of the controversy is the proceeds of a car-load of fat hogs. The hogs were owned by the said Bridenthal, who had executed a mortgage on the same, with much other personal property, in favor of the intervener to secure the payment of $2,078.75 due, as claimed, from the mortgagor to the mortgagee. Shortly after the execution of the mortgage the hogs were shipped by Bridenthal, in his own name, to a commission firm at South Omaha for sale on the open market, with a letter of instructions to the commission merchants to whom they were consigned to send the proceeds to Greenwood, the intervener and mortgagee. At the time of the shipment transcripts were hurriedly secured of judgments obtained theretofore against Bridenthal in Gage county, and filed in Douglas county, executions issued which were returned unsatisfied, and the commission firm garnished as the debtors of Bridenthal. Upon answer, the firm was directed to pay the money they held, as the proceeds of the sale of the hogs, into court to await its further order. The intervener applied for and obtained leave to intervene and file a petition claiming the said money by reason of his chattel mortgage on the property. To this answers were filed, the different cases consolidated and a trial had as though there was but one action. The conclusion was favorable to the judgment creditors.

With respect to the contention that the answer states no affirmative defense, we are unable to agree. While there are a number of allegations which we regard as stating conclusions of fraud, rather than pleading the ultimate facts on which the alleged fraud is predicated, yet in the third paragraph of the answer it is averred that the chattel mortgage, under which the intervener claimed, as well as other mortgages in his favor, were given and received by the parties "fraudulently colluding and conspiring together in the execution and filing of

such chattel mortgages, for the purpose of hindering, delaying and defrauding these plaintiffs and other creditors in the collection of their just dues." And in the fourth paragraph it is declared that the said mortgage was given in fraud and collusion of the parties thereto and "without any existing, valid indebtedness to be secured thereby." The answer, reduced to its simplest terms, alleges, as we view it, that the mortgage pleaded by the intervener, as well as a number of other mortgages, was given and received for the purpose of hindering, delaying and defrauding the creditors of the mortgagor; was without any valid consideration, and executed in pursuance of a common design and intention on the part of the parties to the several instruments to cover up and incumber the property of the mortgagor, so as to place it beyond the reach of creditors. In this respect we regard the answer as stating facts sufficient to constitute a defense.

As to the second question, the trial court found, "that the said chattel mortgage, under and by virtue of which the said intervener, H. A. Greenwood, claims a lien upon the said sum of $560.56, was and is not a valid existing lien thereon, that it was not given in good faith, in due course of trade, for a *bona fide*, ascertained and existing indebtedness from the said J. W. Bridenthal and Ella S. Bridenthal to the said H. A. Greenwood, and that the same was and is void as to the plaintiffs herein and all creditors." The evidence discloses a series of transactions between the intervener and mortgagor, extending over a period of several years and involving the giving of a large number of notes, and mortgages on both chattels and real property to secure the payment of the same. The evidence is not at all contradictory or conflicting, and the only point with respect thereto is the proper deduction warranted thereby. The intervener was doubtless a *bona fide* creditor of the mortgagor, and the several mortgages secured an indebtedness actually existing, as is represented by the several instruments evidencing the

indebtedness introduced in evidence. Most of the indebtedness was for borrowed money. The original indebtedness is shown to be for a balance of over $500, for lumber and building material purchased by the mortgagor and used in the construction of a dwelling-house on his farm, which was constructed in 1885. This, with borrowed money procured from time to time, and accumulated interest, less a number of payments made at different times, had grown to the sum of $2,078.75 at the time of the transactions leading to the institution of the present suit. There can be no question of this sum being actually due the intervener by the mortgagor at the time the mortgage was executed, under which the proceeds of the mortgaged property is claimed. The parties, it appears, would have a settlement of their transactions at the close of each year and a new note and mortgage taken for the sum found to be due at the time of such settlement. Although the notes evidencing the prior indebtedness were surrendered when a settlement was had, it appears that the mortgagee, Greenwood, failed and neglected to release the mortgages of record, and that at the time of bringing this suit there were some twelve unreleased chattel mortgages, aggregating several hundred dollars, appearing on the records against Bridenthal and in favor of the intervener. The intervener explains the matter by saying that he was not in the habit of releasing the mortgages in his favor (he being a money loaner) until, in 1896, some 900 unreleased mortgages were of record after the debts they secured had been paid; that he was furnished a list of the same and requested by the clerk to release them; that he furnished the clerk with a power of attorney to release all that had been satisfied. At about the time of the execution of the mortgage under which the intervener claims, another mortgage on other personal property was also executed, as well as a real estate mortgage, subject to prior incumbrances. The prior real estate mortgages, however, incumbered the land for more than it was worth, and the

chattel security would not be regarded as at all excessive. Aside from the continuous transactions and the mortgaging from time to time of practically all the property of the mortgagor, and the non-release of the mortgages when settlements were had and other mortgages given, we find nothing in the record to warrant the conclusion that the transaction in controversy was other than honest, in good faith, and for the purpose solely of protecting the mortgagee for a debt justly owing him. All of the different transactions were gone into in detail, and there is not the least indication appearing in the record of any one of them being for other purposes than securing an actual existing *bona fide* indebtedness; and, unless the inference is warranted from the uncontradicted evidence that, in addition to the object of securing a just debt, the parties also entertained a fraudulent design to hinder, delay and defraud other creditors, the mortgage must be upheld, and the conclusions reached by the trial court reversed. Most of the property in the prior mortgages had been disposed of, and that which was not was covered by the mortgage through which the intervener claims, and one other executed a day or two subsequent, securing the same debt. We are hardly justified in concluding that there was a design and object to defraud other creditors in permitting these prior mortgages to remain uncanceled, because the security mentioned therein was either disposed of or included in the subsequent mortgages. The neglect was doubtless carelessness on the part of the mortgagee, as stated by him, from which no one has been or could be prejudiced, save the mortgagor. There is nothing in the evidence warranting the conclusion that the mortgagee was acting otherwise than solely to obtain security for a debt justly due him, and the law should not deprive him of this protection when there exists no evidence of fraud or wrongful intent on his part. The mortgagor appears in an equally creditable light. He has been struggling along for several years under adverse circumstances. He appears to

be making an honest effort to keep his head above water and meet his just obligations. If a chattel mortgage in the present instance is not valid because of the acts of the parties in relation to the indebtedness secured, we can scarcely conceive of a case where chattel security may be confidently relied on or when the creditor would be justified in extending the time of payment of a secured debt and carrying the debtor to a more favorable time for him to satisfy the obligation.

In considering the subject we have not overlooked the view of the case that the intervener, claiming against other creditors under a chattel mortgage, the mortgagor being in possession, the instrument under which he claims is *prima facie* fraudulent as to such creditors, which presumption is to be overcome by proof by the mortgagee of the *bona fides* of the transaction. We think the mortgagee has fully met this requirement, and has satisfactorily shown by the evidence that no unfavorable inference, sufficient to avoid the instrument, may rightfully be drawn from their course of dealing as to any fraudulent intent in regard to the other creditors of the mortgagor, under the charges of fraud contained in the answer. The parties all reside in Gage county, where the controversy could, with less expense and more conveniently, be tried. The creditors, however, evidently regard it as more advantageous to them to begin the action in the manner stated in another county, distant from the homes of all parties in interest, and, from the evidence, before any execution had been issued against the debtor in the county in which he resided.

The evidence will not support a judgment against the intervener, whose right to the proceeds of the mortgaged property is based on a valid mortgage in his favor.

The judgment must be reversed, and the cause remanded.

REVERSED AND REMANDED.

MARION E. ROBERTSON V. THOMAS E. HAMILTON.

FILED MAY 22, 1901. No. 9,593.

1. **Review:** EXCEPTION: WAIVER. Where no exception is taken to the ruling of the trial court in sustaining a demurrer to a petition, and a request is made and leave given to file an amended petition, the ruling of the court on the demurrer can not be reviewed on error proceeding in this court.
2. **Appeal:** TRIAL ABOVE: SAME ISSUES: NEW MATTER: PAYMENT. On an appeal to the district court of a case tried before a justice of the peace the cause must be tried on the same issues as were tried in the lower court, except as to new matter arising after the first trial, such as payment, etc. *Halbert v. Rosenbalm*, 49 Nebr., 498.

ERROR from the district court for York county. Tried below before SEDGWICK, J. *Affirmed.*

George B. France and *T. E. Bennett*, for plaintiff in error.

George F. Corcoran and *F. C. Power, contra.*

HOLCOMB, J.

Before a justice of the peace, the plaintiff in error began an action to recover of the defendant, who was an official court reporter of the judicial district in which York county is situated, the sum of $27.76 alleged to be due by reason of an overcharge of that amount for a transcript of the evidence taken in a certain case, which case the plaintiff was desirous of having appealed to the supreme court, such transcript being prepared and furnished the plaintiff by the court reporter at his request. In the bill of particulars it is alleged: "That the defendant demanded of the plaintiff the payment at five cents per hundred words for 148,000 when in fact and in truth the number of words in said transcript was 92,489, and by mistake of fact as to the number of words the plaintiff paid to the defendant the sum of $27.76 too much." On appeal to the district court from a judgment in favor of

the plaintiff, a petition, stating or attempting to state substantially the same cause of action as in the bill of particulars filed in the case before the justice of the peace, was demurred to, the demurrer, upon consideration, being sustained by the trial court. No exception to the ruling sustaining the demurrer was taken; but, on the contrary, the record discloses that, "on request of plaintiff, he is allowed to file an amended petition within thirty days." We are now asked to review the ruling sustaining the demurrer. This we can not do. No exception thereto being taken, and the plaintiff requesting leave to file an amended petition, he has waived the error, if any there be, in the ruling referred to. *Abbott v. Barton*, 47 Nebr., 822. An amended petition was filed, which on motion was stricken from the files, because declaring upon a different cause of action than that stated in the bill of particulars on which the action was tried before the justice of the peace. The plaintiff refusing to plead further, the action was dismissed at his cost. This ruling was correct. The amended petition clearly stated a different cause of action than that tried by the justice. In the petition last filed the recovery was founded on an alleged verbal agreement or contract entered into by the parties at the time the transcript of the evidence was requested by the plaintiff; while in the bill of particulars no agreement was in anywise mentioned, pleaded or set forth as the foundation for the right of recovery. The action there was based on the statute, fixing the fees which a court reporter may legally charge and receive for the service rendered in preparing a transcript of the evidence in long hand.

Whatever may be the merits or demerits of the cause of action stated in the bill of particulars and the petition first filed in the district court, the amended petition obviously presented an entirely different and new cause of action. The rule is well settled, that on appeal to the district court of a case tried before an inferior court the cause must be tried on the same issues as were tried in

the lower court, except as to new matter arising after the first trial, such as payment, etc. *Halbert v. Rosenbalm*, 49 Nebr., 498.

The record appears free from errors, and the judgment of dismissal is accordingly

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. MICHAEL BURNS.

FILED MAY 22, 1901. No. 9,645.

1. **Payment:** NOTE OR BILL OF EXCHANGE FOR PRIOR DEBT: EXPRESS AGREEMENT. The giving and acceptance of an order, bill of exchange or promissory note for a prior indebtedness will not be regarded as payment, unless there be an express agreement between the parties to that effect.
2. **Pay Check:** THIRD PARTY: RAILROAD OFFICIAL. An order or "pay check" drawn by a paymaster of a railroad company, on the assistant treasurer, in favor of an employee, is not drawn against a third party, but on the party from whom the debt, for which the "pay check" is given, is due.
3. ———: PAYABLE AT BANK: COMPANY AND NOT BANK DRAWEE. A "pay check," given to an employee of a railroad company by the paymaster, drawn on the assistant treasurer, and made payable at different banks therein mentioned, is not a check on either of the banks as by a depositor therein. Such check is made payable at the bank specified and not by the bank, and the company, not the bank, is the drawee.
4. ———: LOST PAY CHECK: FORGERY: PAYMENT TO UNAUTHORIZED HOLDER: RIGHT OF RECOVERY. Where the payee of a "pay check," drawn to him or his order, is robbed of it and his indorsement forged thereon, and payment made to an unauthorized holder, the payee may, notwithstanding such payment, recover from the drawee the amount due him, as evidenced by the order.
5. **Negligence.** The drawee sought to escape liability of payment to the payee on the ground of his alleged negligence. *Held*, first, as a question of fact, a finding in favor of the plaintiff would not be disturbed; and, second, the unlawful possession of the holder of the order, and the receiving payment on the forged indorsement, being the result or fruit of a crime, the defendant could not predicate an estoppel by negligence thereon, unless it appears that the negligence is the proximate cause of the forgery being taken as genuine.

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

Greene & Breckenridge, for plaintiff in error.

A. N. Ferguson, contra.

HOLCOMB, J.

The plaintiff below, Michael Burns, defendant in error, was employed by the plaintiff in error as a day laborer, for whose services settlements were had monthly. "Pay checks" were issued upon which the employee was to receive the money due him for labor performed. It appears from the record that there had been delivered to him for his services by the paymaster of the company two "pay checks" aggregating $51.21, one of which reads as follows:

"No. 71509.

"BURLINGTON & MO. RIVER R. R. IN NEB.

OMAHA, November 30, 1895. $25.23

"J. G. Taylor, Asst. Treas. Pay to the order of M. Burns twenty-five 23-100 dollars.

"Payable at the Nebr. Nat'l Bank, Omaha, First Nat'l Bank, Lincoln, First Nat'l Bank, Denver.

"Not good for an amount exceeding two hundred dollars.

C. W. NORTHUP,

"F. W.

"*Paymaster.*

"1895. Pay check. Burlington Route, B. & M. R. R. in Neb.

"No protest."

The other is the same except as to the amount and date. The defendant in error, while returning from where he had been laboring in Wyoming, was, as he testifies, robbed of the two pay checks mentioned, and his indorsements thereon forged, and the amount for which they were drawn secured at one of the banks where made

payable by some unknown person. Burns began suit against the company for the amount due him for his services, as evidenced by the two "pay checks" of which he had, as alleged, been robbed. The company, having paid the bank cashing the check under the circumstances mentioned, denied further liability, and from a judgment against it, for the sum claimed, with interest, brings the case here by proceeding in error.

Counsel for plaintiff in error close their brief with the statement that the case should be reversed for two reasons: (1) The receipt of the checks extinguished the indebtedness of the railroad company to Burns; (2) the payment upon a forged indorsement raised a liability in plaintiff's favor against the bank where they were cashed. We do not think the receipt of the checks extinguished the company's liability to Burns. This would not be the case in the present action, even though the assistant treasurer of the company, on whom the order was drawn, was a third party—which he is not. The rule is: "The giving and accepting of an order, bill of exchange or promissory note, for a prior indebtedness will not be regarded as payment thereof, unless there be an express agreement between the parties to that effect." *Farwell v. Salpaugh*, 32 Ia., 585, and cases cited; *Chamberlain Banking House v. Woolsey*, 60 Nebr., 516. There is no evidence of any express agreement that the pay check was received in satisfaction of the sum due for labor, and it would be ridiculous to conclude that its receipt was other than for the purpose of obtaining from the company, his debtor, on whom it was drawn, the money due as evidenced thereby. But, taking the view contended for, that the acceptance of the order satisfied the prior indebtedness for labor performed and created a new liability in favor of the plaintiff, he has a right of action thereon against the company, as drawee, which is properly pleaded in his petition and justifies a recovery of the amount claimed. The transaction does not come within the rule of an acceptance of an order on a third

party, being a payment and satisfaction of a prior indebtedness, and the authorities in support of the rule are not applicable. The "pay check" or order was not on a third party. It was addressed to the assistant treasurer of the company, signed by the paymaster, and was a direction for the payment by the company, through its proper disbursing officer, of the amount due from it to the employee or his order. The fact that the order is made payable at different banks does not change the character of the instrument. The reasons for making the order thus payable do not appear from the record, and it is needless for us to speculate or philosophize regarding the matter. It is probably regarded as a matter of convenience to all concerned to have the orders gathered up by certain banks and presented by these banks to the company for payment, rather than by the individual payees.

As to the second proposition, viz., the alleged liability of the paying bank to the plaintiff, instead of the liability of the defendant company, we think the question hardly admits of argument. None of the banks mentioned as places where the order is payable, are made a drawee in the pay check, against whom a right of action could be maintained in the event the check was not honored when presented. If not paid, the payee must look to the company on whom the order is drawn for satisfaction. By the evidence of the officers of the company it is made to appear that these "pay checks" are paid by one of the banks named, which immediately forwards them to the assistant treasurer of the company for payment, upon receipt of which by him a bank check of the company is sent to the bank, thus paying the orders, payment to the bank being made in whatever sum was due by reason of cashing the "pay checks." The "pay check" is made payable at and not by the bank. It can not, therefore, be said that the order is a check on a bank, in which the company is a depositor, and, when issued and accepted, an assignment of the company's funds in the bank on

which drawn, subject to the laws generally applying to checks drawn on banks by the depositors therein. The checks or orders in question were drawn against the company, to be paid by its assistant treasurer to the payee therein named, or to his order. The payee never parted with the legal title thereto. He never indorsed the paper or authorized any one to collect the same. The indorsement being forged, it is no indorsement, and the payment by the company to the holder, under the circumstances, was unauthorized and in no way militated against the legal rights of the payee to recover whatever was due him, as evidenced by the orders of which he had been unlawfully deprived. Benjamin's Chalmers Bills, Notes & Checks, art. 81, p. 90. We know of no legal principle which may be applied to relieve the company from liability to the plaintiff on his cause of action stated in the petition.

It is suggested that the plaintiff, being intoxicated at the time, was guilty of negligence, which would preclude a recovery. The alleged negligence is a question of fact, upon which an issue was formed and which has been decided against the defendant. Furthermore, the unlawful possession of the holder of the orders, who received payment on the forged indorsements, being the result or fruit of a crime, we know of no rule that would permit the defendant to predicate an estoppel by negligence thereon, unless it appears that the negligence is the proximate cause of the forgery being taken as genuine. Benjamin's Chalmers Bills, Notes & Checks, p. 93.

We are of the opinion that the judgment should be affirmed, which is accordingly done.

AFFIRMED.

ANDREW J. HANSCOM, APPELLANT, V. MAX MEYER ET AL., APPELLEES.

FILED MAY 22, 1901. No. 11,583.

1. **Repeal of Statute:** DEFICIENCY JUDGMENT: ACTIONS PENDING: The repeal of sections 847 and 849 of the Code of Civil Procedure (Session Laws, 1897, ch. 95), permitting the recovery of deficiency judgments, did not affect actions then pending. *Thompson v. West*, 59 Nebr., 677.

2. **Foreclosure:** JUDGMENT IN PERSONAM: PENDING ACTION. An action brought for the foreclosure of a real estate mortgage and to recover a judgment *in personam* for any deficiency, in which a decree had been rendered ordering a sale of the property and holding defendants personally liable for any deficiency, prior to the repeal of the statute, is a "pending action" for the recovery of a personal judgment, within the meaning of section 2, chapter 88, entitled "An act concerning the enacting and repealing of statutes."

APPEAL from the district court for Douglas county. Heard below before KEYSOR, J. *Reversed.*

George E. Pritchett, for appellant.

Thomas F. Lee, James H. McIntosh, Lodowick F. Crofoot and *Charles S. Elgutter, contra.*

HOLCOMB, J.

In 1895, and long prior to the repeal of sections 847 and 849 of the Code of Civil Procedure, authorizing the recovery of a deficiency judgment in an action for the foreclosure of a real estate mortgage (Session Laws, 1897, ch. 95), the appellant, as plaintiff, instituted an action for the foreclosure of a real estate mortgage securing a debt to him owing by the appellees and for the recovery of a judgment *in personam* against those liable on the notes secured by such mortgage for any deficiency remaining after the sale of the mortgaged property and the application of the proceeds thereof to the satisfaction of the mortgage debt. After the appearance of the parties

and joinder of issues, and yet before the repeal of the sections mentioned, a trial was had in which it was found that a certain sum was due the plaintiff on the notes and mortgage pleaded in the petition as his cause of action, and decreeing a sale of the mortgaged premises upon which such sum was found to be a valid lien; and also decreeing that appellees, defendants in the action, were jointly and severally liable to the plaintiff for any deficiency remaining after the application of the proceeds of the sale of the property covered by the mortagage lien. An appeal was taken from the decree so rendered to this court, on consideration whereof the same was affirmed. During the pendency of the appeal the sections of the Code first referred to were repealed by the legislature of 1897. Afterwards, and at the time of confirmation of the sale of the premises on the decree so rendered as aforesaid, it appearing that the proceeds of the sale of the property were insufficient to satisfy the amount found due with costs, the plaintiff moved for judgment against the defendants found personally liable for the indebtedness, which upon consideration was denied by the trial court. From the order denying him a judgment *in personam* for the deficiency remaining unsatisfied appellant appeals.

Two questions not at all related are presented and argued in brief of counsel for appellant. First, it is argued that the legislation of 1897 (Session Laws, 1897, ch. 95) repealing sections 847 and 849 and amending section 848 of the Civil Code, in so far as it applies to the action then being prosecuted by plaintiff for the recovery of the debt and enforcement of the contract as aforesaid, is void, and of no effect, as being in conflict with the federal constitution prohibiting legislation impairing the obligation of a contract. And second, in view of the provisions of section 2, chapter 88, Compiled Statutes, 1899, being a general saving clause with respect to the effect of a repealed statute on actions pending at the time of repeal or causes of action founded thereon which have accrued

prior thereto, it is contended that plaintiff is entitled to the judgment asked for, notwithstanding the repeal of the statute on which the right to the relief asked was founded. A proper discussion of the case requires the consideration of the proposition last advanced first, for if the repealed law in no way affects actions pending, or where the cause of action accrued prior to the repeal, it is useless to further proceed in the review of the proceedings had in the lower court. An affirmative answer requires a reversal of the order complained of, regardless of the scope and effect of the repeal of the sections referred to on other contracts. Section 2, chapter 88, entitled "An act concerning the enacting and repealing of statutes," reads as follows: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." The repealing act of the sections mentioned is general in its terms and contains nothing to indicate any legislative intent other than that the general section governing repeals, just quoted, should apply with the same force it possesses in relation to any other repealed statute. A general saving clause regarding repealed statutes is by the authorities held to apply as though it was expressly incorporated in the repealing act, and this view of its effect has heretofore been announced by this court in the case of *Kleckner v. Turk*, 45 Nebr., 176, 195, where it is observed by Mr. Justice HARRISON writing the opinion: "The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed, or causes of action not in suit, that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891, which repealed sections 136 and 139, that it was not the purpose of the legislature that such pending actions and those accrued, but not in suit, should be preserved, "citing *Gilleland v. Schuyler*, 9 Kan., 569; *State v. Boyle*, 10 Kan., 113. Suther-

land on Statutory Construction states the rule as follows: "The legislature has the power to pass a general saving statute, which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved. Though one legislature cannot bind future legislatures, and each can make its laws prevail against any that exist, and its intention in that regard will be law; yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view." Sutherland, Statutory Construction, sec. 226, and cases cited. In section 167 it is observed by the same author: "The effect of repeal upon inchoate rights, upon offenses and upon incomplete proceedings may be avoided by a saving clause providing that it shall not affect such rights, prosecutions for such offenses, or such proceedings, or by a general statute for that purpose. Such general statutes have been enacted in nearly all of the states as well as by congress." In *Thompson v. West*, 59 Nebr., 677, recently decided in this court, it is held first: "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." And second: "The repeal of the statute permitting the recovery of deficiency judgments did not affect actions then pending." Says NORVAL, C. J.: "On the other hand if the power to render a deficiency judgment is purely statutory, as was intimated in *Devries v. Squire*, 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." We regard the opinion in the case last cited as decisive of the question. A distinction is sought to be drawn between that case and the one at bar by reason of the fact that in the case cited a request for a deficiency judgment was

made after the incoming of the report of the officer making the sale of the mortgaged premises, and before the repeal of the law empowering the court to render such judgment; while in the present case the decree of foreclosure only had been rendered and the property not yet sold when the repealing act took effect. We do not think the principle applicable is at all different in either case, or that the general statutory saving clause does not cover and include the proceedings in the case at bar and save to the parties such rights as they possessed in the pending action as fully as if the repeal had not taken place. The right of action had accrued and the action was pending. The cause of action entitling the plaintiff to a deficiency judgment was stated in the petition filed long prior to the repeal of the statute. To say that the action was not pending at the time of the repeal of the statute is but playing with words. It was not only pending, but the trial court had litigated the question and decreed that the defendants were liable for any deficiency judgment that might remain after a sale of the mortgaged premises. It has been decided by this court at different times that the liability of a party for a deficiency judgment may be, as it frequently is, litigated at the hearing when the decree of foreclosure is rendered, although the practice is not to be commended. If the question of liability for a deficiency judgment may be thus litigated, as it was in this case, at the time of entering the decree of foreclosure and before the repeal of the law, can it be said the action was not pending; and if the action is pending rightfully, can it be said a cause of action has not accrued? While a final judgment for a deficiency may not be rendered until after the incoming of the officer's report of sale of the mortgaged premises, this fact does not determine either the question of when the cause of action accrued or when the action for the recovery of such judgment was begun, or during what time it was pending. The object of the statute prior to its repeal was to permit of the determination of the entire con-

troversy in the one action, the pendency of which must be considered as commencing at the inception of the suit for the purpose of a foreclosure of the mortgage, and also the recovery of a judgment *in personam* for any deficiency remaining after a sale and application of the proceeds of the property incumbered as security for the debt.

The order denying plaintiff's motion for a deficiency judgment must be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE APPLICATION OF JOHN WALKER FOR A WRIT OF HABEAS CORPUS.

FILED MAY 22, 1901. No. 11,977.

1. **Habeas Corpus:** VOIDABLE JUDGMENT. A prisoner held under a process in due form issued upon a judgment can not obtain his discharge by habeas corpus, unless the judgment is void, and not merely voidable.

2. **Suit Against Putative Father of Bastard, Civil Action with Extraordinary Remedy.** A suit against the putative father for the maintenance of his illegitimate child is essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing a judgment rendered in the case.

3. **Bastardy Act:** POLICE POWER: ENFORCEMENT OF MORAL OBLIGATION. The bastardy act is an exercise of the police power of the state, the object of which is to require the putative father, in compliance with his moral obligation, to furnish support for his child and indemnify the public against liability for its care and maintenance.

4. ———: JUSTICE JURISDICTION, HOW ACQUIRED. A justice of the peace obtains jurisdiction over a defendant under the act in question by the filing of the statutory complaint, duly verified; the issuance of a warrant for the arrest of the defendant, and its execution, the execution of the process serving the same office as the service of a summons in an ordinary civil action.

5. **Jurisdiction of District Court, How Acquired.** In a proceeding

under the bastardy act the district court acquires jurisdiction by the filing of the transcript of the proceedings had before the justice of the peace, based on a proper complaint, arrest of the accused, and order requiring him to appear before the district court for trial. *Altschuler v. Algaza*, 16 Nebr., 631.

6. ———: SCOPE OF JURISDICTION: ABSENCE OF DEFENDANT. The district court having acquired jurisdiction by the filing of a transcript of the proceedings had before a justice of the peace, is empowered to try the case and render judgment, even though the defendant be not personally present.

7. **Failure of Defendant to Appear and Plead:** TRIAL TO COURT WITHOUT JURY. Where a defendant fails to appear in the district court, in pursuance to an order made at the preliminary inquiry had before a justice of the peace, and enters no plea to the complaint, a trial may be had to the court without the aid of a jury provided for by section 5 to try the issue on a plea of not guilty.

8. **Failure to Impanel Jury:** CORRECTION OF ERRONEOUS JUDGMENT BY HABEAS CORPUS. The failure to impanel a jury to try the issue would not go to the jurisdiction of the court, but, at most, render the judgment erroneous, the correction of which could not be had by proceedings in habeas corpus.

9. **Inter-State Extradition:** PROSECUTION FOR ANOTHER CHARGE: CIVIL LIABILITY. A defendant brought to this state on requisition, in good faith, and not as a pretext or device to serve some ulterior purpose, may be prosecuted on any other charge of violating the laws of the state or for a civil liability or obligation resting upon him, and is not exempt from service of process until a reasonable time elapses in which to return to the state from which he was brought under the requisition.

10. ———: DEFENDANT NOT ENTITLED TO IMMUNITY FROM SERVICE OF PROCESS. A defendant brought into the jurisdiction of the courts of this state, on requisition from another state, is not entitled to immunity from service of process, civil or criminal, until a reasonable time elapses in which to withdraw from the jurisdiction, such as is ordinarily extended to suitors and witnesses whose attendance at court is voluntary.

ORIGINAL application for a writ of habeas corpus to release the relator from commitment to enforce a judgment of filiation. *Writ denied.*

Matthew Gering, for relator.

Jesse L. Root, C. S. Polk and *C. E. Tefft, contra.*

HOLCOMB, J.

The petitioner, John Walker, brings an original action in this court for a writ of habeas corpus, alleging in his petition that he is unlawfully restrained of his liberty by the sheriff of Cass county, in whose custody he is held by virtue of a capias writ issued out of the district court of said county. It appears from the record that the writ was issued on a judgment of filiation, rendered in an action pending in said court against the petitioner, in which said judgment it was ordered by the court that the defendant, the petitioner, pay to the plaintiff in the action the sum of $138.75, for the care and expense connected with the birth, care and death of a bastard child, he being adjudged to be the reputed father, and the costs of the action; in default of which payment or the securing of the payment thereof, the defendant should be committed to the jail of the county until the judgment be complied with. The facts in the case are stipulated by the parties. There are but two questions of controlling importance, necessary to be considered in a proper determination of the controversy, which will appear in the further discussion of the subject. In September, 1900, a complaint was entered by Lillie Parker, an unmarried woman, before a justice of the peace of Cass county, under the provisions of chapter 37 of the Compiled Statutes of 1899, charging the defendant with being the father of her illegitimate child, of which she had been delivered a short time previous. A warrant was issued and the defendant arrested and brought before the justice, and upon defendant's application a continuance of the hearing contemplated by statute was had, and he entered into a recognizance to appear at the time to which the hearing was continued. Upon a hearing had before the justice of the peace as to the truth of the charge made against the defendant, at which he was present, evidence was submitted and reduced to writing as required by statute, upon consideration of which it was found that the com-

plaint was established; and the defendant was required to enter into a recognizance in the sum of $500 for his appearance at the next term of the district court, to answer the accusation made against him and abide the order of the court. The defendant was placed in the custody of a constable for the purpose of securing the recognizance required, and, neglecting to give the same, a mittimus was issued authorizing his commitment to the jail of the county. Before execution of the mittimus the defendant escaped from the custody of the constable and fled to the state of Iowa. A transcript of the complaint and all proceedings had before the justice of the peace was duly made, certified and filed in the office of the clerk of the district court of Cass county on the first day of the next term thereof held after the preliminary hearing had before the justice of the peace. The defendant failing to appear at said term of the district court, his default was duly taken and entered, and the case coming on for hearing, evidence was submitted to the court without the intervention of a jury, upon consideration whereof it was by the court adjudged that the defendant was the reputed father of the bastard child of the plaintiff, liable for its support and maintenance, and awarding judgment accordingly as herein first mentioned. The defendant was afterwards arrested on a capias issued upon the judgment and held in custody because of his failure and default in complying with the judgment so rendered.

It is contended by counsel for the petitioner, and argued in his brief, that the judgment, which is the foundation for the process directing the arrest and imprisonment of the defendant, is void for want of jurisdiction over his person of the court rendering the judgment, the precise question being that because the defendant was not personally present in court and had entered into no recognizance for his presence thereat, and having fled from the custody of the officer detaining him under the mittimus, jurisdiction by the district court was never

acquired over his person. We are, therefore, to inquire in what manner does the district court obtain jurisdiction in a proceeding of the character under consideration? Is it by filing a transcript of the complaint and proceedings had before a justice of the peace,—who, it must be conceded, in this case was empowered to act and had the jurisdiction which was exercised at the preliminary inquiry,—or must the personal presence of the defendant, voluntarily or involuntarily, be had in the district court before it is authorized to render judgment in the case?

Preliminary to what follows we, perhaps, should here note that habeas corpus proceedings can not be resorted to for the purpose of correcting errors of the trial court rendering the judgment which is challenged in such proceedings. If the prisoner is held under a process in due form issued upon a judgment, he can not obtain his discharge by habeas corpus, unless the judgment is void and not merely voidable. Freeman, Judgments, sec. 619, citing *Ex parte Marx*, 86 Va., 40; *In re Coy*, 127 U. S., 731, 757, and *Ex parte Watkins*, 3 Pet. [U. S.], 191, 202. The bastardy proceedings must also be regarded as essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing a judgment rendered in the case. *Ex parte Cottrell*, 13 Nebr., 193; *Altschuler v. Algaza*, 16 Nebr., 631; *Strickler v. Grass*, 32 Nebr., 811. While in its character the proceeding is a civil action under the statute, the act is, properly speaking, the exercise of the police power of the state, the object of which is to require the putative father, in compliance with his moral obligation, to furnish support for his child and indemnify the public against liability for its care and keeping, "to compel him to assist in the maintenance of the fruit of his immoral act" and to prevent the child from becoming a county charge. *Stoppert v. Nierle*, 45 Nebr., 105, 117, and cases therein cited. It is practically conceded that the justice of the peace, before whom the preliminary proceedings

were had in the case, had jurisdiction and authority to act regarding the case, in so far as his powers were exercised. This jurisdiction was obtained by the filing of the statutory complaint, duly verified, and the issuance of a warrant thereon, and the arrest of the defendant. The process by which the court acquired jurisdiction over the defendant was the warrant issued for his arrest, and its execution serves the same office as the service of a summons in an ordinary civil action; and the court thereby acquired jurisdiction over the person of the defendant. *Altschuler v. Algaza, supra; Beckett v. State*, 30 N. E. Rep. [Ind.], 536. The justice can not try the case. He may make only an examination, and, if the evidence warrants it, require the defendant to enter into a recognizance to appear at the next term of the district court, there to answer the complaint and abide by the order of the court. This proceeding, however, is required only in the event of the defendant's failure to comply with the provisions of section 1, for the payment of money or transfer of property to the plaintiff, and to give an obligation to save the county free from charge toward the maintenance of the child; if the defendant comply with these provisions, he is entitled to be discharged. On the district court, the statute has conferred original jurisdiction to try the case on its merits, render judgment of filiation, and for the maintenance of the illegitimate child in such sum as may be ordered. *Munro v. Callahan*, 41 Nebr., 849.

Has the district court jurisdiction for this purpose when a defendant has not personally appeared therein, under the facts and circumstances as in the case at bar? In *Altschuler v. Algaza, supra*, it is held in the syllabus: "In a proceeding under the bastardy act the district court acquires jurisdiction by the filing of the transcript of the proceedings before the justice, based on a proper complaint, arrest of the accused, and order requiring him to appear before the district court for trial." The record in this case discloses that a transcript of all the proceedings

had before the justice of the peace were duly filed in the office of the clerk of the district court, and jurisdiction, it would seem, was by the court thus acquired as fully as if the defendant had voluntarily submitted his person to the jurisdiction of that court and afterward departed without leave. The court having secured jurisdiction by the filing of the transcript, the vital question next presented is whether the court has jurisdiction to render a judgment in the absence of the defendant? Jurisdiction having been acquired at the commencement of the action and the case, after the examination contemplated by the statute before the justice, having been transferred to the district court for a continuation of the proceeding, we observe no good reason for holding that the case may not be proceeded with and a proper judgment rendered, of the same validity and force, and to the same extent, as though such proceeding were in the first place had in the district court. The action being civil in character, there would seem to be no pressing necessity for the defendant's presence if he voluntarily absents himself from the court at the time of the hearing had in that tribunal. The court has jurisdiction over the person of the defendant and the subject-matter by the filing of the transcript, and, as we view the entire scope and object of the statute, is empowered to try the case and render judgment, even though the defendant be not personally present. The object of the statute providing for the detention of the defendant in confinement, or his recognizance for his appearance in the district court, is manifestly for the purpose of enforcing summarily the judgment rendered in the action, and not to confer jurisdiction on the court —this had already been accomplished in the manner stated. It is observed by Bellows, J., in a well considered case, *Stokes v. Sanborn*, 45 N. H., 274, 276: "Indeed, it is quite obvious, that the object of the law is to redress a civil injury by compelling the putative father to aid the mother in the support of the child, and to indemnify the town, chargeable with its support, against the ex-

penses which may be incurred thereby; giving to the court the power to require of the father or the mother, or both, security against this liability. * * * Some of the forms of this proceeding, it is true, are borrowed from the criminal law, but these are simply with the view of giving a more summary and stringent character to the process, by which the respondent is brought into court and held to answer to the charge; leaving it, in most other respects, to stand upon the footing of ordinary civil causes. It is, therefore, held, in *Marston v. Jenness* [11 N. H., 156] and *Little v. Dickinson* [29 N. H., 56], * * * that the respondent is not arraigned, but appears and pleads by attorney. Under a similar law in Massachusetts, this is held to be a civil proceeding. *Wilbur v. Crane*, 13 Pick. [Mass.], 284; *Williams v. Campbell*, 3 Met. [Mass.], 209. So in *Mariner v. Dyer*, 2 Greenl. [Me.], 165; *Hinman v. Taylor*, 2 Conn., 357; *Robie v. McNiece*, 7 Vt., 419; *Gray v. Fulsome*, 7 Vt., 452; *Smith v. Lint*, 37 Me., 546. It being settled, then, that proceedings under this law are to be regarded as civil actions, the question is, whether there is anything in their nature, or anything to be implied from the provisions of the statute, that requires the personal presence of the respondent at the trial, or the rendition of judgment, or that takes such cases out of the general rule, that judgment in civil actions may be rendered upon default. The service in these cases is by the arrest of the body, and security taken for the appearance of the respondent at the proper court, by bond; and, although the form of the proceeding is more summary, yet in substance it is like the cases of arrest and bail in ordinary civil process; and, upon a careful consideration of the question, we are of the opinion that a trial and judgment may be had without the personal attendance of the respondent, or that judgment may be rendered on default. Indeed, it may be regarded as settled here, that the respondent need not be arraigned, but may plead by attorney, from which a strong inference arises that his presence in person is not

necessary." In England, under statutes the scope and object of which are similar to ours, it is held that jurisdiction may be acquired by leaving summons at the place of residence of the accused and, upon hearing, judgment may be rendered by default and enforced summarily by arrest and imprisonment when defendant is within the jurisdiction of the court. *Regina v. Webb*, 65 Law J. M. Cas., 98; *Regina v. Lee*, 58 Law T. [n. s.], 384; *Regina v. De Winton*, 53 Just. P., 292, 59 Law T. [n. s.], 382. See, also, *Blood v. Morrill*, 17 Vt., 598; *Chandler v. Commonwealth*, 4 Met. [Ky.], 66, 68; *Lucas v. Hawkins*, 102 Ind., 64, 1 N. E. Rep., 358.

It is also contended that the default and trial to the court without a jury renders the judgment void, for the reason that section 5 of the act provides for a trial to a jury upon the issue of a plea of not guilty. In this case there was no issue raised by a plea of not guilty. There was no demand for a jury to try an issue not raised by a plea entered by the defendant. By his default he practically confessed the charge. The plaintiff was at liberty to submit her evidence to the court. While the defendant, being present, could demand a jury to try the issues raised, yet he is not, because of his absence, in a position to complain. The court could properly determine the matter without the aid of a jury. *Wolf v. State*, 11 Ind., 231; *Mariner v. Dyer*, 2 Me., 165. Even though the statute should be construed as requiring the trial of the issue of defendant's guilt to be submitted to a jury, the failure to observe the requirement would not go to the jurisdiction of the court, but, at most, render the judgment erroneous, the correction of which could not be had by proceedings in habeas corpus. *In re Fife*, 110 Cal., 8; *Lowery v. Howard*, 103 Ind., 440; *Ex parte Miller*, 82 Cal., 454; *State v. Sheriff*, 24 Minn., 87.

The second question of importance is whether the defendant, at the time the capias was served upon him, was privileged from arrest by reason of the fact that he had been brought into the jurisdiction of the court under an

extradition warrant, to answer for a crime or charge of which he was discharged, and immediately rearrested on a process issued on the judgment rendered in the case at bar. His counsel contends that the asylum state from which he was extradited was, by the choice of the defendant, made his home, and constituted his domicile, to which he should have been allowed a reasonable time to return, and during such time he was entitled to immunity from arrest; and that the service of the writ was an unlawful act and the subsequent restraint likewise unlawful. Two subordinate propositions are involved in the consideration of this phase of the case: First, are there any express provisions in the laws and rules governing extradition which are violated, directly or indirectly, by the service of process, civil or criminal, on one who has been extradited to answer a charge of violating the criminal laws, without allowing him the immunity contended for? And, second, is there a sound rule or policy of the law in the administration of justice which forbids the service of such a writ without extending the privilege of departing within a reasonable time from the jurisdiction to which a person has been brought, against his will, by virtue of the laws providing for rendition and extradition of fugitives from justice, after discharge from custody on the charge by reason of which the requisition was granted? In a late case, *Lascelles v. Georgia*, where the question of the rights of such a person was directly in issue, it is stated in the syllabus: "As between the states of the union, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offenses than that for which his return was demanded, without violating any right secured by the constitution or laws of the United States." 13 Sup. Ct. Rep., 687, 148 U. S., 537.* Says Mr. Justice Jackson, who wrote the opinion: "The sole object of the provision of the constitution, and the act of congress to carry it

*The same case, 90 Ga., 347, 16 S. E. Rep., 945.—REPORTER.

into effect, is to secure the surrender of persons accused of crime, who have fled from the justice of the state, whose laws they are charged with violating. Neither the constitution, nor the act of congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives, under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done. *Commonwealth of Kentucky v. Dennison*, 24 How., 66, 101, 102; *Ex Parte Reggel*, 114 U. S., 642." If a defendant brought into another state by requisition is not exempt and has no immunity from arrest and prosecution for any crime committed against the laws of the state to which he has been returned, there certainly can be no good reason assigned why he should be exempt from summary proceedings by arrest and imprisonment to enforce a judgment lawfully rendered against him, or be subject and liable to process in any civil action in which a legal obligation rests upon him. The law applicable in both instances and the reasons therefor are the same. There is, in fact, no express authority in the federal laws, regulating the subject of interstate extradition of fugitives from justice, granting the immunity claimed; and we must look to the question of a sound policy or rule of law in the administration of justice for the privilege, or its existence must be denied. Some state courts have extended immunity in all cases from both criminal and civil process by confusing the laws of extradition as between foreign states and countries with the law of interstate extradition. This is noted and discussed in the case of *Lascelles v. Georgia*, last cited.

In many cases immunity from prosecution, civil and criminal, has been extended for a reasonable time, because the return of the fugitive was obtained unlawfully or by fraudulent means, or for the purpose of subserving some different or ulterior purpose than that indicated in the proceedings in extradition, such as the collection of a private debt or other like purpose. *In re Robinson*, 29 Nebr., 135; *Compton v. Wilder*, 40 Ohio St., 130. In the case last cited, which is relied on by counsel for the petitioner, it is disclosed that Wilder had been brought from Pennsylvania on a requisition issued by the governor of the state of Ohio, upon application of Compton, Ault & Co.; that he waived an examination and entered into a recognizance to appear before the court of common pleas; that he was released from custody, and before he could depart was arrested by Compton, Ault & Co. in a civil action against him commenced in the superior court, and that he by motion asked the court to set aside the service of summons and order of arrest and to discharge him from custody. The motion was granted and the case was taken to the supreme court. In affirming the judgment discharging the defendant, the supreme court said: "In this case this machinery [the extradition] was set in motion by Compton, Ault & Co., by their application to the governor of Ohio. * * * It was bad faith in Compton, Ault & Co. to commence a civil action * * * before conviction and before he [Wilder] had an opportunity to return to his home. * * * The temptation to make it [extradition] subservient to private interests is great. * * * [It] has been seen and appreciated by the chief executives of many states, and to guard against it rules and regulations are being adopted, which may make the extradition of an alleged fugitive, in a proper case, extremely difficult. * * * The certain remedy to prevent its [the abuse of extradition] growth is, to deprive all persons who participate in the misuse of the power to extradite persons, alleged to be fugitives from justice, of the fruits resulting from such participa-

tion." In *Adriance v. Lagrave*, 59 N. Y., 110, the court holds substantially to the same views; "but," says Justice Barrett, in *Browning v. Abrams*, 51 How. Pr. [N. Y.], 173, "this rule does not apply to persons not concerned in the device." To the same effect also is *Slade v. Joseph*, 5 Daly [N. Y.], 187.

In the present case the record is wholly free from any evidence of bad faith, fraud or other unwarranted means in procuring the return of the petitioner to this state to answer the offense charged, for which he was extradited. It is conceded, as we understand counsel for relator, that the proceeding begun and had upon that charge was in good faith and to subserve only the ends of public justice, and that the plaintiff in the bastardy proceedings, or others connected therewith, were in nowise connected, concerned in or had anything whatever to do with the criminal charge and prosecution, which formed the basis of the extradition proceedings. The privilege from service by process, claimed by the petitioner, must be granted, if at all, under the immunity that exists generally in favor of suitors and witnesses attending voluntarily on courts or other tribunals where their presence is required in the furtherance of justice and the due adminstration of the law. Does the reason for the rule apply in his case as it exists and is acknowledged in the general class of cases mentioned, where the attendance is voluntary on the part of the person thus privileged?

Williams v. Bacon, 10 Wend. [N. Y.], 636, is an authority bearing on the subject. It is there stated in the syllabus: "It is no cause for setting aside an arrest on a capias under an order to hold to bail, that the defendant was brought into this state as a fugitive from justice. It seems, however, that had the criminal proceeding been a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*, that the defendant would have been discharged." In the opinion it is said by Nelson, J.: "The defendant is not within the rule privileging suitors and

witnesses from arrest whilst going to, attending at or returning from court; for if so, the rule allowing criminals in custody to be charged in civil actions in the usual way would not have been established, for the privilege would have been an answer to the suit. It would be unjust and unreasonable to extend this privilege to cases of this kind; for it must continue, if it exist at all, during the whole period of the criminal custody; it might and would lead to great abuse. There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*."

In *Moore v. Green*, 73 N. Car., 394, it is observed by Rodman, J.: "Parties in civil actions appear in court voluntarily, and should be encouraged to appear, by immunity from arrest; whereas defendants in criminal actions appear involuntarily, and need not be encouraged."

In the case of *Reid v. Ham*, 56 N. W. Rep. [Minn.], 35, after citing *Lascelles v. Georgia, supra; People v. Cross*, 135 N. Y., 536 [32 N. E. Rep., 246], and *Commonwealth v. Wright*, 33 N. E. Rep. [Mass.], 82, it is stated by the author of the opinion: "These decisions logically, if not necessarily, lead to the conclusion that detention under such criminal proceedings affords no exemption or privilege from civil prosecutions; and this has been so decided. *Williams v. Bacon*, 10 Wend. [N. Y.], 636; *Adriance v. Lagrave*, 59 N. Y., 110."

The immunity from service of process extended to suitors and witnesses attending court is founded on considerations of wisdom, and is well calculated to assist in the due administration of justice. It needs no argument to sustain the proposition that whatever encourages the attendance of witnesses at the trial of any case in controversy in the courts will conduce more certainly to a rightful determination and assure to a party litigant the protection of all his rights guaranteed by law. This desired result can best be accomplished by steadily adhering to a policy which will save to all, whose attendance is

desirable in the furtherance of the ends of justice, and who come voluntarily, annoyance, inconvenience and oftentimes oppression by the service of process upon them while present in any stated jurisdiction for the purposes mentioned. This privilege has constantly been safeguarded by the courts, and the rule can doubtless be safely and confidently invoked by all who come within its scope and purview. The petitioner in the case at bar does not, however, come within the reason of the rule. His presence is involuntary and against his will. He was brought into the state forcibly and for the purpose of answering a charge of violating its laws. The reason for extending the rule of immunity is wanting in his case. If he may rightfully be prosecuted for another crime, he may with equal propriety be held to respond to any civil liability resting upon him. There exists the same reason for granting immunity for the one as the other. There being no positive law granting the privilege, and no good and valid reason existing for extending to the defendant the immunity granted to suitors and witnesses generally, the service of the writ is held to be lawful. The judgment is valid and binding, and an obligation is thereby placed upon the defendant to comply with its terms, which he can not escape by the present proceeding. His detention appearing to be in conformity with law, the writ prayed for must be denied.

JUDGMENT ACCORDINGLY.

NOTE.—The question as to whether an extradited fugitive may be proceeded against for offenses other than those named in the warrant is discussed in Hawley, Inter-State Extradition, pp. 79-111.—REPORTER.

JAMES M. MYERS ET AL. V. MINNIE B. BAUGHMAN.

FILED MAY 22, 1901. No. 9,485.

Commissioner's opinion. Department No. 1.

1 **Action Upon Forfeited Recognizance: OBLIGEE PROPER PARTY PLAINTIFF.** An action based upon a forfeited recognizance taken under the provisions of section 3, chapter 37, Compiled Statutes, 1899, must be brought in the name of the state, the obligee named in the recognizance.

2. **Statutory Recognizance Not Bond of Indemnity.** A recognizance given under section 3 of chapter 37, Compiled Statutes, 1899, is not a bond of indemnity for the payment of the judgment which may be ultimately recovered in the action.

3. **Amount of Liability.** The amount of liability on such a recognizance is the penal sum named therein, with interest thereon from the date of the forfeiture.

ERROR from the district court for Seward county. Tried below before BATES, J. *Reversed.*

Stearns & Tyrrell and *Frank H. Woods*, for plaintiffs in error.

J. C. McNerney, Frank D. Eager and *J. J. Thomas, contra.*

DAY, C.

The question for determination presented by this record arises upon the ruling of the court on the defendants' demurrer to the petition. Exception was taken to this ruling, and the defendants electing to stand on their demurrer, judgment was entered against them for $600 and costs. The defendants bring the case to this court alleging error in overruling the demurrer to the petition, and error in entering judgment in favor of plaintiff against the defendants. The petition alleges, in substance, that on June 11, 1895, Minnie B. Baughman filed a complaint before a justice of the peace in Seward county against one George Howell, charging him with being the father of a bastard child born to her March 19, 1895. Upon

this complaint Howell was arrested, and, upon examination, required to enter into a recognizance in the sum of $600 for his appearance at the next term of the district court of Seward county to answer the accusation and abide the order of the court therein. Pursuant to this order of the justice the defendants gave their bond, which was approved and filed. This bond was given under the provisions of section 3 of the act, hereinafter considered, and, omitting signatures and formal parts, is as follows, to-wit: "That on the 12th day of June, A. D. 1895, J. M. Myers, John Howell, F. M. Tyrell of Lancaster county and Thomas A. Healey, personally appeared before me, a justice of the peace within and for the county of Seward, and jointly and severally acknowledged themselves to owe the State of Nebraska the sum of six hundred dollars, to be levied on their goods and chattels, lands, tenements, if default is made in the following condition, to-wit: The condition of the recognizance is such, that if the above bounden George Howell shall personally be and appear before the district court of Seward county, Nebraska, on the first day of the term thereof, next to be holden in and for the county aforesaid, then and there to answer a charge of bastardy and abide the judgment of the court, and not depart without leave, then this recognizance shall be void, otherwise it shall be and remain in full force and virtue in law." The petition further alleges that at the next following term of the district court a trial was had to a jury and the said George Howell found guilty as charged in the complaint, and the court thereupon rendered a judgment on the verdict and ordered the said George Howell to pay into court the sum of $750, payable in installments for the use, benefit, support and maintenance of the said bastard child of the plaintiff, and that he stand committed to the county jail until the order and judgment of the court was complied with; that said Howell wholly failed and refused to comply with and abide the order and judgment of the court, and failed to appear according to the con-

ditions of said bond and recognizance and abide the said judgment of the court and not depart without leave; that the obligors of said bond (plaintiffs in error) wholly failed and refused to produce the body of said George Howell to abide the judgment and decree of the court, and that by reason thereof said bond became absolute; that on the 6th day of February, 1896, said George Howell was three times called in open court to come into court and abide the judgment of the court, but wholly failed and refused to do so, whereupon the said defendants (plaintiffs in error) were each three times called to come into court and produce the body of the said George Howell to abide the order and judgment of the court, which they and each of them failed and refused to do, and thereupon said bond and recognizance of said George Howell was declared and adjudged to be forfeited; that by reason of the facts above alleged, plaintiff (defendant in error) has sustained damages in the sum of $750. A demurrer to this petition was filed by plaintiffs in error, on the ground that the petition does not state facts sufficient to constitute a cause of action against them. This demurrer properly raises the question as to the right of the plaintiff to maintain an action on the recognizance in her own name.

An examination of our statute with reference to bastardy proceedings will disclose a twofold purpose in its enactment; first, to require the putative father to contribute to the support of his own offspring, a duty prompted by both moral and natural obligations, and second, to protect the county in which the child is born, lest its support and maintenance become a public charge. The innocent child and incidentally the rights of the mother and the public are the ones for whose protection the statute seems to have been enacted. *Stoppert v. Nierle*, 45 Nebr., 105; *Ex parte Cottrell*, 13 Nebr., 193. Section 1 of chapter 37, Compiled Statutes, 1899, provides that where the party accused "shall pay or secure to be paid to the complainant such sum or sums of money or

property as she may agree to receive in full satisfaction. and shall further give bonds to the county commissioners of the county in which said complainant shall reside and their successors in office, conditioned to save such county free from all charge toward the maintenance of said child, then and in that case the justice shall discharge the party accused out of custody, or [on] his paying the costs of prosecution." Section 2 of the act provides that when any woman who has a bastard child neglects or refuses to bring suit for its maintenance, the county commissioners in any county interested may bring suit in behalf of the county against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child. Section 3 of this act, under which was given the recognizance which forms the basis of this suit, expressly provides that the recognizance shall be "for the benefit of the county in which such bastard child shall be born." The recognizance runs to the state of Nebraska as obligee, and the statute prescribes that it is for the benefit of the county. In the absence of a statute authorizing a suit to be brought upon such recognizance in the name of the beneficiary, the suit should be brought upon such recognizance in the name of the state of Nebraska. When the recognizance became forfeited, it was a judicial determination that the condition of the recognizance had not been complied with, and gave rise to but one cause of action and that action must be brought in the name of the state for all who are or may be ultimately entitled to the fund when collected. *Porter v. State*, 23 Ohio St., 320, 325.

A complainant in a bastardy proceeding can not maintain an action in her own name upon a forfeited recognizance given under the provisions of section 3 of the act, because by the terms of the act the county has an interest in it. Such a recognizance is not in a strict sense a bond of indemnity for the payment of the judgment which may be ultimately rendered in the action, and when forfeited for the non-appearance of him for

whose appearance it was given, the penalty named in the bond is due. *Gebhart v. Drake*, 24 Ohio St., 177. The case of *State v. Gassaway*, 30 Tenn., 202, was an action brought upon a recognizance for the use and benefit of complainant in a bastardy proceeding. The court says: "In the first place the suit is for the use of Frances Bullard, who is, therefore, to be regarded in our practice, as the real party, responsible for costs, and entitled to the proceeds of the recovery. But we do not see that she can, by legal possibility, have, or acquire, any interest in this recognizance to the state." It is clear that a cause of action on such a recognizance can not be separated nor divided so as to authorize an action upon it in the name of the state and another in the name of the complainant. Suppose, in the case before us, the complainant in the bastardy proceedings had recovered a judgment of $200, instead of $750; it could not, we think, be successfully claimed that the sureties upon the recognizance, by paying this judgment, could be relieved from further liability to the state upon the forfeited recognizance, and yet, if the liability on the recognizance is one of indemnity merely, the payment of the judgment would be a complete satisfaction of the liability upon the recognizance.

The provisions of our statute of 1875 respecting bastardy proceedings have no doubt been borrowed from the state of Ohio, in which state, since 1873, a statute has existed almost identical in language with our own. The supreme court of that state had occasion to construe its statute in a case where the precise question presented by the record in this case was considered. In *Clark v. Petty*, 29 Ohio St., 452, complaint had been filed and accused ordered to enter a recognizance for his appearance at the next term of court. Upon the trial the court ordered him to stand charged with the maintenance of the child in the sum of $350, to be paid to the mother in installments and to give security for the same, and in default thereof that he stand committed until he complied with the order. Not complying with the order, action was

brought on the recognizance in the name of the complainant to secure the application of the amount of the penalty, or so much thereof as was necessary in discharge of the judgment. The statute of Ohio, in addition to the provisions contained in ours, provides: "If the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited; and if a verdict of guilty be rendered, and judgment entered thereon as hereinafter provided, the amount of such forfeited recognizance shall be applied in payment of the judgment. 2 Bates' Annotated Ohio Statutes [3d ed.], sec. 5623. A demurrer was interposed to the petition as in this case, and the supreme court held that an action brought on a forfeited recognizance under section 4 of the bastardy act—which is identical with section 3 of our act, except that it is for the benefit of the township, while ours is for the benefit of the county—could only be brought in the name of the state. We therefore conclude that an action brought upon a forfeited recognizance under section 3 of chapter 37 of the statutes of 1899 can be brought only in the name of the state for the use of such persons as may be entitled to receive it. We do not desire to be understood as holding that the fund when paid, in a proper proceeding, may not be applied in satisfaction of the judgment. That question is not now before us.

For the reasons above suggested it follows that the learned district judge erred in not sustaining the demurrer to the petition and dismissing the cause. We therefore recommend that the case be reversed and remanded and the cause dismissed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court in the above cause is reversed and the cause dismissed.

REVERSED AND DISMISSED.

MATTIE BOHRER V. J. S. ADAIR.

FILED MAY 22, 1901. No. 9,601.

Commissioner's opinion. Department No. 1.

Garnishment: STOCK SUBSCRIPTION. A stock subscription to the capital stock of a corporation, which by its terms is due and payable, may be garnished by a creditor of the corporation, and to the extent it is due and unpaid may be applied to the satisfaction of the creditor's claims, the corporation being a going concern and having dominion over its property.

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

Dryden & Main, for plaintiff in error.

E. C. Calkins, contra.

Orally argued by *Dryden*, for plaintiff in error, and by *Calkins, contra.*

DAY, C.

This action was brought under section 225 of the Code of Civil Procedure, which, in so far as it relates to the subject matter of this controversy, provides that in case the garnishee fails to appear and answer, or if he answer and his disclosure is not satisfactory to the plaintiff, the plaintiff may proceed against him as in ordinary actions. The facts alleged in the petition, necessary to be set out to correctly understand the points in controversy, are as follows: In 1891 the Kearney National Bank recovered judgment in the district court of Buffalo county against the Journal Company, upon which there was due and unpaid over $1,200, which judgment had been duly assigned to the plaintiff, and upon which execution was issued and returned *nulla bona*. The Journal Company is a corporation organized under the laws of Nebraska on the 1st day of July, 1890, with a capital stock fixed at

$25,000, and by its articles of incorporation was authorized to begin business when $5,000 had been subscribed to its capital stock; that good and valid subscriptions were secured to the amount of $5,000. The defendant subscribed $500 to the capital stock of said company and agreed to pay therefor, one-fourth upon the organization of the company and the remainder in equal installments, in three, six and nine months from the date of the organization of the company; that said amount remains wholly due and unpaid from the defendant to the Journal Company. Upon the return of the execution *nulla bona*, garnishment summons was served on the defendant as a debtor of the Journal Company. His answer as garnishee being unsatisfactory to the plaintiff, this action was instituted under the provisions of the statute above referred to. A demurrer was interposed to the petition, upon the grounds of defect of parties and that the facts alleged fail to state a cause of action. The demurrer was sustained, and plaintiff electing to stand upon his petition, the action was dismissed. The plaintiff brings error to this court.

The ultimate question presented by the record is whether, under the facts alleged, the subscription to the capital stock can in a proper sense be said to be an asset of the corporation. If it is, there seems to be no good reason why it may not be subjected to the payment of the debts of the corporation by the usual remedies provided by statute for the enforcement of payment. The time of payment of the subscription in this case is fixed by the contract of subscription, and at the time the garnishee-order was served nothing remained to be done to render it a subsisting obligation to the corporation. If at the time of the subscription to the stock the defendant had given his note for the amount to the corporation and the same was due and unpaid, it could not, we think, be claimed that the amount was not an asset of the corporation, and on principle we can see no valid distinction between an obligation arising by vir-

tue of a subscription which by its terms is due and payable and one arising by virtue of any other contract. In either case it is a debt due the corporation and as such is a part of its subsisting assets. The fact that the corporation may not have insisted on the payment does not render it any the less an obligation owing to the company. In Cook on Corporations [4th ed.], section 201, the rule is stated: "There are various remedies which corporate creditors may employ to enforce the payment of partially paid up subscriptions. Among these is that of garnishment. Thus, where a subscription has been called in, in part or wholly, and has not been paid by the subscriber it is, at least to the extent of such calls, an asset of the corporation, and, like other assets, is subject to garnishment at the instance of a corporate creditor. When, therefore, a stockholder is in default for installments of stock for which calls have been made, he stands in the attitude of any other debtor to the corporation, and may be garnished in the usual way, upon the theory of the authorities just cited, for the purpose of collecting the debt due from the corporation. But this remedy is not available to reach that part of the unpaid subscription for which calls have not been made." This statement of the author concisely states the rule and is supported by authorities cited and we cheerfully adopt it.

It is contended by counsel for defendant in error that this court has adopted the rule that an action could not be maintained by a single creditor against a single stockholder of a corporation, and that the same reasoning would apply with equal or greater force against the garnishment by a single creditor of a stockholder. The rulings of this court in the cases referred to are not at variance with the doctrine announced in this opinion. This action arises on demurrer and we must assume the facts alleged to be true, and are not permitted to go into the realms of speculation as to what facts might be developed on an answer and trial. So far as we know, there is but one stockholder who has not paid his sub-

scription, and there is no fact stated from which an inference might be drawn that there are other creditors, and nothing to indicate but that the corporation is a going concern. In *Farmers Loan & Trust Company v. Funk*, 19 Nebr., 353, the pleadings admit that before suit was brought a receiver had been appointed for the bank to wind up its affairs, and that it was insolvent. It was at the time in the hands of a court of equity to make a settlement of its affairs, and had ceased to be a going concern. These facts being established, it was very proper to hold that an individual creditor could not come in and sue a stockholder for his own benefit alone. In addition, the liability sought to be enforced was what is known as the "double liability" under section 7 of article 11 of the constitution. We do not doubt the correctness of the rule that where the corporation has become insolvent and a receiver has been appointed, or by some action it has lost dominion over its property, that then the property of every character becomes a trust fund for the benefit of creditors. This court has held, in *Shaw v. Robinson*, 50 Nebr., 403, that in a proper case an insolvent corporation may make a preference to its creditors, and it seems to us to be illogical to hold that stock subscriptions of a corporation which are due and payable are in the nature of a trust fund for the benefit of all its creditors, whilst its other assets might be used to create a preference.

The case of *Van Pelt v. Gardner*, 54 Nebr., 701, is cited by counsel for both sides, to sustain their respective contentions. The facts of that case were: That in 1887, the Metropolitan Building & Loan Association was organized with a capital stock fixed at $50,000, divided into shares of $1,000 each; the shares to be paid for in monthly installments of $12.50 each. In 1890 Van Pelt and others recovered a judgment against the corporation, upon which execution was issued and returned wholly unsatisfied. Van Pelt and others then brought this action against Gardner and others, stockholders of said corpora-

tion, claiming they were largely indebted to the corporation for subscriptions of stock made by them and which subscriptions of stock they had not paid. "In other words," says the court, "the object of this action was, in effect, to compel each of the said stock subscribers to pay into court such a part of his unpaid stock subscription as would be sufficient to satisfy Van Pelt's judgment, interest and costs." In these facts there is nothing to indicate that any portion of the unpaid subscription was due and unpaid to the corporation by virtue of the contract of subscription, and the theory upon which it was sought to maintain the action was that section 4, article 11 (Miscellaneous Corporations), of the constitution made the stock subscribers liable for the debts of the corporation to the amount of their unpaid subscriptions. It was held that "one creditor of a corporation can not maintain an action in his own name and for his own benefit against the debtor stock subscribers of a corporation; but to subject unpaid stock subscriptions to the payment of corporate debts, all debtor stock subscribers and all creditors of the corporation should be made parties, and a receiver appointed." This is a sufficient statement to show that there is nothing inconsistent with the views expressed in this opinion in the utterances of the court in *Van Pelt v. Gardner*. The liability of a stockholder for the unpaid subscription, whether it is due to the corporation or not, does not run direct to the creditor, but his obligation is through the corporation. There is no privity of contract between the creditor of the corporation and the stockholder, and this in itself is a sufficient reason why an action will not lie at the instance of a creditor directly against the stockholder. In the case now before us the garnishment proceedings creates the privity between the creditor and the stockholder, and the statute prescribes this proceeding as one of the remedies which a creditor has the right to employ in the enforcement of his judgment against a judgment debtor.

Reference was also made in the briefs to the cases of *German Nat. Bank v. Farmers & Merchants Bank*, 54 Nebr., 593; *Hastings v. Barnd*, 55 Nebr., 93, and *Pickering v. Hastings*, 56 Nebr., 201. But an examination of these cases will not show a variance with the conclusions reached here. We hold that where a subscription to the capital stock of a corporation is by its terms due and payable to the corporation, it becomes a direct asset of the corporation, and can be reached by garnishment proceedings by a creditor of the corporation, it not being shown that a receiver has been appointed for the corporation or any action taken to wind up its affairs.

For the reasons above suggested it follows that the learned district judge erred in sustaining the demurrer to plaintiff's petition, and we therefore recommend that the cause be reversed and remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment in the above case is reversed, and the cause is remanded for further proceedings in accordance with said opinion.

REVERSED AND REMANDED.

E. R. FOGG, AS RECEIVER, V. JOHN ELLIS ET AL.

FILED MAY 22, 1901. No. 9,486.

Commissioner's opinion. Department No. 2.

1. **Confession of Judgment: AUTHORITY OF PRESIDENT AND CASHIER.** The president and cashier of an incorporated state bank are not authorized to enter a confession of judgment against the corporation under section 433 of the Code more than two years after the bank has ceased doing business, upon notes executed by the cashier in the name of the bank after the bank has ceased doing business.

2. **Judgment Void for Want of Jurisdiction, May Be Attacked Collaterally.** When the record shows that no jurisdiction over the defendant has been acquired, the judgment rendered against such defendant is void, and its invalidity may be shown in any action in which it may be called in question. *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Nebr., 722.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Samuel Rinaker, R. S. Bibb and *Ernest O. Kretsinger*, for plaintiff in error.

L. M. Pemberton, W. H. Ashby and *Leonard W. Colby, contra.*

SEDGWICK, C.

In January, 1890, the Peoples Bank of Beatrice was reorganized as the Nebraska National Bank of Beatrice; the assets and liabilities of the old organization were assumed by the new, and the president and cashier were continued as president and cashier of the new bank. The Peoples Bank ceased doing business from the time of the reorganization. In July, 1893, E. R. Fogg was appointed receiver of the Nebraska National Bank, it having become insolvent. The receiver found among the papers of the Nebraska National Bank four promissory notes payable to the bank, bearing date, one in October and three in December of 1890. Each of the notes was signed "Peoples Bank, by H. L. Ewing, Cashier." On the 4th day of October, 1894, the receiver filed a petition in the district court of Gage county upon these notes asking judgment against the Peoples Bank thereon. Copies of the notes were attached to the petition. On the same day there was filed a written confession of judgment on said petition, and waiver of issuance and service of summons. It was signed, "Peoples Bank, by John Ellis, Pres. H. L. Ewing, Cashier." The plaintiff filed an acceptance of the offer of confession, and judgment was thereupon entered thereon. Afterwards this

action was brought by the receiver against these defendants as stockholders of the Peoples Bank upon said judgment to establish the defendants' liability as stockholders. An answer was filed in the action containing a general denial of the allegations of the petition and alleging: "That the pretended judgment of the plaintiff against the Peoples Bank of Beatrice, Nebraska, mentioned and referred to in said petition was rendered upon a pretended confession of judgment made by John Ellis as president, and H. L. Ewing as cashier of the said Peoples Bank, in favor of the Nebraska National Bank of Beatrice, Nebraska, of which the said John Ellis was also president, and the said Horace L. Ewing was also cashier; that said pretended confession of judgment was made by said John Ellis as president, and Horace L. Ewing as cashier, long after said Peoples Bank had been merged into the said Nebraska National Bank, and had ceased to do business, and without any authority whatever from said Peoples Bank, or the board of directors or stockholders thereof, and upon notes which were without consideration, and the execution of which had never been authorized by the board of directors of said Peoples Bank, and that said pretended judgment was rendered without authority and is null and void." The defendant Knowles answered separately, and asked for an accounting of the affairs of the Peoples Bank, and other relief. The cause was tried by the court without a jury, with findings and judgment for defendants, and finding and judgment against the defendant Knowles on her cross-petition. The plaintiff prosecuted error to this court. There is also an appeal by the defendant Knowles.

Upon the trial the plaintiff offered in evidence the judgment in favor of E. R. Fogg, receiver, against the Peoples Bank. The defendants objected to this evidence, and it was excluded by the court. This ruling is now complained of. It is contended that an officer of a corporation on whom service of summons may be made is

authorized to enter a confession of judgment against the corporation. This appears to be the rule in some states. *Miller v. Bank of British Columbia*, 2 Ore., 291; 1 Black, Judgments, sec. 59. Freeman, in the third edition of his work on judgments (vol. 2, sec. 545), says this is the rule in Oregon, and cites *Miller v. Bank;* but in the fourth edition he says this is not the law (vol. 2, sec. 545). It is not the law in this state. In *Howell v. Gilt Edge Mfg. Co.*, 32 Nebr., 627, the question was whether the "manager" of a corporation could enter an appearance, waive summons and confess judgment against the corporation. The court says: "The defendant being a corporation, under the laws of this state, there could be no personal appearance for the confession of judgment. The statutes provide that 'Any person indebted, or against whom a cause of action exists, may personally appear * * * and, with the assent of the creditor * * * confess judgment therefor.' (Sec. 433, Civil Code.)" And the rule so announced is plainly stated in the syllabus. In *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Nebr., 722, the question was whether the chairman of the board of trustees of the village of Trenton could waive the issuance and service of summons and enter the voluntary appearance of the village. The question of his authority to confess judgment against the village was not presented. The court says: "The rule of procedure announced in the case last cited [*City of North Lawrence v. Hoysradt*, 6 Kan., 170], is directly in conflict with that announced by this court in *Howell v. Gilt Edge Mfg. Co.*, 32 Nebr., 627, wherein it is held that a judgment by confession can only be entered by the debtor personally, with the assent of the creditor, or by an attorney or agent who shall produce his warrant of authority and make it a part of the record in the case." The opinion in this case seems to leave the question of the authority of the president of a private corporation to waive summons and enter appearance for the corporation in doubt. But the rule in *Howell v. Gilt Edge Mfg. Co.*, that such president

could not enter a valid confession of judgment against the corporation, is clearly approved. In Kansas, the president of a private corporation, or the mayor or chief officer of a municipal corporation, may waive summons and enter the voluntary appearance of the corporation. The rule is derived from a construction of their statutes in regard to the service of summons and entering of the voluntary appearance of defendant. The reasoning of their court would not apply to entering a confession of judgment under a statute like ours. *Salina Nat. Bank v. Prescott*, 57 Pac. Rep. [Kan.], 121; *City of North Lawrence v. Hoysradt*, 6 Kan., 170. In the case at bar the cashier of the Peoples Bank became also cashier of the Nebraska National Bank upon the reorganization. From ten to twelve months after the Peoples Bank had disposed of all its assets, provided for its liabilities and gone out of business, and while he was acting as cashier of the Nebraska National Bank, he executed a series of notes to the Nebraska National Bank, signed the name of the Peoples Bank thereto by himself as cashier, retained these notes for more than two years, and then, with the former president of the Peoples Bank, who was at that time president of the Nebraska National Bank, without authority from the stockholders or directors of either organization, signed a written confession of judgment against the Peoples Bank and in favor of the Nebraska National Bank. And we think that the trial court rightly held that the judgment entered thereon was void.

The contention that this judgment can not be assailed in this collateral manner is without merit. The steps by which the court is supposed to have obtained jurisdiction are disclosed by the record, from which it appears that no jurisdiction was acquired. The judgment is, therefore, void. *Chicago, B. & Q. R. Co. v. Hitchcock County, supra; Howell v. Gilt Edge Mfg. Co., supra.*

The defendant Knowles has filed no brief in this court. The evidence supports the findings of the trial court upon her cross-petition.

It is recommended that the judgment of the district court be affirmed with costs.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion the judgment is

AFFIRMED.

EMERSON L. STONE, APPELLEE, V. OMAHA FIRE INSURANCE COMPANY, APPELLEE, IMPLEADED WITH W. W. MORSMAN, APPELLANT.

FILED MAY 22, 1901. No. 9,552.

Commissioner's opinion. Department No. 2.

1. **Expenses of Procuring Receiver Chargeable Against Fund in Custodia Curiae.** The expenses of procuring a receivership of an insolvent corporation, including services of an attorney in consultations, preparing papers and procuring the appointment of a receiver, are properly chargeable against the fund so brought into the court's control.

2. **Value of Attorney's Services: ABUSE OF DISCRETION.** Where the value of an attorney's services rendered to a receiver is admitted, or clearly established, it is an abuse of discretion of the trial court to order the attorney's claim for such services to be reduced a certain amount below such value on the ground that the corporation is insolvent and the creditors will be compelled to lose a large proportion of their claim, and that the attorney received a large volume of business from one client.

APPEAL from the district court for Douglas county. Heard below before SCOTT, J. *Reversed.*

W. W. Morsman, for himself.

Lodowick F. Crofoot, Receiver, for himself.

SEDGWICK, C.

The directors of the Omaha Fire Insurance Company, finding that its affairs had become embarrassed and it

could no longer continue business upon the lines that had been pursued, consulted the appellant, Mr. Morsman, who is a member of the Douglas county bar, as to the condition of the affairs of the corporation and as to the best course to be pursued. After several consultations, in which the affairs of the company seem to have been thoroughly investigated, it was thought best, and the directors were advised by their counsel, to make application to the district court of Douglas county for the appointment of a receiver to take charge of the property and business of the corporation and wind up its affairs. Thereupon the appellant, under the instruction of the directors, began an action in the name of Emerson L. Stone, one of the directors, against the Omaha Fire Insurance Company and procured the appointment of a receiver, who duly qualified as such and took possession of the assets of the company, which were then supposed to be of about the value of $50,000, but were afterwards found to be of somewhat less value. The receiver was continued a little more than a year, when he was discharged by the court upon complaint of one of the creditors, on the ground that he was directly or indirectly personally interested in the assets. No charges of mismanagement or any default were made against the receiver; and indeed the affairs of the receivership, so far as appears from this record, were faithfully and efficiently conducted during his receivership. Upon the discharge of the first receiver, the present receiver, Mr. Crofoot, was appointed by the court. The appellant seems to have acted as sole attorney for the first receiver. The business that came into the hands of the first receiver was somewhat complicated and occasioned a more than usual demand for the services of an attorney. On the 16th day of February, 1897, near the end of the first year from the time of his employment, the appellant presented to the first receiver an account for specified services, amounting in the aggregate to $935. The receiver presented it to the district court and recommended its al-

lowance. It was soon after that that the receiver was removed and Mr. Crofoot appointed in his place. Two of the creditors filed exceptions to appellant's first claim, in which they specified two items, and object that they were "for services rendered to the plaintiff and other stockholders"; and then say, "While no fault could probably be found with any item in this bill if it stood by itself, we respectfully suggest that since all these services were rendered to one party, and because the assets on hand are very limited, the whole bill ought to be reduced about 30 per cent." The record does not disclose any ruling of the court upon this bill at that time; but the court ordered the new receiver to investigate this claim and report to the court. In accordance with this order the receiver reported, and speaks of the first item of the claim, to wit, "Preparing papers, consultations, and procuring order appointing receiver, $150," as having been already rejected by the court, and, specifying three other items, suggests that a smaller charge would be reasonable, and says that the remaining items of the bill are just and reasonable. The exceptions filed by the two creditors above referred to, and this report of the receiver, appear to have been treated by all parties as constituting an answer to plaintiff's claim, and there was no controversy in regard to any items of the first claim except as to the four items referred to. On the 7th day of May, 1897, the appellant filed a second claim for services rendered or completed after the filing of the first claim. The second claim was for $765; the total amount of both claims being $1,700. There was a hearing had on these claims, and the court disallowed the first item of the first claim, to wit, "February 24th, 1896, preparing papers, consultations, and procuring order appointing receiver, $150," for the reason, as stated in the order, that it was "an improper charge against the receiver, the same being services rendered the corporation," and allowed the appellant on both claims $1,200, and no more. From this order the appellant has appealed to this court.

Was the service of February 24, 1896, preparing papers, consultations, and procuring order appointing receiver, an improper charge against the funds in the hands of the receiver? It seems clear to us that it was not. In *Trustees v. Greenough*, 105 U. S., 527, 532, the court said: "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts." This doctrine is approved in *Central R. & B. Co. v. Pettus*, 113 U. S., 116, and in other cases. The principle involved has been frequently recognized by this court. *Mathis v. Pitman*, 32 Nebr., 191; *Seebrock v. Fedawa*, 33 Nebr., 413; *Wallace v. Sheldon*, 56 Nebr., 55. When a corporation, by reason of impairment of its capital, is unable longer to carry on its business, and creditors are pressing with judgments and executions, the directors owe a duty to the creditors, stockholders and all persons having an interest in the property, as well as to the corporation itself. If in the discharge of that duty, and being no longer able to hold the property as officers of the corporation, they take such steps as are necessary to invoke the jurisdiction of a court of equity to preserve the property and distribute it to those entitled thereto, we are unable to see why the expense of so doing is not as properly chargeable against the property as are any expenses incurred during the receivership. The directors did the thing that the beneficiaries of the fund needed to have done in order to serve their interests. It is through this action of the directors that the fund is made available to the beneficiaries, and there seems to be no reason why the necessary expenses of this action should not be paid out of the fund. We think this item should have been allowed.

There were three other items of the first claim amounting to $140 that were questioned, and also various items of the second claim. The court, after disposing of the item for preparing papers, etc., above referred to, "finds under the facts and evidence in the case that said W. W. Morsman claims should be reduced by the further amount of $350." There is no direct finding of the value of the services rendered. Indeed, the evidence in the case would not support a finding that the services rendered were of less value than the amount charged. These services were rendered during a little more than a year of the first part of the receivership. It is this period of a receivership that ordinarily makes the most exacting demands upon the efforts of the receiver and his attorney. The services rendered and charged for by appellant are not criticised; there is some attempt to criticise the general results of the conduct of the receivership during this period, but such criticisms are not at all justified by the evidence. The evidence of the appellant himself, which is very clear and convincing, is supported by Mr. Learned, who also covers the whole ground and shows himself to be a competent and candid witness; and by a stipulation of the parties it was agreed that two other well known members of the Omaha bar would testify substantially as Mr. Learned; so that we have the evidence of four witnesses, from which it would appear that the services rendered were of greater value than the amount charged by the appellant. There were also, in behalf of the receiver, four witnesses, all of whom substantially admitted that the services rendered by appellant were "reasonable if standing by themselves." Mr. Haller, who appears to be a candid witness, was put upon the stand by the receiver. The following questions were asked and answers given:

Q. Taking into consideration in answering the questions propounded by me, the fact that the insurance company was insolvent, and that all of the services performed were performed for one client, I will ask you to

state what, in your opinion, was the reasonable value of the services outlined for securing the appointment of the receiver?

A. I would like to ask whether I can make a general statement with reference to all of these questions, to make my position clear?

Q. Yes, I will ask you for a general statement.

A. I looked over the bills, and I would like to state this: If each item of service had been rendered for separate individuals, I don't think there is an overcharge, except the two, and those are the last charges on the second bill.

It is very manifest from the evidence, the conduct of the hearing, the hypothetical questions propounded in behalf of the receiver and the findings of the court that the idea suggested by these questions and answers was the controlling thought that caused appellant's claim to be reduced; that is, the services rendered were of the value charged, but on account of certain considerations, such as that claimant had received a large volume of business from one client and that creditors would not be paid in full, and that the assets had not been more speedily converted into cash, the court, in its discretion, ought to deduct a percentage from claimants charges. So that the question now is, is it within the discretion of the trial court to reduce the claim on such grounds? Assets in the hands of receivers are too often unnecessarily depleted. Receiverships involving large expenses are too frequently protracted for the benefit of officers and attaches, rather than for the benefit of creditors and other owners of the funds; and, as suggested by the appellee in this case, it is the duty of the court to scrutinize such proceedings closely, and prevent, as far as possible, those practices, which too often bring reproach upon the administration of the law. And therefore the law clothes the court with a large discretion in reviewing the expenses incurred by its receivers. In ordinary cases the findings of a trial court upon conflicting evidence are not

to be disturbed unless clearly wrong, and the reason for allowing an ample discretion in dealing with the accounts of a receiver, who is but an arm of the court itself, is very apparent. But in this case, as it appears to us, we are not dealing with a finding of the trial court upon conflicting evidence. If the services of the appellant were of the value charged, and he has made no contract to take a less amount, the question is whether the trial court may in its discretion apply a part of the earnings of appellant to make good the losses of the creditors of the corporation or its stockholders; and to this question there can be but one answer. If an attorney receives a large volume of business from one client, and if the client's business is unprofitable, or he has suffered great losses, such considerations may, and no doubt often do, induce an attorney to agree to render his services for less than their real value. But in the absence of such agreement he can not be compelled to do so.

We are sorry to be obliged to add that there are in appellant's brief some strictures of the trial court which do not appear to be justified by the record; and also criticisms of appellant in the brief of opposing counsel that are unwarranted. They are unfortunate blemishes upon presentations of the case, which are otherwise admirable, furnishing great assistance to us in this difficult investigation.

It is recommended that the order of the trial court be reversed, and the cause remanded with instructions to enter an order allowing appellant's claim as rendered, with interest thereon at seven per cent per annum from the date of the order appealed from, with costs of this appeal taxed to the receiver.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the order of the district court in the above case is reversed, and cause remanded to the district court with instructions to enter an order allowing appellant's claim

as rendered, with interest thereon at the rate of seven per cent per annum from the date of the order appealed from, with the costs of this appeal taxed to the receiver.

REVERSED AND REMANDED.

JOHN PERRY, RECEIVER OF THE NATIONAL BANK OF KANSAS CITY, MISSOURI, APPELLANT, V. ACHILLES BAKER ET AL., APPELLEES.

FILED MAY 22, 1901. No. 9,599.

Commissioner's opinion. Department No. 2.

1. **Judgment:** PLEADINGS: EVIDENCE: AMENDMENT OF PLEADING AFTER SUSTAINING OF DEMURRER. A judgment for defendant upon sufficient pleadings and evidence will not be reversed because another judge of the same court had, before the trial, sustained a general demurrer to the answer, the answer having been amended by leave of court after ruling on the demurrer; and this is the rule although no evidence is offered on the trial sustaining the allegations brought into the answer by such amendment.

2. **Purchase at Sheriff's Sale by Mortgagee Under Prior Lien:** If a mortgagee, or the assignee of a mortgage whose assignment is recorded, buys the land at sheriff's sale upon a prior lien, and is credited by the sheriff with the mortgage which he appears to own as disclosed by the record, a part of which is allowed by the sheriff on the purchase price of the land, and such purchaser afterwards quitclaims all interest in the land, this will be equivalent to payment by the mortgagor to the original mortgagee.

3. **Innocent Purchaser.** And in such case an innocent purchaser of the land from the grantee in said quitclaim deed will take the land free from the lien of the mortgage as against the holder of the note secured by such mortgage, although such holder is an innocent purchaser thereof. *Whipple v. Fowler*, 41 Nebr., 675.

APPEAL from the district court for Greeley county. Heard below before THOMPSON, J. *Affirmed.*

Bell & Robinson, for appellant.

W. T. Thompson, contra.

SEDGWICK, C.

This action was brought to foreclose a mortgage given by defendant Baker and wife to Mary E. Kelley on land in Greeley county, to secure a negotiable note for $800. The mortgage was subject to a mechanic's lien for materials sold Baker prior to the execution of the mortgage. Mary E. Kelley indorsed the note in blank and delivered it to A. E. Cady, together with an assignment of the mortgage. The assignment was duly recorded. Afterwards, on the 5th day of May, 1890, Mr. Cady sold and delivered the note to the National Bank of Kansas City. The bank was an innocent purchaser of the same; and this plaintiff, who is receiver for said bank and is seeking to foreclose this mortgage, holds this note as an innocent purchaser for value. The mechanic's lien on the premises was foreclosed, the decree being regularly entered in the district court of Greeley county on the 13th day of October, 1891. At the time of the commencement of the mechanic's lien foreclosure the mortgage sued upon herein and the assignment to Cady were of record in Greeley county, and Cady and Mary E. Kelley were made parties defendant to the foreclosure proceedings. On the sheriff's sale, under the decree, Cady purchased the property, and the surplus proceeds of the sale, amounting to $638.43, was treated as belonging to Cady and allowed him by the sheriff on his bid, the money never having passed through the hands of the sheriff. Afterwards, Cady and his wife conveyed the land by quitclaim, and the defendant, Jensen, derived his title from Cady through mesne conveyances, all of which were warranty deeds. Mr. Jensen purchased the land for full value and without any actual notice of the mortgage sued on, the deed to him being a warranty deed, and Jensen took possession of the premises on the 4th day of April, 1895, immediately upon receiving his deed, and has ever since had possession. The petition was in the ordinary form of a mortgage foreclosure, alleging also

that the bank was an innocent purchaser of the note, and the answer admitted these allegations of the petition, and states the foregoing matters in defense. Defendant Rounds claims under a mortgage executed by a grantee of Cady, and the title of defendant Jensen is subject to her mortgage. The district court found generally in favor of the defendants, ordered the plaintiff's mortgage canceled and quieted the title in Jensen, subject to the mortgage of the defendant, Rounds. From this decree the plaintiff appeals.

It appears from the record that the plaintiff filed a general demurrer to the defendants' answer, on the ground that it did not state facts sufficient to constitute a defense, which was sustained by the court. The defendants then took leave to amend their answer *instanter;* and amended by interlining the allegation that the bank did not become the owner of the note and mortgage until after the commencement of the mechanic's lien foreclosure. To this answer so amended the plaintiff filed a reply, and upon trial the undisputed evidence shows that the bank did become the owner of the note and mortgage on the 5th day of May, 1890, which was before the commencement of the mechanic's lien foreclosure; and the plaintiff now insists that the ruling of the court upon the demurrer determines the law of the case to be that the defendants have no defense in this action unless they make it appear from the evidence that Cady was the owner of the mortgage at the time of the mechanic's lien foreclosure, and as the defendants have failed in that respect, the decree must, for that reason, be in favor of plaintiff. We think this position is untenable. In *Richman v. Board of Supervisors*, 42 N. W. Rep., 422, the supreme court of Iowa said (page 426): At the trial in the district court there was a demurrer to the petition, which was overruled, after which the defendants made a return to the writ, as required by its terms. At the further hearing there was a change in the *personnel* of the court, and it is urged that the issues presented by the return were

the same as those arising on the demurrer to the petition, and that there was a readjudication thereof against the objection of appellants, and its correctness is urged for our consideration. We think the change of judges makes no difference. It is the same court. We are not prepared to hold that if during the trial of the issues of an action a court becomes convinced of an error he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain. If, on the trial of the issues presented by the return, questions legitimately arose involved in the issues presented by the demurrer, it was the duty of the court to pass upon them, and in so doing it was not required to follow the ruling on the demurrer as against its convictions." And this rule is affirmed by the same court in *Seery v. Murray*, 77 N. W. Rep., 1058. Judge Hammond, of the United States district court, in two cases discusses the general question herein considered, and while in one case he follows the former ruling of another judge and in the other postpones his decision to avoid doing so, his reasoning in each case supports the doctrine of the Iowa court. *Norton v. Taxing District*, 36 Fed. Rep., 99, 102; *Louis Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep., 18, 23. The case of *Marvin v. Weider*, 31 Nebr., 774, was decided by this court upon the proposition that the petition stated sufficient facts to constitute a cause of action; and while it is stated in the syllabus that when one judge of a district overrules a general demurrer to a petition it is error for another judge of the same district upon the trial to sustain an objection to evidence on the ground that the petition does not state a cause of action, that case must not be taken to establish the doctrine that such ruling would be reversible error requiring a new trial of the case notwithstanding that the petition, upon examination, should be found to fail to state a cause of action. There may be several judges of the district court in a district, but there is only one district court, and the law makes no distinction between the judges. If a judge

makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the *personnel* changes or not. So far as a different rule was announced in *Marvin v. Weider, supra*, that case ought to be overruled.

Under the foreclosure proceedings the property was sold to Mr. Cady, who at that time appeared by the records of the county to be the owner of the mortgage by assignment from the original mortgagee. He paid for the property in part by giving credit on this mortgage, and then for valuable consideration quitclaimed all interest in the land. This would be equivalent to a payment of the mortgage to the original mortgagor, who appeared to be such upon the records, and procuring him to release the mortgage of record. The deed from Cady was duly recorded, and if he had been the owner of the mortgage as he appeared by the records to be, this deed would operate as a release of the mortgage. A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase or the payment of the consideration that the debt was assigned or was unpaid, or that the release was unauthorized. *Whipple v. Fowler*, 41 Nebr., 675; *Eggert v. Beyer*, 43 Nebr., 711, 719; *Porter v. Ourada*, 51 Nebr., 510. And this does not conflict with the line of decisions of this court in which the innocent purchaser of the paper was seeking to enforce his securities against the original mortgagor or his privies, and not against one who innocently purchased the land, relying upon the records, without either actual or constructive notice of the out-

standing incumbrance. If Jensen and Rounds are innocent purchasers of the land, they will be protected. The answer contains no allegations that Cady, or any one claiming under his purchase at sheriff's sale, took possession of the land until Jensen took possession at the time of his purchase, and evidence of possession prior to Jensen's purchase was erroneously admitted by the court, the plaintiff objecting on the ground that "it is incompetent and immaterial under the issues joined," and excepting at the time. Jensen and Rounds are, therefore, chargeable with such notice as must be implied from possession. It will be presumed that the defendant, Baker, was in possession at the time of the execution of the mortgage to Rounds and of the deed to Jensen, since the title of all parties comes through him, and Baker's possession would not be notice of plaintiffs' claim.

It is insisted that plaintiff could not maintain this action without offering to redeem from the mechanic's lien, but as the judgment must be affirmed for the reasons above given, it is unnecessary to further investigate the question so suggested.

It is recommended that the judgment of the district court be affirmed with costs.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

GEORGE W. AMES V. JEROME B. PARROTT.

FILED MAY 22, 1901. No. 9,489.

Commissioner's opinion. Department No. 2.

1. **Where a Statute Requires a Witness to an Act, by Implication He Must Be Disinterested.** Where a statute, in order to secure evidence of some act, requires it to be done in the presence of or attested by a specified number of persons, it is implied that such persons shall be disinterested, and no person having a direct interest in such act is a competent witness thereto.

2. **Statutory Provisions for Levy of Attachment to be Strictly Pursued.** Special statutory provisions respecting the manner in which attachments shall be levied must be strictly pursued, and departure therefrom will render a levy invalid.

3. **Plaintiff in Attachment Not a Proper Witness of Levy Thereof.** The requirement of section 205 of the Code of Civil Procedure that a sheriff levying an attachment go to the place where property of the defendant may be found and declare that by virtue of the order he attaches such property at the suit of the plaintiff, in the presence of two residents of the county, is not complied with by a levy and declaration in the presence of two persons one of whom is the plaintiff in the attachment.

4. **Pleading:** REPLY. In case no reply to material allegations of new matter in an answer appears in the record, and other issues are disclosed upon which the cause was properly triable, it will not be presumed that it was tried upon the matters admitted by the pleadings. To bring the case within the exception that no advantage may be taken of want of reply where the trial proceeded upon the theory that a reply had been filed, there must be something in the record from which an inference may be drawn that reply was waived or from which this court may know what issues were in fact tried.

5. **Motion for New Trial:** TIME. The time within which a motion for a new trial is required to be filed is to be reckoned from the date of rendition of the decision of the trial court, and not from the date of entry thereof.

6. ——: WHEN NOT REQUIRED. No motion for a new trial is necessary where the error complained of is that the pleadings, taken together, do not support the judgment.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Reversed.*

Hamilton & Maxwell, for plaintiff in error.

Cowin & Abbott and *Lee Helsley, contra.*

Argued orally by *Henry E. Maxwell*, for plaintiff in error, by *Lysle I. Abbott, contra.*

POUND, C.

Parrott, hereinafter referred to as plaintiff, sued Ames, hereinafter styled defendant, setting up five causes of action for services rendered and money loaned. An order of attachment was issued at the instance of the plaintiff and levied upon the lands of the defendant. The latter moved to discharge the attachment on the ground that the levy was irregular and invalid, and is here upon error from the order of the court overruling such motion, and from the judgment of the court in favor of the plaintiff upon the main case.

The sheriff's return shows that upon receipt of the order of attachment he went to the lands to be levied upon and attached them "in the presence of J. B. Parrott and F. P. Salmon, two residents of Douglas county, state of Nebraska." It appeared in evidence upon the motion to discharge the attachment, and the court found, that "the J. B. Parrott named by the officer in his return to said order of attachment and Jerome B. Parrott, plaintiff herein, are one and the same person," and it does not appear and is not claimed that any person other than said Parrott and Salmon was present at the time of the levy. For these reasons the defendant contends that the requirements of the statute were not complied with and that the levy is invalid. The Code (section 205) provides that in levying an attachment the officer "shall go to the place where the defendant's property may be found, and there in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff; and the officer, with the said residents, who shall be first sworn or affirmed

by the officer, shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and residents, and returned with the order." Is the plaintiff in attachment, being a resident of the county, a proper person to witness the levy and declaration thereof by the sheriff under this section? Requirements of this nature are very common in attachment statutes, and are to be found in some of the earliest statutes upon the subject. In the most recent statutes the tendency is to substitute a requirement that a copy of the writ and proceedings be filed with the recorder or register of deeds. But in either case, the obvious purpose is to make the levy public and notorious, to prevent attachment liens from attaching secretly and by surreptitious entries and indorsements, and to enable the other party to inquire into the date of and circumstances attending the levy; and the courts have so construed them. *Bryant v. Duffy*, 128 Mo., 18, 30 S. W. Rep., 317; *Root v. Railroad Co.*, 45 Ohio St., 222, 12 N. E. Rep., 812. If this is the purpose of the requirement, we think that it follows that no person having a direct interest in the levy is a competent witness thereof.

In the analogous cases of attesting witnesses to deeds and mortgages it is well settled that they must be without direct or certain legal interest in the act attested. Interested parties have also been held disqualified from attesting a chattel mortgage (*Seibold v. Rogers*, 110 Ala., 438, 18 So. Rep., 312), or a signature to a note by mark, required by statute to be attested. *Chadwell v. Chadwell*, 98 Ky., 643, 33 S. W. Rep., 1118. The object of requiring attestation of deeds and other instruments is to enable the other party to inquire into the circumstances attending the sealing and delivery (*Markley v. Swartzlander*, 8 Watts & Serg. [Pa.], 172); and although the incompetency of grantees or parties directly interested in conveyances to attest their execution has sometimes been put upon the ground of common law incapacity to testify to the facts in court, and sometimes upon construction

of particular statutes (*Child v. Baker*, 24 Nebr., 188), the prevailing and better view is that public policy is the true basis thereof. *Amick v. Woodworth*, 58 Ohio St., 86, 50 N. E. Rep., 437; *Donovan v. St. Anthony & Dakota Elevator Co.*, 8 N. Dak., 585, 80 N. W. Rep., 772. We are not unaware, in reaching this conclusion, that the common law disqualifications of witnesses by reason of interest have been done away with; nor have we overlooked that disqualification of interested attesting witnesses having been rested by some upon incompetency to testify in court, the removal of the latter disqualification has sometimes been thought to obviate the former. *Fisher v. Porter*, 11 S. Dak., 311, 77 N. W. Rep., 112. But we prefer to adhere to those authorities which recognize an inherent disqualification resting upon public policy and unaffected by the change in the rules of evidence. In *Amick v. Woodworth, supra*, the court says (p. 100): "The true reason of the disqualification we apprehend is, that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on the grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent *bona fide* transactions." In *Donovan v. St. Anthony & Dakota Elevator Co., supra*, the court, quoting from the foregoing, adds: "But not only is the construction contended for by respondent repugnant to the intent and purpose of the statute, but it is, we think, entirely out of harmony with its language as commonly understood; for we think men generally understand it to mean the calling in of a person who is not a party to a transaction to hear and see its consummation, and subscribe his name as a witness to what the parties have in his presence consummated, and that parties to the contract are disqualified to act in

that capacity; and such is the weight of authority." In *Winsted Savings Bank v. Spencer*, 26 Conn., 194, it is held that a statute requiring conveyances of land to be attested by two witnesses implies that the witnesses are to be disinterested. Likewise in *Horbach v. Tyrrell*, 48 Nebr., 514, 521, this court said: "It would seem that on grounds of public policy an officer should be disqualified from taking acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made which he acknowledged." Without citing other instances, it is evident that where the law, in order to secure evidence of some act, requires it to be done in the presence of, or attested by, a specified number of persons, an implication arises that these persons shall be such as are not directly interested in the act and beneficiaries thereof. This conclusion is rendered the more certain in respect to the statute here in question because it is provided that the same persons who witness the levy shall inventory and appraise the attached property, which could not be done, with any propriety, by an interested party. As Parrott, plaintiff in the attachment, was not a competent witness of the levy thereof, the case stands as if the sheriff had made his levy and declaration in the presence of one witness only, and we have further to consider the effect of such an irregularity thereon.

It is a well established rule that where there is a special statutory provision respecting the manner in which levy of an attachment shall be made, it must be strictly observed, and that departure therefrom will invalidate the levy. 1 Shinn, Attachment & Garnishment, sec. 207; Drake, Attachment, secs. 194, 236*a*; 3 Ency. Pl. & Pr., 54; *Fairbanks v. Bennett*, 52 Mich., 61, 63, 17 N. W. Rep., 696; *Cary v. Everett*, 107 Mich., 654, 65 N. W. Rep., 566; *Main v. Tappener*, 43 Cal., 206; *Norvell v. Porter*, 62 Mo., 309; *Gates v. Tusten*, 89 Mo., 13, 21; *Bottoms v. McFerran*, 43 S. W. Rep. [Ky.], 236. Not only have very small irregularities in other respects been held fatal to the levy,

but the courts have uniformly enforced strict observance of requirements designed to insure publicity and notoriety and to preserve evidence of the time and circumstances of the levy. Failure to levy or make declaration thereof before witnesses, under substantially the same requirement as in our statute, has been decided to be fatal repeatedly. *Tiffany v. Glover*, 3 Greene [Ia.], 387, 393; *Marnine v. Murphy*, 8 Ind., 272; *Earthman v. Jones*, 2 Yerg. [Tenn.], 484; *Cabeen v. Douglass*, 1 Mo., 336. Under more recent statutes prescribing some form of written or recorded notice in addition to or as a substitute for declaration before witnesses, strict and entire compliance with the statutory requirements has been exacted. *Stanton v. Boschert*, 104 Mo., 393, 16 S. W. Rep., 393; *Bryant v. Duffy*, 128 Mo., 18, 30 S. W. Rep., 317; *Sharp v. Baird*, 43 Cal., 577; *Smith v. Brown*, 96 Ga., 274, 23 S. E. Rep., 849; *Thompson v. White*, 25 Colo., 226, 54 Pac. Rep., 718; *Steinfeld v. Menager*, 53 Pac. Rep. [Ariz.], 495. In *Stanton v. Boschert* it appeared that a requirement that an abstract of the attachment be filed with the recorder had been substituted for an older requirement of declaration of levy before a witness. The court held that no lien could be acquired unless such abstract was filed as required by the statute. In *Bryant v. Duffy* the same question arose, and counsel suggested that the case just cited referred only to priorities between different attaching creditors. But the court said that the requirement in question, being a substitute for levy and declaration before witnesses, "was intended to constitute part of a complete and valid levy," and that "by a failure of the sheriff to file the required abstract no valid attachment of the property was made." In *Sharp v. Baird* the statute required the sheriff, in attaching land, to post a copy of the attachment in a conspicuous place on the premises. The sheriff, instead of posting a copy of the attachment, posted a notice thereof, and the attachment was held invalid. Nothing has been cited to the contrary. It is argued that *Tiffany v. Glover, supra*, is over-

ruled by *Rowan v. Lamb*, 4 Greene [Ia.], 468. But in *Rowan v. Lamb* the real question involved was whether deficiencies in a return could be supplied by parol and what presumption arose where the details of the levy were not returned. In *Tiffany v. Glover* the court had held that omission in the return to recite all the statutory steps was fatal. In *Rowan v. Lamb* the court overrules *Tiffany v. Glover* as to this, but does not suggest that the prior ruling as to the necessity of levy and declaration before witnesses was unsound. In *Gapen v. Stephenson*, 18 Kan., 140, the defect complained of was not in the levy but that one of the appraisers was not a householder. Appraisement is not required in order to secure notoriety and publicity in the levy, but for the benefit of the attachment debtor, and the court held that in the absence of prejudice such irregularity, not going to the right of the plaintiff to have an attachment, was not fatal. In this connection we may notice the suggestion made at the hearing that the defect here in question could not be taken advantage of by the attachment defendant, but only by other attaching creditors or claimants of the property who might be injured thereby. Examination of the authorities discloses no ground for such distinction, and in *Bryant v. Duffy, supra*, it was expressly repudiated. The true distinction is between requirements after levy intended solely for the benefit of the debtor, and those intended for the protection not only of the debtor but of the public generally, by insuring a public and notorious levy, the time and circumstances whereof do not depend for evidence merely upon such entry as an officer may make in secret, but are subject to proof by records or disinterested witnesses. *Root v. Railroad Co.*, 45 Ohio St., 222, 228, 12 N. E. Rep., 812. It appears that afterwards, when about to appraise the property levied upon, the sheriff called one John H. Butler to assist therein, and that the appraisement was made by Salmon and Butler, the plaintiff taking no part. The court found that the levy was made as above described and that "thereafter"

the sheriff called Salmon and Butler to make the appraisement, and that the defendant had failed to show prejudice by reason of the fact that Butler, who took part in the appraisement, was not one of the residents who witnessed the levy, as required by the statute. What would be the effect of calling a person to appraise who was not present at the levy, we need not decide, since the real point, overlooked in the findings of the lower court, is as to the effect of failure to make the levy and declaration thereof before two witnesses. The subsequent calling in of Butler did not obviate this defect, since no levy and no declaration in his presence is claimed. For the foregoing reasons we are of opinion that the motion to discharge the attachment should have been sustained.

Exception is also taken to the judgment in the main case for the reason that no reply was filed to the answer of the defendant wherein he set up an accord and satisfaction as to the first cause of action in the petition. The judgment is general, and it does not appear upon which of the causes of action it was rendered, but it is conceded that the amount thereof could only be sustained by a finding for the plaintiff upon each. That material allegations of new matter in an answer will stand admitted unless replied to is firmly established by recent and repeated decisions of this court. But it is argued that the answer in the case at bar contains no material allegations of new matter requiring reply, and also that the cause was tried below on the theory that the affirmative allegations of the answer were denied, and hence that reply was waived, or at least the failure to reply may not be urged at this time. In the first cause of action plaintiff alleged that he commenced work for defendant in November, 1890, as a salesman and collector, and continued in his employment for the period of fifty-two and two-thirds months. He further alleged that at the time he entered such service the parties orally agreed upon a compensation of $75 a month for the period of one year; that at the expiration of the year they agreed orally to continue said contract

indefinitely, and that for the services rendered the defendant agreed to pay $4,850. There were four other causes of action. The answer was a general denial as to the four last causes of action. As to the first, it admitted that "the plaintiff commenced work for the defendant in November, 1890, as a salesman" and denied "each and every other allegation and part of allegation in the said first cause of action contained." Further answering it alleged that in November, 1892, the defendant paid the plaintiff the sum of $3,500, and that such sum was in full payment and was accepted by the plaintiff in full payment of $1,000 theretofore loaned and "for all services rendered by said plaintiff in any sum whatever." We take it no issue is raised as to the length of service by admitting that some work was done and denying the other allegations. This would be consistent with fifty-two months' service instead of the fifty-two and two-thirds alleged, and in this respect is comparable to the answer in *Gray v. Elbling*, 35 Nebr., 278. But the petition alleges also a contract to pay a stipulated compensation for one year and a subsequent extension of said contract to the whole term of service. If there was such a contract admitted, so that a fixed and liquidated sum was due thereunder, the plea of payment and acceptance of a less sum would not state a defense. But the answer denied these and all other allegations of the petition, except the rendition of the services; and even though it must be construed as admitting the whole service alleged, it put in issue the alleged agreement to pay $75 a month therefor and the alleged extension. *Ruth v. Ruth*, 12 Nebr., 594; *Smiley v. Anderson*, 28 Nebr., 100. In other words, the answer admits the service, denies the contract to pay a fixed compensation, so that the liability would be in an unliquidated sum,—whatever the services were reasonably worth,—and alleges satisfaction thereof by payment of $3,500 accepted in full payment by the plaintiff. This plea of accord and satisfaction required a reply.

With respect to the claim that the cause was tried

below on the theory that a reply had been filed, we find nothing in the record to sustain such conclusion, and the recital in the judgment that the cause was heard "upon the petition of the plaintiff, the answer of the defendant and the testimony" obviously raises an inference to the contrary. There were five causes of action, as to four of which the answer was a general denial. The mere fact that testimony was taken and a trial had, of itself, would not indicate more than that the cause was tried upon the matters properly triable, namely, the four last causes of action. There is no bill of exceptions from which this court may know what was in fact tried, and while we might have suspected that the issue tendered in the answer was tried, by reason of the amount of the judgment, the fact that the record recites a trial on petition and answer only, indicating either that no reply was deemed necessary, or that the cause was tried on the four last causes of action, precludes such an inference. In *Stewart v. American Exchange Nat. Bank*, 54 Nebr., 461, it was held substantially that to bring a case within the rule that no advantage may be taken in this court of failure to reply below where trial was had on the theory that a reply had been filed, there must be something in the record from which an inference may be drawn that reply was waived or from which this court may ascertain what issues were actually tried. We fail to see any distinction between this case and that, and must hold that the answer as to the first cause of action stood admitted and that the pleadings and the finding for the plaintiff "on the issues" do not support the judgment rendered. *Grant v. Bartholomew*, 57 Nebr., 673; *Harlan County v. Hogsett*, 60 Nebr., 362.

It is contended, however, that the motion for a new trial was not filed at the proper time, and hence that errors in the judgment are not reviewable. The cause was tried to the court without a jury. The findings of the court are dated April 3, 1897, but the judgment, including the findings, appears on the journal of April 10,

1897. The motion for a new trial was filed on April 6, and counsel argue that it is of no effect because it appears to have been filed four days prior to entry of the judgment. The record shows that it was on file at the time the judgment was entered, and that after entry of the judgment it was called up and ruled on. This might well be thought sufficient. But we do not feel bound to decide as to the effect of premature filing of such a motion. As the findings of the court are dated April 3, and the order overruling the motion for a new trial was rendered April 10, it is pretty clear that the clerk withheld the entry of the findings and judgment until the motion for a new trial had been passed on. The record ought to be so construed as to give effect to all the recitals therein, and in no other way can the two dates which appear in connection with this judgment be reconciled. In such case the motion was seasonable, since the Code (sec. 316) requires it to be filed within three days after the verdict or decision was "rendered." There is a clear and well established distinction between rendition and entry of a judgment. 1 Black, Judgments, sec. 106. The findings of the court were its "verdict or decision" within the meaning of the Code, and the motion should have been and was made within three days from the rendition thereof. The date of the entry upon the journal would be presumed to be the date of rendition, but where the record shows these dates to be different, the latter alone is to be considered. *Nebraska Nat. Bank v. Pennock*, 59 Nebr., 61. Moreover, it is very doubtful whether a motion for a new trial was required to raise the point in question. In *Farris v. State*, 46 Nebr., 857, 858, this court held that without a motion for a new trial all the pleadings might be examined for the purpose of ascertaining whether the judgment rendered could be rendered properly on such pleadings. See, also, *Shickle v. Kent*, 34 Nebr., 568, 572; *Hansen v. Kinney*, 46 Nebr., 207; *Holmes v. Lincoln Salt Lake Co.*, 58 Nebr., 74. It is true in *Becker v. Simonds*, 33 Nebr., 680, the court ruled

that error in overruling a motion for judgment on the pleadings could not be reviewed unless raised in the motion for a new trial. But it will be noticed that the petition in error did not assign as error that the judgment was contrary to law or not sustained by the pleadings; and error in the ruling on the motion, which alone was assigned, had been waived by going to trial. In *Fox v. Graves*, 46 Nebr., 812, it was held that an objection that the verdict and judgment exceeded the amount prayed in the petition must be raised by motion for a new trial. But this was on the ground that an entire omission to pray for judgment would not have rendered the petition demurrable. A case more in point is *Everett v. Hobleman*, 15 Nebr., 376. There plaintiff in error claimed that he should have had a verdict upon a counter-claim of $20, there being no reply thereto. The court pointed out that for aught that appeared in the record the jury may have allowed it and reduced the recovery to that extent. This seems to have been the controlling consideration, although the court remarked upon the failure to raise the objection in the motion for a new trial. We think all of these cases may be reconciled with *Farris v. State*, *supra*, and that the error in question is reviewable without regard to the time of filing of the motion for a new trial.

For the foregoing reasons it is recommended that the order overruling the motion to discharge the attachment and also the judgment in the main case be reversed, and that the cause be remanded with directions to discharge the attachment and grant a new trial of the main case.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons given in the foregoing opinion the ruling on the motion to discharge the attachment and also the judgment in the main case are reversed and the cause is remanded with direction to the district court to discharge the attachment and grant a new trial of the main case.

REVERSED AND REMANDED.

CHARLES S. JOSLIN ET AL., APPELLANTS, V. DORA E. WILLIAMS ET AL., APPELLEES.

FILED MAY 22, 1901. No. 9,470.

Commissioner's opinion. Department No. 3.

1. **Foreclosure:** DEFENSE: TITLE. In an action to foreclose a mortgage it is no defense to the mortgagor, or to persons claiming in privity with him, or succeeding to his estate subsequently to the mortgage, that at the time of the execution of the instrument he had no title to the premises sought to be affected, or that the title afterwards failed, or that there is an outstanding paramount title.

2. **Parties to Action:** ADVERSE CLAIMANT. Persons claiming adversely to a mortgagor are not proper parties to an action to foreclose the mortgage, and in their absence their rights can not be adjudicated.

APPEAL from the district court for Douglas county. Heard below before SCOTT, J. *Reversed.*

Hamilton & Maxwell, for appellants.

B. N. Robertson, contra.

AMES, C.

This is an action to foreclose a mortgage executed by one William R. Williams, now deceased, and his then wife, on the 5th day of May, 1891. The mortgage was executed to the plaintiffs, as executors and trustees under the will of one John J. Joslin, deceased. Swick was made a defendant, as having or claiming a lien or interest in the premises which was alleged in the petition to be subsequent and subject to the mortgage of the plaintiffs. Swick did not answer, and his name does not appear elsewhere in the record. The defendant, Dora E. Williams, is the widow of William R. Williams, who died in January, 1896, before the beginning of this action, leaving a will which was afterwards probated, and pursuant to which his widow was appointed as execu-

trix thereof. What estate, if any, the said Dora E. Williams acquired in the premises under the will, or what interest or title she ever had therein, other than her seizin and her estate of dower, the pleadings do not disclose, but she answered, admitting the execution and delivery of the note and mortgage sued upon, and pleading as a sole defense that the testator, William R. Williams, had not, at the time of the execution of the mortgage, "the legal title or any title whatever" to the property in question, but that the said real estate was a part and parcel of the Douglas county poor farm, and by said Douglas county was platted and laid out into lots and blocks and known as Douglas Addition to the city of Omaha; that the said William R. Williams purchased lot 7, in block 1, and received a deed therefor, but that said deed was made without authority of law, and is null and void, and that said William R. Williams acquired no right, title or interest in or to said lot 7, block 1, in said Douglas Addition. For a reply the plaintiff denied every allegation of the answer, except that the premises in question were at one time a part of the Douglas county poor farm, and averred that the defendant was estopped by her covenants in the mortgage in suit. On the trial, evidence was admitted tending to support the allegations of the answer, and the court, by its decree, found generally all the allegations of the petition to be true, and ascertained and adjudged the amount due upon the plaintiff's note and mortgage, and found that the possession of the premises had been, and was, in William R. Williams and wife until the decease of the former, and afterwards in the defendant continuously until the date of the decree. But the court further found that in the year 1886 Douglas county was the owner in fee of the mortgaged premises, which were a part of its poor farm, and that prior to the 16th day of May, 1887, its board of commissioners undertook to sell and convey the same to William R. Williams, and executed and delivered to him a deed therefor, but that said

proceedings and deed were without authority of law and void and failed to convey any right, title or interest in the said property, and by reason of that fact the mortgage was itself also void and the plaintiffs not entitled to a foreclosure thereof. Consequent upon these findings, a judgment of dismissal and for costs was rendered in favor of the defendant. This was error. In an action to foreclose a mortgage it is no defense to the mortgagor, or to persons claiming in privity with him, or succeeding to his estate, subsequently to the mortgage, that at the time of the execution of the instrument he had no title to the premises sought to be affected, or that the title afterwards failed or that there is an outstanding paramount title. Wiltsie, Mortgage Foreclosures, p. 420, and cases cited in note. Persons claiming such title can not properly be made parties to the foreclosure suit, and in their absence their rights can neither be litigated in the action nor affected by the decree. The judgment of the district court should be reversed and the case remanded for further proceedings.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment in the above cause is reversed, and the cause remanded for further proceedings in accordance with said opinion.

REVERSED AND REMANDED.

RICHARD RICE ET AL., APPELLEES, V. THOMAS H. McCAGUE, TRUSTEE, APPELLANT.

FILED MAY 22, 1901. No. 9,544.

Commissioner's opinion. Department No. 3.

1. **Assignment of Note and Mortgage by Payee:** DEFAULT IN INTEREST INSTALLMENT: ELECTION OF REMEDY BY ORIGINAL PAYEE: HIS CONSEQUENT LIABILITY. When a payee in a note and mortgage

has sold and assigned the same, accompanied by his own collateral guaranty of the prompt payment of the interest and of the collection of the principal within two years after it becomes due, and afterwards, upon the happening of a default on an installment of interest, seeks and obtains the note and mortgage from his assignee for the purpose of enforcing collection, and thereupon, without consulting the assignee with respect to the methods to be pursued, prosecutes against the debtor remedies of his own selection, he, himself, becomes responsible for any default, negligence or dilatoriness in pursuit of the principal and the same will not be imputed to his assignee.

2. **Contemporaneous Contracts Pertaining to Same Subject-Matter:** INTENT SHOWN BY CONDUCT. In an instance like the foregoing, contemporaneous contracts between parties, pertaining to the same subject-matter, the nature of the transaction between them and attendant circumstances, and the meaning in which they, as indicated by their own conduct, appear to have intended the language of the guaranty to be understood, may properly be taken into consideration in interpreting that document.

3. **Exhaustion of Remedy:** DILIGENCE AND GOOD FAITH: There is no inflexible rule that a creditor, holding as collateral to his own demand the guaranty of a third person of its collection, must exhaust his legal remedies against the principal debtor before calling upon the guarantor for payment. What is required of the creditor in such cases is diligence and good faith, and if it is shown by any competent evidence that the principal is insolvent and the creditor has been guilty of no negligence, the guarantor will be required to respond.

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

Charles B. Keller, for appellant.

Acheson & Adams, contra.

AMES, C.

Except as hereinafter otherwise stated, during all the times mentioned in the following opinion the Anglo-American Mortgage & Trust Company was a Nebraska corporation, engaged in the city of Omaha, in this state, in the general business popularly known as money loaning, and the Union Trust Company was a Pennsylvania corporation, with its place of business at Philadelphia,

in the last named state, which business consisted in part, at least, in the brokerage of real estate securities. For the sake of brevity, the former mentioned institution will be hereafter called the Omaha company, and the latter the trust company. On the 8th day of March, 1889, the Omaha company entered into a contract with the trust company by which it appointed the latter its agent in the city of Philadelphia "for the sale of guaranteed western mortgages and other securities," in which it was stipulated, among other things, that the trust company should receive from "the said Anglo-American Mortgage & Trust Company, of Omaha, Nebraska, interest falling due upon said mortgage and other securities from time to time and pay the same over to the purchasers and owners of said securities respectively." The trust company was to be compensated for its services by a commission on the amount of its sales. By this means it will be seen that the two companies contemplated the joint retention and control by themselves of the management of the loans even after the sale of securities. The Omaha company was to collect the amounts falling due upon the loans and remit them to the trust company, and the latter was to distrubute the sums to the owners of the securities. On the 1st day of March, 1889, the Omaha company had loaned to the Briggs Place Building Association, another Omaha institution, the sum of $2,500, and had received on account thereof the note of that institution payable, as to principal, five years after date, with interest at the rate of six per cent per annum, payable semi-annually, in accordance with coupons attached to the note. The note was made to the Omaha company, as payee, and a mortgage to one Lysander W. Tulleys, as trustee, to secure the payment of the note. Shortly afterwards the note was sold, through the instrumentality of the trust company, to a certain Dr. Agnew, of Philadelphia, and was indorsed with an assignment by the Omaha company in blank, without recourse, but at the time the papers were

transmitted to the trust company for sale they were accompanied by a written guaranty, as follows:

"For value received the Anglo-American Mortgage and Trust Company, of Omaha, Nebraska, hereby guarantees: First, the collection within two years after maturity of the principal mortgage bond of Briggs Place Blg. Ass'n for $2,500, dated March 1st, 1889; second, the prompt payment of interest thereon at 6 per cent per annum until paid. Reserving the right, in case of a default before the bond matures, or in case this company, for any valid reason should wish to pay it before maturity, to take up said bond paying therefor, in cash, the amount of principal and interest accrued at the date of payment.

"Witness our hand and seal at New York, this 22nd day of April, 1889.

"[SEAL.] J. N. BROWN, *Vice President*,
"J. V. MCDOWELL, *Secretary*."

To this instrument was affixed the corporate seal of the Omaha company. The papers were also accompanied by an application from the Briggs Place Building Association to the Omaha company for a loan, in which it was represented that the lot purported to be conveyed by the mortgage was worth $2,500; that there was a dwelling-house and other buildings thereon of the value of $4,500, and that the latter were insured for the sum of $1,500 in a responsible insurance company. Some time in December, 1890, it appears to have been ascertained by the Omaha company that there had been a mistake committed with respect to the loan in question, as a result of which the mortgage purported to convey a lot not contemplated to be accepted as security at the time it was made, and that the house and other improvements described in the application were situated not upon lot 11, in block 11, described in the mortgage, but upon lot 11, block 10, so that the mortgage was inadequate security for the loan. On the 10th of that month, therefore, the Omaha company wrote to the trust company, requesting a return of the bond, trust deed, application and

abstract pertaining to the loan, saying that the interest had been in default since the first of the preceding September, and that the company hoped to bring it up without suit, but that it might be obliged to retain the papers for foreclosure purposes, and in that event would send the trust company a receipt by its attorneys, and saying that the trust company would, of course, retain the guaranty given in connection with the loan. After some further correspondence in regard to the matter, the request of the Omaha company was complied with, and the Omaha company and its attorneys have since retained, and still retain, the possession of all the papers. In July, 1891, by direction of the Omaha company, an action was begun in the United States circuit court for this district, in the name of Lysander W. Tulleys, as trustee for the Union Trust Company of Philadelphia, plaintiff, against the mortgagor and other persons, seeking to reform the mortgage by substituting a description of lot 11, in block 10, for that of lot 11, in block 11, and to obtain a decree of foreclosure and sale of the mortgage as reformed. That action is now pending and undetermined. In January, 1892, the Omaha company went into the hands of William A. Redick, as receiver, and the trust company first learned by means of a letter from the receiver, under date March 28, 1892, the fact of the mistake in respect to the description of the property in the mortgage and what was the true nature of the action pending in the United States circuit court. Some time in June or July, 1892, the receiver was discharged and the Omaha company resumed possession and control of the assets and business; but in July, 1893, the present appellant, S. S. Curtis, was appointed receiver of the company and has since then been in discharge of his duties in the winding up of its affairs. In April, 1896, Dr. Agnew, having died, and no satisfaction having been obtained on the note and mortgage by the Omaha company, its attorneys and the receiver having declined to relinquish possession of the papers, the executors of Agnew applied for, and ob-

tained leave to file a petition in intervention in the receivership suit, setting forth more fully and in detail than is here stated, the above recited facts and circumstances, together with other matters which it is not deemed essential or important to recite here. To this petition the receiver interposed an answer, admitting part of the allegations of the petition, but, among other things, alleging that the action in the United States circuit court was begun at the instance and request of the trust company and for its benefit and protection, and that the reason why the suit had not been pressed to a determination was that that course had been forbidden by the trust company, and that the reason why the bond, note and trust deed had not been returned to the trust company was that they were annexed to a deposition and were parts of the files in the suit in the United States circuit court, and that the trust company had declined to satisfy certain charges thereon for disbursements in the suit, and for taxes paid by the Omaha company or its receiver, and pleading the statute of limitations. To this answer a reply was filed, which it is not deemed necessary to particularly recite at this time, and which put in issue, in one form and another, all the allegations of new matter contained in the answer. After the trial, the district court made a series of findings of fact, which are very full and complete, but which are too long to be inserted in this opinion, and which do not differ materially from the foregoing statement. As a conclusion from such findings the court adjudged that Samuel S. Curtis, receiver, be directed to pay out of the assets of the Omaha company to the petitioners the amount of said mortgage debt, with accrued interest, being $3,550, with interest at the rate of seven per cent per annum, from March 1, 1897, and to pay out of said assets the cost of intervention. From this decree the receiver appealed to this court.

It can hardly be seriously disputed that the above quoted guaranty purports to be the act of the Omaha

company. It begins with the statement: "For value received, the Anglo-American Mortgage and Trust Company, of Omaha, Nebraska, hereby guarantees," etc., and concludes with attestations by the signatures of the vice president and secretary of the company and its corporate seal. It may be doubtful if more formal phraseology could have expressed more clearly the intent to execute the instrument in the name and on behalf of the corporation. In the absence of evidence to the contrary, the recitals are sufficient proof of authority for its execution. *Hayden v. Lincoln C. E. R. Co.*, 43 Nebr., 680. In addition thereto, authority may well be inferred from the nature of the business in which the Omaha company was engaged. It is equally free from doubt that it inured to the benefit of whomsoever became the purchaser of the note and mortgage to which it referred. It rests upon two sufficient considerations: First, the agency agreement between the Omaha company and the trust company; and second, the money paid by Dr. Agnew for the securities in question. It is not likely that the note assigned without recourse could have been sold to advantage in a community of strangers, although it was supposed to be secured by a mortgage on real estate in a distant city, if it had not been understood that the guaranty supplied the lack of an indorser's liability. My conclusion, therefore, is that the guaranty is the valid obligation of the Omaha company; that it is collateral to the note and mortgage of the Briggs Place Building Association, and followed those instruments into the hands of the present holders of them who are entitled to enforce it against the former corporation and its assets according to its true intent and meaning, unless that right has been lost or impaired by negligence. For the purpose of interpreting the document, it is proper to look into other papers constituting parts of the same transaction and to consider the nature and course of the business between the parties to it and their own apparent contemporaneous construction of it. By the terms of the

agency contract between the Omaha company and the trust company, the former very plainly reserved the general management and control of the securities which they sold and guaranteed, including the right to collect both the interest and principal thereof and to remit the same to the trust company. The latter was required to keep a registry of all sales made by it, in a book to be especially kept for that purpose, and to keep correct books of accounts of all receipts from such sales, and also of all sums received by it from the Omaha company, on account of interest falling due and collected and remitted to it from the Omaha company and to pay the same over to the purchasers and owners of such securities respectively. Nothing is said in this contract about the collection of the principal, but the correspondence in the record shows that the Omaha company demanded, or, at least, requested, the opportunity to enforce the same, and the possession of the securities for that purpose, with which request, the trust company reluctantly complied, and that it thereupon took such steps in the matter as it saw fit without informing the trust company or the owner of the securities or the representatives of the latter, either as to the misdescription in the mortgage or as to the nature of the action which was begun and in course of prosecution, or of the insolvency, or at any rate, practical dissolution of the mortgage company. Of all these things, the trust company and its clients seem to have remained ignorant until they were informed concerning them by a letter from Receiver Redick, under date of March 28, 1892. In the light of all these circumstances, it is not an unfair inference that the parties interpreted the guaranty to mean that the Omaha company undertook to be responsible absolutely for the prompt payment of the interest installments when due, and the collection by it of the principal of the mortgage debt within two years after its maturity. Such a construction would do no violence to the language used and would be more consistent with the course of business be-

tween the parties than one which would give to the words, "guarantees the collection," their technical legal meaning, as they are ordinarily employed, and impose upon the holder the duty to exhaust, to a reasonable extent, his remedies against the maker before calling upon the guarantor. But it is not necessary to resort to this interpretation in order to reach a true solution of the difficulty in hand. The evidence in this record is conclusive and overwhelming that the Omaha company not only sought and obtained possession of the note and mortgage for the purpose of adopting their own methods to secure their payment, concerning which they did not consult the trust company or its customer, but that it studiously concealed from the latter the true state of affairs until the responsibility of the maker, if it had ever had any, had vanished. If there was any dilatoriness or negligence in omitting to attempt recovery from the Briggs Place Building Association, or to foreclose the mortgage upon the property which it describes, the fault is that of the Omaha company and not of the trust company, or of Dr. Agnew, or his representatives. To hold otherwise would be to permit the Omaha company to gain an advantage by its own wrong, a thing which the courts never intentionally do. Beside this, the Omaha company having taken on itself to elect in behalf of its assignee to treat the mortgage as a lien, not upon the premises described in it, but upon the lot upon which the dwelling is situated, it is estopped now to complain because a different course was not pursued. It is not an inflexible rule that a creditor holding a collateral guaranty by a third person for the collection of his demand is bound to exhaust his legal remedies against his principal debtor before resorting to his guarantor. Insolvency of the principal renders the obligation of such a guarantor absolute, and a judgment against the former, upon which execution has been issued and returned unsatisfied, is regarded, in most cases, as satisfactory and conclusive proof of his insolvency; but it is not the ex-

clusive evidence of that fact, nor is it exempt from impeachment. All that is required of the creditor is the use of due diligence for the collection of his demand from the principal. If he has exercised such diligence, and it is shown that the principal is insolvent, so that a suit, judgment and execution against him would be fruitless, the guarantor may be called upon to respond. *Stone v. Rockefeller*, 29 Ohio St., 625; *Camden v. Doremus*, 3 How. [U. S.], 515. "It is the doctrine of a majority of the courts and seems the better opinion, that the fact that it [the debt] is not collectible, may be shown by any other competent evidence as well as the fruitless prosecution of a suit against the previous parties liable for the debt, and if such parties are actually insolvent, no suit against them is necessary to charge the guarantor." Brandt, Suretyship & Guaranty, sec. 98, and cases cited. There is but little, if any, direct evidence in this record that the Briggs Place Building Association is insolvent, but it may be fairly presumed to be so from the fact that the Omaha company and its receivers have had the matter of the collection of the mortgage in their exclusive charge since January, 1891, and have taken no steps to enforce the personal responsibility, if any, of the mortgagor. But the question is immaterial. The two years named in the guaranty have elapsed, the creditor has been guilty of no laches and the money is unpaid. The right of recovery is, therefore, complete. The right of action of the interveners is founded upon the contract of guaranty and is not affected by the statute of limitations. It did not become complete until March 1, 1896, two years after the maturity of the principal debt, and the application for leave to intervene in the action was made on the 15th day of the following month. The continuing force of the guaranty was acknowledged by the Omaha company, by letter, under date of July 21, 1892.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MARSHALL D. HUCKINS V. STATE OF NEBRASKA.

FILED MAY 22, 1901. No. 11,878.

Commissioner's opinion. Department No. 3.

1. **Statute Giving Witness Right to Demand Fees in Advance, Does Not Obtain in a Criminal Case.** Section 355 of the Code of Civil Procedure, which provides that a witness may demand his traveling fees and fee for one day's attendance when the subpœna is served on him, and if the same be not paid the witness shall not be obliged to obey the subpœna, has no application to witnesses in criminal cases.

2. **Contempt:** DEFENSE. A witness, duly served with a subpœna in a criminal case, can not justify a failure to obey the writ on the ground that he has demanded his fees and they were not paid.

3. ——: PURGING: INABILITY TO OBEY WRIT. Inability to obey a writ, resulting from a willful act done with a knowledge that it would result in such inability, does not purge of contempt.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

Frank Irvine and *John V. Morgan*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

ALBERT, C.

The plaintiff in error seeks to reverse a judgment of the district court of Otoe county imposing upon him a fine of $50 for contempt of court. The act constituting the offense whereof he was charged, as the same appears from the transcript, was his failure to obey a subpœna duly issued by the clerk of said court in a criminal cause

then pending in said court, wherein one ———— was charged with a felony. But two grounds are relied upon for a reversal and we shall consider them in their order.

1. It is urged that the witness having demanded his fees in advance, and the state having failed to pay them, he was thereby absolved from his obligation to attend in obedience to the subpœna. It will be borne in mind that the subpœna under consideration issued in a criminal case, but counsel insist that the same rule applies in criminal as in civil cases. We can not assent to this doctrine. Section 355 of the Code of Civil Procedure, which permits a witness to insist on the payment of his fees as a condition precedent to obeying the subpœna, applies only to civil cases. We discover nothing from which we can infer that it was intended to apply also to criminal cases. The fees in criminal cases are paid by the county. We know of no provision of law that authorizes their payment before they are audited and allowed by the county board, or that authorizes that body to audit and allow them before they are actually earned. Besides, it is not unusual for arrest and trial to take place between sittings of the county board; or again, that body might decline to allow such fees in advance even though in session and authorized to do so. It would require a very plain provision of law to justify the belief that the legislative branch of the government intended to interpose such obstacles to the prosecution of crime.

2. It is urged further that the court erred in refusing to permit plaintiff in error to show that it was impossible for him to obey the writ. The evidence shows that he was in Otoe county at the time he was served with the subpœna; that some five days after the service of the subpœna he had a conversation with the county attorney of that county, in the course of which he informed the county attorney of the service of the subpœna; that he expected to go to Illinois; that he had no way of making a living in Otoe county; that he had no money to pay out for railroad fare to come back from Illinois; and that

if the county attorney would arrange for him, be responsible for the time he put in waiting, or pay his railroad fare to come back, he would come back. Afterward, and before the time fixed by the subpœna for his attendance as a witness, he went to Illinois and remained there until after the time thus fixed, and until after the disposition of the case in which he was subpœnaed. He offered to show on his trial that he was unable to pay the railroad fare from Illinois to Otoe county, and that his failure to return in time to obey the writ was due to a lack of means. As a general rule, inability to comply with an order of court purges of contempt, but the inability must not result from the willful acts of the contemnor which he knew or had reason to believe would result in such inability. In this case, his conversation with the county attorney above referred to shows that he knew his going to Illinois would result in his inability to obey the writ. He went voluntarily, for while it appears from the evidence that he went there to get employment, there is nothing in the record to show that he was under any necessity for doing so. The only evidence of such necessity is that he told the county attorney that he could not make a living in Nebraska City. His evidence on that point is evidence of the conversation only, and not of the truth of the statements made in such conversation. The inability sought to be shown was the result of his own acts willfully done with a full knowledge that they would result in such inability. If shown, it would have afforded no justification or excuse, and the evidence thereof was properly excluded.

The judgment of the district court should be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

GEORGE W. LEAVITT, APPELLEE, V. S. D. MERCER COMPANY ET AL., APPELLANTS.

FILED JUNE 5, 1901. No. 9,710.

Stare Decisis.

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

Albert Swartzlander, for appellant.

H. P. Leavitt, contra.

PER CURIAM.

The questions in this case are substantially the same as those in *Green v. Hellman*, 61 Nebr., 875, decided herewith, and for the reasons stated in the opinion therein the decree of the district court is

AFFIRMED.

MICHAEL FARRELL, APPELLEE, V. AUSTIN BOUCK ET AL., APPELLANTS.*

FILED JUNE 5, 1901. No. 9,306.

1. **Mistake of Fact:** NEGLIGENCE. One who seeks relief on the ground of mistake of fact must show that he was free from negligence.
2. **Finding of Fact:** SILENCE ON MATERIAL ISSUE: PRESUMPTION. When the court makes special findings of fact, and they are silent as to a material issue, such omissions will be construed against the party on whom rested the burden of establishing such issue.

APPEAL from the district court for Dixon county. Heard below before EVANS, J. Rehearing of case reported in 60 Nebr., 771. *Former judgment of reversal sustained.*

Jay & Welty and *William P. Warner*, for appellants.

McCarthy & Pearson, contra.

*Rehearing allowed.

NORVAL, C. J.

This is a rehearing of the case reported in 60 Nebr., 771. An examination of the record, and arguments of counsel, convinces us that the former opinion is right, and must stand. One who, through culpable inertness, fails to make inquiry when it is his duty to do so, is not in a position to have a release of a mortgage canceled on the ground of mistake. *Washburn v. Osgood*, 38 Nebr., 804; *Rice v. Winters*, 45 Nebr., 517. There is no averment in the petition, nor finding of fact, that plaintiff examined the record to ascertain whether there were any liens on the land subsequent to that of the mortgage in question sought to be foreclosed. The petition is drafted on the theory that plaintiff was induced to release the mortgage through certain false representations of Ryan. While there is evidence tending to sustain such an averment, the court made no finding whatever on that issue, which is equivalent to a finding that there were no fraudulent representations made by Ryan.

The decree is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN H. GREEN, APPELLEE, V. MARIA HELLMAN ET AL., APPELLANTS.

FILED JUNE 5, 1901. No. 9,415.

1. **Purchaser at Tax Sale Must Pay Treasurer Forthwith.** By section 111, article 1, chapter 77, Compiled Statutes, a purchaser of real estate at a tax sale is required forthwith to pay to the treasurer the amount of his bid, and on failure so to do the property shall at once again be offered as if there had been no sale.

2. **Failure of Treasurer to Comply With Statute Does Not Invalidate Tax.** The failure of the treasurer to observe said section of the statutes by offering the lands for sale will not invalidate the taxes thereon.

3. **Subrogation.** A purchaser of lands at an invalid tax sale is subrogated to the rights of the county.

4. **Indorsement, Certificate.** A tax certificate may be assigned by indorsement.

5 **Rights, Assignee.** An assignee of a tax certificate acquires all the rights thereunder of the assignor.

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

Connell & Ives, for appellants.

E. C. Wolcott and *I. L. McCloud, contra.*

NORVAL, C. J.

This is an appeal from a decree foreclosing a tax certificate, by Maria Hellman in her own right and as executrix of the last will and testament of Myer Hellman, her deceased husband. The lots in controversy are situated in the city of Omaha and were sold by the county treasurer of Douglas county on November 19, 1892, at public sale for the taxes due thereon. One A. F. Connett was the purchaser at said sale. The county treasurer required contemplating purchasers at tax sales to make a money deposit prior to the sale to be applied on their bids, which requirement Mr. Connett complied with. He did not make any payment on his bid until April 10, 1893, when the tax certificate was issued of the date of the sale. Subsequently said county and city taxes were paid on the lots under the certificate of sale, the receipts therefor being made out in the name of I. L. McCloud or McCloud & Connett. The First National Bank of Omaha claimed to be the owner of the tax certificate and tax receipts which it set up in a cross-petition, and the bank was by the decree awarded a lien for the amount of the tax certificate and taxes paid thereunder as aforesaid, with interest.

The first contention of appellant is that the tax sale to

Connett is absolutely void, and no right of subrogation exists thereunder because the purchaser did not pay the amount of the bid until several months after the date of the sale. Section 111, article 1, chapter 77, Compiled Statutes, provides that the person purchasing real estate at a tax sale "shall forthwith pay to the treasurer the amount of taxes and costs charged thereon, and on failure to do so, the said parcel shall at once again be offered as if no such sale had been made." It is the duty of a purchaser at a sale of real estate for taxes to immediately pay the treasurer the amount of his bid, and if he did not do so, the property is again offered as if there had been no sale. The failure, however, of the county treasurer to comply with the foregoing provision by offering the lands again for sale did not invalidate the taxes. *Henderson v. Hughes County*, 83 N. W. Rep. [S. Dak.], 682. For the purpose of the case we will assume that the sale to Connett was rendered invalid by his failure to forthwith pay to the treasurer the amount of his bid; nevertheless, by the subsequent payment of the amount and the issuance of the certificate of sale Connett became subrogated to the rights of the county and is entitled to enforce a lien against the lots for the amount of the taxes paid and interest. To this doctrine this court is thoroughly committed. *Dillon v. Merriam*, 22 Nebr., 151; *Stegeman v. Faulkner*, 42 Nebr., 53; *Adams v. Osgood*, 42 Nebr., 450; *Medland v. Linton*, 60 Nebr., 249.

It is insisted that the payment of the 1892 county and city taxes and the 1893 city taxes was purely voluntary and no recovery can be had therefor. The county taxes for 1892 and the city taxes for 1893 were paid in the name of I. L. McCloud, and the city taxes for 1892 in the firm name of McCloud & Connett. The record shows that the tax purchaser and I. L. McCloud were partners, engaged in making loans, purchasing property at tax sales, etc.; that through inadventure the subsequent payment of taxes was made in the name of one or the other of the parties. The undisputed evidence shows that the payment

of the taxes in question was made under the original certificate issued to Connett.

Objection is made that the bank can not recover because there is no assignment of the tax certificate by Connett. The certificate and some of the tax receipts contain this indorsement, "Without recourse A. F. Connett." But it is said there is no proof by whom the same were written. These assignments were received in evidence without objection, and it is now too late to insist that they were not in the handwriting of Mr. Connett, the tax purchaser. The tax certificate was assigned in compliance with section 117, article 1, chapter 77, Compiled Statutes, which provides that "the certificate of purchase shall be assignable by endorsement, and an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser." The certificate of purchase and the tax receipts were produced on the trial by the bank, which was evidence of their delivery. Two of the tax receipts were not formally assigned, but the assignment of the tax certificate transferred to the assignee all the rights of the assignor, including those arising from taxes paid by him subsequent to the tax sale.

There is no error in the decree, and it is hereby

AFFIRMED.

JAMES E. BOYD, APPELLANT, V. THOMAS MULVIHILL ET AL., APPELLEES.

FILED JUNE 5, 1901. No. 9,446.

1. **Conflicting Evidence.** A finding of fact based upon sufficient competent evidence will be sustained on review, although the evidence is conflicting and would have upheld a contrary finding.
2. **Insanity of Obligor.** Insanity of the obligor at the time the contract was entered into is a good defense to an action thereon, although no advantage was taken of him by the obligee.

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

Parke Godwin, for appellant.

Frank H. Gaines and *Duffie, Gaines, Kelby & Storey, contra.*

NORVAL, C. J.

James E. Boyd commenced this suit to foreclose a real estate mortgage executed by Thomas Mulvihill and Mary, his wife, to plaintiff to secure a certain promissory note given by said defendants to said Boyd. The defense was that at the time of the execution and delivery of the note and mortgage Thomas Mulvihill was insane, and incapable of understanding or entering into the same, and incapable of understanding or transacting the matters out of which the mortgage and note arose, and that they are for that reason null and void. On the trial the court found the issues in favor of the defendants, and from a decree in their favor plaintiff appeals.

Plaintiff relies wholly upon the weight of the evidence to reverse the case. The rule of this court that a finding of fact based upon conflicting evidence will not on review be reversed, where there is any competent evidence to sustain it, is too well established to make it necessary to cite cases so holding. We have carefully examined the record, and it is clear that there is therein sufficient evidence to have upheld a finding of the trial court in favor of either party. That being true, it is our duty to sustain the decree as rendered.

We think it unnecessary to enter into a discussion of the case at length. There being in the record sufficient competent evidence to establish the insanity of Thomas Mulvihill at the time the note and mortgage were executed (and the contrary is not seriously contended), they are void, although no advantage was taken of Mulvihill by the plaintiff. *Wager v. Wagoner*, 53 Nebr., 511; *Curtis v. Brownell*, 3 N. W. Rep. [Mich.], 936.

The only question involved here is, was there sufficient

evidence of the insanity of Thomas Mulvihill introduced to sustain the finding of the court that his condition at the time of the making of the contract was such that he was incapable of understanding or entering into it? That question must be answered in the affirmative, and being so determined, the decree is accordingly

AFFIRMED.

THE SEVEN VALLEYS BANK v. CHARLOTTE M. WISE.

FILED JUNE 5, 1901. No. 9,819.

1. **General Demurrer:** ASSIGNMENTS OF ERROR. Where a trial court overrules a general demurrer to a petition and renders judgment in favor of the plaintiff for the full amount of his claim, assignments of error that (1) the court erred in overruling the demurrer, and (2) in giving judgment in favor of the plaintiff instead of against him, call only for an inquiry as to whether the petition states a cause of action.

2. **Petition Good on Demurrer.** In an action on a certificate of deposit, a petition which alleges that the certificate was duly issued, that plaintiff is the owner of it, that it was duly presented and payment refused, and that defendant claims to have a partial defense, can not be successfully assailed by general demurrer.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

R. E. Brega and *Kirkpatrick Bros.*, for plaintiff in error.

Alphonso Moore, contra.

SULLIVAN, J.

This was an action by Charlotte M. Wise against the Seven Valleys Bank upon a certificate of deposit. The court overruled a general demurrer to the petition and rendered judgment in favor of the plaintiff for the full amount of her claim. The bank brings the record here for review, alleging in its petition in error that the court erred (1) in overruling the demurrer; and (2) in not giving

judgment in favor of the defendant instead of against it. Under these specifications of error we need only inquire whether the petition states a cause of action. We think it does. After alleging the corporate character of the bank and the issuance by the bank of a certificate of deposit to plaintiff's agent, and in his name, in payment of a remainder due upon a sale of plaintiff's property made by such agent to one F. J. Black, the petition proceeds as follows: "That said certificate was by said agent duly presented and payment thereon demanded from said bank upon said day, April 22, 1897, and payment thereof refused, defendant alleging at such time that said Black had not deposited the currency but a draft, and that the said bank could not pay for a few days as they were short on currency, whereupon said agent turned over said certificate properly indorsed to plaintiff, and thereafter, to-wit, on May 14, 1897, said plaintiff presented said certificate to said bank properly and demanded payment thereon which was by said bank refused for the reason as claimed by said bank that they had discovered an old note against the agent of plaintiff, A. H. Wise, which the bank held, and that they, the said bank, would withhold and had set apart $146.55, of such fund in liquidation of said note, to which, at the time, plaintiff protested, alleging that the cattle and the certificate being the proceeds of the sale thereof was her separate and distinct property which fact was and is true." These averments show plainly enough that the bank issued the certificate and that plaintiff is the owner of it. They do not show that the defendant has any lawful excuse for withholding payment of any part of the $280 mentioned in the certificate; they merely disclose the reason given by the bank for refusing to pay all of it. The defendant might have had reasons plenty as blackberries, yet they would avail it nothing if merely stated to the plaintiff and not shown to the court. The petition undoubtedly states a cause of action. The judgment is right and is

AFFIRMED.

GEORGE J. SHEPARD V. JAMES M. EASTERLING ET AL.

FILED JUNE 5, 1901. No. 9,834.

1. **Claim Against County: JURISDICTION OF DISTRICT COURT DERIVATIVE.** The jurisdiction of the district court to hear and determine actions for the enforcement of claims against counties arising *ex contractu* and embraced within the provisions of section 37, chapter 18, article 1, Compiled Statutes, 1899, is derivative and not original.

2. **Jurisdiction of Board: RECORD.** A claim against a county must be presented, in writing, to the county board before that body has jurisdiction or authority to act upon it.

3. **———: SUBJECT MATTER.** The only claim which the county board is, by section 37, chapter 18, article 1, Compiled Statutes, 1899, authorized to examine, adjust and allow, or reject, is one which must be paid by the issuance of a warrant upon the county treasurer.

4. **Right of Taxpayer.** The right of a taxpayer to test the validity of a claim against the county does not arise until there has been an adjudication by the county board in favor of the claimant.

5. **Report of County Officer: APPROVAL BY COUNTY BOARD IS NOT A JUDICIAL ORDER AND IS NOT APPEALABLE.** The approval by the county board of the report of a county officer made in compliance with the requirements of section 43, chapter 28, Compiled Statutes, 1899, is not a judicial order; it has not the force or conclusiveness of a judgment and is not appealable.

6. **Injunction by Taxpayer.** A taxpayer may maintain a suit to restrain the governing body of a municipal or public corporation from making an illegal disposition of public funds or property.

7. **Taxpayer Plaintiff in Equitable Action, Corporation Defendant.** A taxpayer may, also, commence and prosecute to judgment an equitable action to enforce, for the benefit of a municipal or public corporation, a right of action which its governing body has refused to enforce. In such case the corporation should be made a party defendant.

8. **County Board May Pay Judge for Extra-Official Service.** A county board may lawfully contract with a county judge to perform extra-official services in connection with the records of his office; and where such services have been performed without any valid contract, the county may accept the product of the judge's labor and pay him therefor. In such case, a taxpayer can not maintain an equitable action against the county judge on the

theory that the money received by him for such services belongs in equity and good conscience to the county and should be paid over to the county treasurer.

ERROR from the district court for Buffalo county. Heard below before GREENE, J. *Affirmed.*

Frank E. Beeman, for plaintiff in error.

Willis D. Oldham and *Hector M. Sinclair, contra.*

James M. Easterling, for himself.

SULLIVAN, J.

The defendant in error, James M. Easterling, as county judge of Buffalo county, collected certain fees earned by his predecessor, Thomas H. Cornett. These fees, it is contended, belong to the county and should be turned over to the county treasurer. It appears that the defendant performed extra-official services for the county in 1894, and that the county board afterwards adopted a report of its finance committee recommending that he be permitted to retain the Cornett fees as compensation for such services. The recommendation of the committee is as follows: "We would further report that we find the office of county judge in good condition and that said judge has devoted much labor to docketing and 'jacketing' some 600 cases that have not been docketed or 'jacketed' and filed away, and that at a considerable expense and labor that he has completed a large two-volume index of the probate records of this county—an indispensable piece of work for the convenience of the public, and the proper administration of the office. We would further suggest that this index covers the records of the county court from the organization of the county down to the present time and that if not made now at some future day the county would be compelled to make said index at great expense. We would therefore recommend that the fees aforesaid, viz: $269.59 (same being the fees earned by

Thomas H. Cornett as above set forth) be allowed and appropriated for the payment to Mr. Easterling for making said index and doing other necessary work in the office which is but a small remuneration for said work." From the action of the board adopting the report and approving the recommendation the plaintiff, George J. Shepard, undertook to prosecute an appeal. In the district court he filed a petition setting out the action of the county board, and alleging that such action "was a quarterly settlement between the said board and the said county judge, for the quarter ending June 30, 1895." An answer and reply were subsequently filed, and the issues thus raised were tried to the court and found in favor of the defendant. Judgment was rendered dismissing the case. In view of the conclusion which we have reached, it will not be necessary to consider all the questions discussed by counsel.

Obviously at the threshold of the case is the question of the authority of the court to grant the plaintiff any relief whatever. The plaintiff's theory seems to be that the action of the county board was, in substance, the allowance of a claim in favor of Easterling for the services mentioned in the committee's report. Assuming this to be a correct view, we proceed to inquire whether the district court obtained jurisdiction of the case by the appeal. If it did not, it was without power or authority to determine the validity of the defendant's claim for services, or to render a judgment affecting in any way the rights of the county. The jurisdiction of the district court in such matters is derivative, and not original. *Brown v. Otoe County*, 6 Nebr., 111; *Dixon County v. Barnes*, 13 Nebr., 294; *Brondberg v. Babbott*, 14 Nebr., 517; *Union P. R. Co. v. Ogilvy*, 18 Nebr., 638; *Moise v. Powell*, 40 Nebr., 671; *Keeshan v. State*, 46 Nebr., 155; *Stenberg v. State*, 48 Nebr., 299. Sections 33, 37 and 38, chapter 18, article 1, Compiled Statutes, 1899, are as follows:

"Sec. 33. Upon the allowance of any claim or account against the county, the county board shall direct the

county clerk to draw a warrant upon the county treasurer in payment thereof, such warrant to be signed by the chairman of the county board, countersigned by the county clerk, and sealed with the county seal, but the same shall not be delivered to the party until the time for taking an appeal has expired, and if such appeal be taken then not until the same shall have been determined."

"Sec. 37. Before any claim against a county is audited and allowed, the claimant or his agent shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing just credits. All claims against a county must be filed with the county clerk. And when the claim of any person against a county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision, and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing, of the fact, within five days after such disallowance. Notice mailed within said time shall be deemed sufficient.

"Sec. 38. Any taxpayer may likewise appeal from the allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section."

Considering together these provisions of the law relative to the allowance of claims against counties, it seems clear that a claim must be presented to the county board

in writing before that body has jurisdiction or authority to act upon it—before an order of allowance or disallowance can be made. It also seems that the only claim which the board is by the statute authorized to examine, adjust and allow, or reject, is one which must be paid by the issuance of a warrant upon the county treasurer. The object of the legislature in giving a taxpayer the right of appeal was to enable him to safeguard the interests of the public and his own by preventing money in the treasury from being paid out upon illegal claims. If this is a correct interpretation of the statute, the conclusion follows that the action of the county board in adopting the report of the finance committee was not an appealable order; it did not have the force or conclusiveness of a judgment. The board acted ministerially; it did not assume to act otherwise; it did not undertake to make a judicial order. Easterling did not invoke judicial action on any claim against the county, and consequently the board was without authority to bind him by an adjudication, either favorable or adverse. The action of the board, as stated in the petition and admitted by the answer, was a quarterly settlement between Easterling and the supervisors. In making these settlements, it is well understood, the county board performs ministerial functions only. *Heald v. Polk County*, 46 Nebr., 28; *Hazelet v. Holt County*, 51 Nebr., 716. As was said by the chief justice in a recent case (*Sheibley v. Dixon County*, 61 Nebr., 409), the action of the board "was not in any sense an adjudication," and may not be alleged as an estoppel by either the county or the officer. It results from these considerations that the appeal was a nullity, and conferred no jurisdiction upon the district court. The county made no appearance in the case, and the court was, therefore, without power or jurisdiction to give a binding decision either in its favor or against it. The only parties to the suit were Shepard and Easterling, and if the purpose of the litigation was to determine the latter's right to compensation for services, it was prematurely com-

menced. The right of a taxpayer to test the validity of a claim against the county does not arise until there has been an adjudication by the county board in favor of the claimant.

It is not contended that the controversy may be regarded as an original action to charge the defendant as a trustee of the Cornett fees, and to compel him to pay the same to the county treasurer for the use of the county; but if it be so regarded, the plaintiff has not made a case entitling him to relief. There is, it is believed, no serious question about the right of a taxpayer to maintain a suit to restrain the governing body of a municipal or public corporation from making an illegal disposition of public funds or property. *Tukey v. City of Omaha*, 54 Nebr., 370. And on principle it would seem that a taxpayer should be permitted to enforce for the benefit of such corporation a right of action which its governing body has refused to enforce. If a taxpayer, to avoid the burdens of needless taxation, may sue to prevent public officers from squandering public money, there is, it seems to us, no good reason why he may not also commence and prosecute to judgment an equitable action for the enforcement of a corporate claim which the officers of the corporation have refused to enforce. *In re Cole's Estate*, 102 Wis., 1, 78 N. W. Rep., 402; *Quaw v. Paff*, 98 Wis., 586; *Frederick v. Douglas County*, 96 Wis., 411. It is not shown in this case that there was any demand upon the county board to bring suit for the county; but it may be conceded that, under the circumstances, no demand was necessary. It may also be conceded that Easterling had no valid contract for the performance of the services mentioned in the report of the finance committee. How then does the case stand? The services were undoubtedly extra-official; they were outside of and beyond the duties which the law imposed upon the defendant as judge of the county court; he could not have been compelled to perform them; they might have been performed by any one employed for the purpose. The county got the benefit of Easterling's labor,

and it is plain, according to equity and good conscience, that it should render an equivalent therefor. The county might have contracted with Easterling in advance for the services which he rendered, but because it did not make a formal and valid contract, is no legal reason why it might not afterwards accept the work and pay for it. *Burroughs v. Norton County*, 29 Kan., 196; *McBride v. City of Grand Rapids*, 47 Mich., 236; *Evans v. City of Trenton*, 24 N. J. Law, 764. The method by which the county board undertook to compensate the defendant for his services was, of course, irregular, but it worked no real injury to the plaintiff or any other taxpayer of the county. It is not claimed that the amount allowed the defendant was excessive, or that a less amount would have been allowed if the usual procedure had been followed.

The plaintiff is not entitled to any relief, either in law or in equity, and hence the trial court did not err in dismissing the action. The judgment is

AFFIRMED.

NORVAL, C. J.

I concur in the judgment just rendered.

BRUCE CHAPMAN V. STATE OF NEBRASKA.

FILED JUNE 5, 1901. No. 11,973.

1. **Statutory Crime: TWO STATUTES: ONE ACT: TWO CRIMES.** A statute which denounces an act as criminal does not cease to be effective because another statute declares the same act to be a crime when done at a particular place or under special circumstances.
2. **Information: STATUTE: ELEMENTS OF CRIME: LANGUAGE OF STATUTE.** Where a statute states the elements of a crime, it is generally sufficient, either in an indictment or information, to charge such crime in the language of the statute.
3. **Repeating Instructions.** It is not error to refuse a special instruction embodying an idea which has been given by the court to the jury in the general charge.

4. **Argumentative Instruction.** It is not error to refuse an instruction which is argumentative and singles out and gives undue prominence to some portions of the evidence.

5. **Evidence: VERDICT.** Evidence examined, and found sufficient to support the verdict and sentence.

ERROR from the district court for Sherman county. Tried below before SULLIVAN, J. *Affirmed.*

Richard J. Nightingale, for plaintiff in error:

The theory of counsel for the state and of the trial court was that notwithstanding the specific language of the statute making consent an element of this form of rape, yet there is a legal fiction under all statutes of this kind, to-wit, that the female is incapable of consent. They relied chiefly on *State v. Wright*, 25 Nebr., 38. But that case, in so far as it deals with this question, is mere *obiter dicta*. The common law made this presumption rebuttable. Our statute is a substantial copy of 18 Elizbeth, chapter 7, section 4, with the words "with her consent" inserted. The statute against seduction was not repealed by implication. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Nebr., 900. Is it not a reasonable construction of the statute to say that the rape statute provides a punishment for male persons over eighteen years who have sexual intercourse with females over fifteen and under eighteen of chaste character by exciting the sexual passion?

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

SULLIVAN, J.

This was a prosecution for statutory rape. The jury found the defendant guilty, and the court sentenced him to imprisonment in the penitentiary for a period of three years. The petition in error contains many assignments, but the principal ground relied upon for a reversal of the sentence is that the state's evidence, while tending to

prove seduction, disproves completely the crime charged in the information. Briefly stated, the main facts of the case are these: Bruce Chapman resides in Sherman county and is now between thirty-two and thirty-five years of age. One evening in August, 1899, he attended a camp-meeting at Round Grove, where he satisfied his religious yearning—slaked his thirst for spirituality—and then permitted his attention to become engrossed with secular things. At the meeting he fell in with the prosecutrix, Ora Nell Johnson, and the two went home together. On the way home, it would seem, Chapman felt the rise and surge of a tender passion and took occasion to mention the fact to Miss Johnson. Finding her in a responsive mood he indulged freely in erotic vagaries, and finally, after promising marriage and eternal fidelity, had sexual intercourse with her. The promise of marriage, it is now insisted, adds to the crime charged an extenuating element which reduces it from rape to seduction—from a felony to a misdemeanor. We listened with great interest to the ingenious reasoning by which the learned counsel for the defendant undertook at the bar to sustain this position. We were charmed with the cleverness of the argument, but its logic was not irresistible; it failed to convince us that a person prosecuted for the commission of a criminal act must go free if it be made to appear at the trial that he transgressed two sections of the law against crimes instead of one. It may be conceded that section 207 of the Criminal Code is in full force, and that the defendant might have been, and still may be, tried and convicted for debauching the prosecutrix. The act charged in the information constituted a crime under section 12 of the Criminal Code, while the act proved was a violation of both sections. One need not be specially skilled in divining the legislative will in order to perceive that the law forbidding illicit carnal relations under promise of marriage was not permitted to stand on the statute books for the benefit and protection of those seducers of children who take the trouble

to add a promise of marriage to the other lures and enticements which they may see fit to employ. If the defendant were held to be innocent of rape because guilty of seduction, he might, according to the argument of his counsel, when prosecuted for the latter offense, secure an acquittal by showing that he was a married man, and, therefore, guilty of adultery. And by the same logic, a person charged with a murderous assault would be entitled to an acquittal if it should appear that the person assaulted was an officer engaged in the execution of his office, or a minister of the gospel preaching to his congregation. It would also entitle a licensed vender of intoxicating liquors, charged with making sales on Sunday or election day, to an acquittal if he could show that the persons to whom the sales were made were minors, Indians, lunatics or habitual drunkards. The true rule undoubtedly is that a statute which denounces an act as criminal does not cease to be effective because another statute declares the same act to be a crime when done at a particular place or under special circumstances. *Commonwealth v. Vaughn*, 101 Ky., 603, 45 L. R. A., 858; *State v. Gapen*, 17 Ind. App., 524; *Ruble v. State*, 51 Ark., 170; *Arrington v. Commonwealth*, 87 Va., 96.

There is some criticism on the form of the information, but as it follows closely the language of the statute, we have no doubt whatever of its sufficiency.

The court having on its own motion charged the jury that there could not be a conviction unless it appeared that the prosecutrix was chaste up to the time the sexual act in question was committed, it was not error to refuse an instruction offered by the defendant embodying the same idea.

The defendant's seventh request for an instruction was also properly refused. It was argumentative—altogether too argumentative; and besides, it singled out and gave undue prominence to some portions of the evidence.

The other assignments of error have not been discussed at length by counsel, and they do not seem to us to merit

special consideration. All the rulings complained of have been closely examined, and have been approved without hesitation. The trial was in every respect a fair one; and, considering that want of previous chastity—the only defense relied upon—was but feebly supported by the evidence, we think the sentence of the court was tempered with mercy. The defendant has brought to ruin a young and inexperienced girl; he has violated his solemn pledge to make her his wife; he has embittered her life and clouded her destiny; and, finally, he has done what even a roue seldom does under like circumstances—he has attempted to smirch her reputation by denouncing her before the world as a wanton. The wage of sin is certainly due to Mr. Chapman, and the hour of liquidation is at hand. The judgment is

AFFIRMED.

NOTE.—Two crimes may be committed by a single act. One may be convicted of keeping a liquor nuisance, and of specific sales which have been shown in evidence of it. *State v. Lincoln*, 50 Vt., 644. Conviction of being a common seller of intoxicating liquors is no bar to conviction of maintaining a common nuisance by keeping a tenement used for such illegal sale, although the same evidence is relied upon in both cases. *Commonwealth v. Hogan*, 97 Mass., 122. Keeping liquor for sale and selling are distinct offenses. *State v. Head*, 3 R. I., 135. B., who has been acquitted as a principal in the murder of H., may be convicted as an accessory before the fact in the same murder. *State v. Buzzell*, 58 N. H., 257; 59 N. H., 65.—REPORTER.

WILLIAM E. VEEDER, APPELLANT, V. MCKINLEY-LANNING LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED JUNE 5, 1901. No. 9,361.

1. **License Granted at Chambers Must Be Filed with Clerk.** An order or license, to an administrator to sell real estate of an intestate, granted by a judge sitting at chambers, must be filed in the office of the clerk of the district court of the county in which letters of administration are issued, before the administrator is empowered and authorized to sell such real estate.

2. **Administrator Is Prohibited from Being a Purchaser at a Sale.** When an administrator is authorized to sell real estate belong-

ing to the estate he represents, he is prohibited by statute, in making a sale, from either directly or indirectly becoming a purchaser, in his individual right, of the property so sold by him as such administrator.

3. **The Word "Void" in a Statute Construed to Mean "Voidable."** It would seem that the statute declaring a sale so made to be void should be construed to mean voidable, and that such sale may be declared void in a suitable proceeding at the instance of any proper party in interest.

4. **The Rule of Caveat Emptor Applied to a Subsequent Purchaser of Real Estate at an Administrator's Sale.** A subsequent purchaser or mortgagee of real estate sold by an administrator is chargeable with notice of what is contained in the public records, evidencing the chain of title through which the party claims, and with all information imparted thereby; and where such records make it apparent that an administrator, in violation of law, was indirectly the purchaser of the property at such sale, and to whom the property was immediately transferred, or where the facts are sufficient to put an ordinarily prudent man on inquiry, such subsequent purchaser or mortgagee is not a good-faith grantee, for value, and without notice of the infirmity in the title held by his grantor.

5. **Statute of Frauds:** EXPRESS TRUST: THOMAS V. CHURCHILL. "A parol agreement by a grantee, to reconvey real estate to his grantor, is within the statute of frauds and does not create an express trust in such real estate in favor of the grantor." *Thomas v. Churchill*, 48 Nebr., 266.

6. **Real Estate Conveyed by Husband to Wife Is Presumed to Be an Advancement Passing the Title.** Where real estate is conveyed, or procured to be conveyed, by a husband to his wife, without pecuniary consideration on her part, the *prima facie* presumption of law is that it was intended as a gift or advancement, and that the parties intended that the full and absolute title, both legal and equitable, should pass together by the same conveyance.

7. **A Resulting Trust Will Not Be Presumed. The Burden Is Upon the One Claiming Its Existence.** A resulting trust will not be declared upon doubtful or uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence.

8. **Facts Do Not Prove It.** *Held*, That the evidence did not prove facts establishing a resulting trust.

9. **Subrogation: Lien.** The defendant, the Omaha Savings Bank, *held* to be entitled to be subrogated to the rights of the administrator

as a creditor of the estate to the extent of $396, the amount of an incumbrance on real estate belonging to the estate and costs of administration, and to have a lien upon such real estate for said amount.

APPEAL from the district court for Hall county. Heard below before THOMPSON, J. *Reversed.*

Othman A. Abbott and *Johnson & Wellman*, for appellants.

W. H. Platt, *W. R. Morris* and *Tibbets Bros.*, *Morey & Ferris*, *contra.*

HOLCOMB, J.

Appellant, plaintiff below, brought an action in equity, under the provisions of section 57, chapter 73, Compiled Statutes of 1899, for the purpose of having adjudicated and determined the title and interest of several defendants to certain real estate, described in the petition, adverse to him, and to have the title thereto quieted in his favor, subject to the life estate of his father, as tenant by curtesy of his deceased wife, mother of the appellant.

Briefly, the salient features of the case may be outlined as follows: The plaintiff is the son and heir at law of Emma V. Veeder, deceased, who died possessed of a title in fee simple to the real estate which is the subject of the suit. Defendant Aaron B. Veeder was the husband of Emma V. Veeder, and is the plaintiff's father. The son arrived at his majority shortly prior to the commencement of the present action. It is averred, in substance, in the petition that after the death of the mother and wife, who died seized of the real estate therein described, leaving the plaintiff as her sole heir at law, and without any debts or other demands against the estate, that the defendant, Aaron B. Veeder, procured letters of administration of the intestate's estate to be issued to him, and thereafter filed against the estate a fraudulent and pretended claim in favor of himself, and obtained the allowance thereof as a legal and valid claim against the estate, and afterward made application to the dis-

trict court of Hall county, the county in which letters of administration had been granted, for a license to sell the real estate to pay the debt so allowed and the cost of administration, which application was heard on an order to show cause before a judge at chambers in another county; that no license had been granted, and, if granted, the same was void for want of jurisdiction. It is further averred that thereafter a pretended sale of the real estate was made to one Thomas J. Hurford for the alleged consideration of $3,100, which the said Veeder caused to be ratified and approved by the district court of Hall county, and an administrator's deed executed and acknowledged in favor of the said Hurford; that such pretended sale was without consideration and was made for the use and benefit of the administrator and in pursuance of a fraudulent design to defraud the estate out of said real estate and to permit the administrator to acquire title thereto in his own right; that on the subsequent day the said real estate was by the said Hurford, the pretended purchaser, conveyed by warranty deed to the said Aaron B. Veeder, without consideration and for the purpose of cheating and defrauding the estate and the plaintiff, as heir at law, out of his interest and estate therein; that said two pretended sales were in pursuance of a prior agreement between the said administrator and the said Hurford, with the intent to defraud the estate and the plaintiff out of his interest therein; that no return was made to the probate court, nor were any of the proceeds of the sale ever accounted for; that afterwards the said Aaron B. Veeder and his then wife conveyed one acre of said tract of land to school district No. 15, of Hall county, defendant, which claims title thereto by virtue of said deed of conveyance, which, it is alleged, conveyed only the life estate of the said grantor therein; that afterwards the said Veeder and his then wife by mortgage deed conveyed unto the Omaha Savings Bank, defendant, said real estate for the consideration of $1,000, and that said defendant secured thereby

only a lien on and interest in the life estate of the said grantor. It also appears that one D. L. Johnson, one of the defendants, claims some interest in the land by reason of his purchase of certain coupons for interest on the debt secured by the conveyance to the defendant, the Omaha Savings Bank; that afterwards another mortgage deed was executed on said real estate in favor of the defendant, Susan J. Fillion, for the consideration of $3,000 which, it is alleged, gave to the mortgagee no greater title to or interest in said land than the life estate of the grantor. The defendant, the McKinley-Lanning Loan & Trust Company, having obtained a judgment against Aaron B. Veeder, levied upon and sold the land as upon execution as the property of the said Veeder; but it is alleged that the said defendant thereby acquired no greater interest in said real estate than the life estate of the said Veeder, as against the plaintiff. Other persons appearing to have some interest in the land adverse to the plaintiff were made parties defendant; but their several interests need not be here further noticed.

The Omaha Savings Bank and Johnson answered, admitting the execution and delivery of the mortgage to them, denying that the plaintiff has any interest, right or title to the property in suit, or any part thereof, and denying the other allegations of the petition. By way of cross-petition they asked a foreclosure of their mortgage lien, which it is alleged was created to secure the payment of $1,000, money borrowed by the said Aaron B. Veeder, default having occurred in the conditions of the mortgage.

Defendant Fillion answered, admitting some of the formal parts of the petition and that after the death of Emma V. Veeder, Aaron B. Veeder was appointed administrator and administered upon said estate, and that the real estate in controversy was sold under order of court, and, in general, averring the regularity of the proceedings whereby the real estate was sold by the administrator to pay the debt allowed against the estate; pleaded

her mortgage for $3,000, alleged to have been given for borrowed money, loaned to the mortgagor, Veeder, and praying a foreclosure thereof. It is also pleaded by this defendant that the said real estate was in truth and in fact the property of the said Aaron B. Veeder, who by the proceedings of administration merely acquired title to his own property, and that the deceased held the legal title which she had obtained without consideration, and which she held as trustee for the use and benefit of her husband, Aaron B. Veeder, under an agreement to reconvey to him, which had not been effectuated prior to her death; that the land had been conveyed to her for the purpose of withdrawing the same from the creditors of her husband, who, it is alleged, was at the time financially embarrassed and unable to meet his obligations to his creditors; that one eighty acres of said tract of land was a government homestead, acquired by the said Aaron B. Veeder from the United States government, and the other was purchased and paid for by him and the title taken in the name of his wife; that she had no property or means, and that the conveyances were as to her wholly without consideration; that the husband had the possession and control of said real estate, made the improvements and paid the taxes accruing thereon. It is also alleged that after the death of the wife, the said Aaron B. Veeder, in order to more quickly facilitate the settlement of the estate, and to gain title to himself, as he was legally entitled thereto, had the proceedings of administration as set out in plaintiff's petition, but asserting that all of such proceedings were had in pursuance of law and equity and that nothing was done to defraud the plaintiff or any other person.

The other answer amounted substantially to a general denial, with a plea that the defendant was entitled to protection as a good-faith purchaser without notice and for value.

On the issues presented, the trial court found that at the time of the death of Emma Veeder she left the plain-

tiff and an infant child, who soon thereafter died, as her heirs at law, and that the title to the real estate in controversy was in her name; that the administrator's sale to Hurford was without consideration and for the purpose of placing the legal title of said property in the name of Aaron B. Veeder; that one eighty acres of land was taken as a homestead by the said Aaron B. Veeder and by him conveyed to his wife through the name of John Westley, without consideration; that the other eighty acres was purchased and paid for by said Aaron B. Veeder from John W. Irwin and conveyed to Emma Veeder without consideration from her; that said tracts adjoin each other and were occupied as a homestead by the said Aaron B. Veeder and Emma V. Veeder, at the time said conveyances were made to Emma V. Veeder and at the time of her death; that at the time said conveyances were made, the said Aaron B. Veeder was indebted to sundry persons, and such conveyances were made to hinder the creditors of Aaron B. Veeder in the collection of their debts; that the plaintiff resided with his father until attaining his majority, was schooled and clothed by him, and had no other benefit or consideration for any of the conveyances of said real estate. The court found in favor of the mortgagees and judgment creditor who purchased at execution sale; that the conveyances through which they claimed were made without any notice or knowledge of the manner or character of the conveyances between the said Thomas J. Hurford and the said Aaron B. Veeder, and were made in good faith, and that the liens and interests in the said premises acquired thereby were prior and superior to the plaintiff's right, fixing their relative order of priority and rendering a decree accordingly. From the decree so made the plaintiff appeals.

Assuming for the present that the deceased was the owner in her own right of the real estate to which she held the legal title at the time of her death, an orderly discussion and consideration of the case would seem to

suggest that attention first be given to the allegations in the petition of fraud and irregularities with respect to the method and manner of divesting the estate of the title to the property in controversy, resulting, as contended, in a pretended sale by the administrator which is utterly null and void and ineffectual to pass any title thereby as against the plaintiff, as sole heir at law of the deceased. We glean from the record that some time after the appointment and qualification of the husband of the deceased as administrator, he verified and presented a claim in his favor against the estate of which he was administrator, in the sum of $627.50, which claim was by the probate court approved and allowed as a proper charge against the estate. The order of allowance was entered January 30, 1882, the claim having been filed the third of the same month. On the 14th of February, following, a petition was filed by the administrator in the office of the clerk of the district court of Hall county, praying for license to sell all of the real estate of the intestate, describing it, which aggregated about 170 acres, for the purpose of satisfying the claim so allowed against the estate by the probate court of said county. After the publication of an order to show cause why a license should not issue, and fixing the hearing of the application before the judge of the district court sitting at chambers in another county in the judicial district, it seems a hearing was had at the time and place stated, to wit, April 14, 1882, and a license or order of sale appears to have been granted as prayed for. After giving the bond and taking the oath as required by statute, the administrator, acting ostensibly in pursuance of the authority conferred by a license issued by the district court, sold or pretended to sell the real estate and made report that, after advertisement of notice of sale, the premises described were sold on May 27, 1882, to Thomas J. Hurford for the sum of $3,100, which sum so bid was subsequently paid into court. The license to sell, the oath of the administrator and the answer of the

guardian *ad litem* were never filed in the office of the clerk of the district court of Hall county, where letters of administration were granted and the proceedings to obtain license were initiated, until during the time of the trial of the present action. After the purported sale an administrator's deed was by the administrator executed in favor of Hurford, the alleged purchaser, on the 8th day of March, 1883. On the next day, the 9th day of March, Hurford, the grantee, and his wife by deed of general warranty conveyed all of said premises to Aaron B. Veeder in his individual capacity. In each of these instruments the expressed consideration is $3,100, the sum reported for which the land was sold. No further proceedings were had in the administration of the estate, and it does not appear that the administrator ever reported or made any effort to account for the proceeds of the sale.

That the attempted sale of the real estate in the manner by which it was brought about was in direct violation of the statute and in fraud of the rights of the estate and the plaintiff as heir at law, is indisputably established by the facts and circumstances surrounding the transaction, as shown by the evidence. The foregoing being the record, the chain of title, the *indicia* of ownership, through and under which the defendants claim, what are their rights in the premises under the subsequent conveyances by the grantor, Veeder? How are they affected by and charged with notice of the infirmities adverted to in the title of their common grantor, and can they be good-faith purchasers, entitled to protection as such, under the facts and circumstances disclosed by the record? At the threshold of the inquiry a very serious question arises as to the authority of the administrator to sell the land in controversy under any aspect of the case, because of failure to comply with the provisions of statute empowering an administrator to sell real estate belonging to the estate he represents. By section 339 of the decedents act, regulating the sale of real

estate, it is provided: "In all cases where the judge shall order a sale of any real estate, while sitting at chambers, he shall make out, in writing, a copy of said order, and cause the same to be filed in the office of the clerk of said court, and said clerk shall thereupon record said order, in the record book of said court, before any sale shall be made as aforesaid." Compiled Statutes, 1899, ch. 23. If regard is to be had for the plain provisions of the section cited, authority to sell as in the present case is dependent on compliance with the requirement that "before any sale shall be made," the order of sale or license given shall, after allowance by the judge sitting at chambers, be filed in the office of the clerk of the district court where letters of administration are granted and by him recorded in the record book of said office. This provision, as it occurs to us, is of the substance of the proceedings required to be taken, and compliance with it essential to a valid sale. The authority of the administrator to sell real estate under a license granted at chambers is not established alone by the grant of the license, but it is further required that before the sale is made the order be filed in the office of the clerk of the district court as directed. This construction of the statute is given in *Stack v. Royce*, 34 Nebr., 833, wherein it is held that the petition and license must be filed in the office of the clerk of the district court of the county in which administration was granted. The precise point decided was that an administrator was without authority to sell real estate of the intestate unless the petition and license therefor granted at chambers were filed in the office of the clerk of the district court of the county in which administration was had upon the intestate's property, rather than in the county in which the land was situated, as was done in that case. Says NORVAL, J., writing the opinion: "Looking to the proviso clause of section 339 of said chapter 23, it will be seen that in all cases where a judge of the district court orders a sale of any real estate while sitting at chambers, it is made his

duty to cause a copy of the order to be filed in the office of the clerk of the district court, 'and said clerk shall thereupon record said order in the record book of said court before any sale shall be made as aforesaid.' It would be a strange proceeding to require the order to be recorded, and yet not preserve the petition, the jurisdictional paper upon which the license and all subsequent proceedings are based. That such petition must be filed and preserved by the clerk, we have no doubt." And further on it is observed: "But the defects relied on in the case before us are not mere irregularities, but go to the jurisdiction. If the petition of the administrator for a license had not been filed, and the license and subsequent proceedings thereunder had never been recorded, in any district court of the state, we do not think it would be contended that the sale and administrator's deed were valid." But it is contended that confirmation of the sale made by the administrator cured the irregularity in not filing the order of the judge made at chambers, because of section 119 of the decedents act, enumerating what will and what will not avoid a sale for irregularities. We do not think the failure to file in the proper office the license to sell comes within the provisions of statute of irregularities merely, which will not avoid a sale. The non-compliance with the statute goes to the jurisdiction, and involves the authority of the administrator to act. The license to sell is in law incomplete, as an expression of the court empowering the administrator to act, until it is made a part of the records of the court in which it is required to be filed. The court or the judge sitting at chambers speaks only through the court records, and the license is ineffectual to confer authority until made a part of the records. In the case last referred to, in a concurring opinion by POST, J., it is pertinently remarked: "I take it to be an elementary rule of evidence that judicial proceedings are proved by their records only, or, in the language of Mr. Greenleaf, a judgment is 'the only proper

and legal evidence of itself.' (1 Greenleaf, Evidence, 538.) In this case, the authority of Hammond, the administrator, to sell the land must appear of record. It must be proved by a record which the law authorizes to be kept." The essential requirements of the statute not having been complied with, the administrator was without authority even to make the attempted sale which he engaged in; and if such be the case, a subsequent grantee or mortgagee can not, we assume, be a purchaser in good faith. There was an entire absence of any record evidencing authority to sell. The merest inspection of the record, at the time appellees claim to have acquired title to and an interest in the land in controversy, and of which they are charged with notice must exist, would have disclosed that the administrator had not proceeded according to law in the sale of the property to which they claim title by a conveyance subsequent thereto.

We pass next to the second point, and a question of equally vital importance in the disposition of the case. In the attempted sale by the administrator of the real estate in controversy, under the license granted and the deed of conveyance made in pursuance thereof, it is made manifest, and beyond serious doubt, that no *bona fide* sale to the nominal purchaser was ever in fact made; that Hurford in truth never bought the property or paid any consideration therefor; that the sale to him was colorable only, and a device and scheme to obtain the title thereto by the administrator in his own name, and to whom the nominal purchaser on the day following deeded the land; both of such conveyances on the next day being filed for record in the office of the recorder of deeds at exactly the same hour and minute, and evidently by the same person. Hurford, in his testimony, says he did not buy the land; that he paid nothing; had nothing to do with the transactions, save as he was made the instrumentality by which the title to the property was acquired by the administrator in his own name; and that he understood that this was the only object to be

accomplished by the conveyances in which his name appeared as grantee and grantor respectively. The conclusion, therefore, is irresistible that in so far as there was a purchase of the property by any person under the purported sale made by the administrator, he himself was the purchaser. Section 85 of the chapter providing for the sale of real estate of a decedent declares that "the executor or administrator making the sale * * * shall not directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void." To give the section quoted a literal construction, and hold the sale made by the administrator and the deeds made in pursuance thereof void and of no force and effect in the strict legal sense of the term, would end the discussion of the case and render further consideration unnecessary. If the sale is void *in toto*, and not merely voidable, the titles acquired by the defendants by their subsequent conveyances must fall to the ground and leave them without standing upon which to base the relief demanded. Whether the section shall be so construed may be said to be an open question in this state. Whether the legislature intended that a sale so made should be utterly void may not be entirely free from doubt. It has been frequently and well said that the terms "void" and "voidable" are frequently used interchangeably, and that the word "void" is often so used when the act so characterized is intended to be voidable only. It may, we think, well be doubted whether the legislature intended that a sale made in the manner condemned by the section quoted should be, for all purposes, void and as though it had never taken place. The purposes intended and objects to be accomplished, and the legislative will with respect thereto, can probably be better enforced and carried out by construing the word as meaning "voidable," and the action condemned held void upon the application of any proper party in a suitable action, as against all who may rightfully be charged

with the wrong-doing, excepting only innocent, *bona fide*, subsequent grantees or mortgagees. *Melms v. Pabst Brewing Co.*, 66 N. W. Rep. [Wis.], 518, and cases therein cited. We do not, however, finally decide the question, preferring, in the present case, to base our conclusions on the assumption that the sale, under the circumstances, is voidable only, and that only those who claim subsequently to the voidable sale with notice, of facts of which they are charged, and not as good-faith grantees or mortgagees, are to be affected by the acts upon which the sale may be declared void. This leads us directly to the question of whether the subsequent mortgagees and the purchaser at the execution sale of the land as the property of Aaron B. Veeder, may be exempted from the force and effect of the fraudulent and void acts of the administrator in attempting the sale of the land to himself as an individual, while acting as the administrator of the estate in making a sale under the order of court.

It is repugnant to every sense of justice and honesty of transactions between individuals, to permit a person occupying a trust relation to deal with the subject of the trust in such manner as to permit his selfish and personal interest to be brought in conflict with the duties imposed in the faithful execution of the trust. The purchase by an administrator for his own use of the property of the estate he represents, and the occupation by him of the dual position of seller and buyer, contravenes a policy founded in wisdom and based on the application of sound principles of law. The courts have universally condemned such acts from time immemorial, and legislatures have set their seal of disapproval thereon by statutory enactments declaratory of the common law on the subject. An instructive discussion of the underlying principles, which may be considered with profit, is found in *Michoud v. Girod*, 45 U. S., 502, 552, wherein Mr. Justice Wayne, of the United States supreme court, has with much perspicuity stated the rule and policy of the law with respect to such transactions. The sale of the

real estate in question having been made in contravention of the express provisions of the statute, and being for that reason void, it remains to be seen whether the subsequent mortgagees and purchaser at execution sale may be regarded as good-faith purchasers and entitled to protection as such, or whether they are in no better position than their grantor. To reach the conclusion that they are shielded from the consequences of the prior illegal transactions of their grantor, we must hold that not only were they acting in good faith and with good motives sanctioned by law, but also that the circumstances attending the transactions, whereby they became the creditors of the grantor and accepted a conveyance from him of the real estate in controversy, were not such as to put them on inquiry and charge them with notice of the defective title arising from the unwarranted acts of the administrator respecting the sale of the property of the estate of the intestate. The conclusion is overwhelming that if they in fact were not aware of the defective title of their grantor, they were possessed, or could have been possessed by reasonable diligence, of such information; and their failure to obtain the same must be attributable to their own want of observance of care and caution about a business transaction, of the importance of the one they engaged in, which an ordinarily prudent person would display under similar circumstances. Let us see what their position was. They were negotiating loans to the ostensible owner of the land in controversy on the faith of the security of the mortgages executed by him. Their security depended upon his ownership of the land. The evidence of his title thereto was a matter of record open to the inspection of all, and of which they were by law charged with constructive notice. An examination of his title discloses that his wife died intestate, seized of the land; that he was appointed administrator; that a claim of $627.50 was allowed in his favor as a proper charge against the estate; that a petition had been filed by him as administrator for license to

sell the real estate of the deceased to pay the debt as aforesaid; that no license, so far as the record discloses, had ever been issued, and that the statute requiring the petition and order to sell real estate to be filed in the office of the clerk of the district court of the county where letters of administration had been granted, had not been complied with, and no sufficient authority appeared for the sale thus made; that the property was sold —apparently on the day it was advertised to be sold—to one individual for the expressed consideration of $3,100; and on the next day, for the same expressed consideration, the property was conveyed to the administrator as an individual, who by law was prohibited, either directly or indirectly, from purchasing the property which he was charged with the duty of selling to the best advantage and in the interest of the estate of which he was a trustee; and that both deeds were filed for record at the same time, and the title thus conveyed to one who, by positive enactment of law, is forbidden from buying. Can mortgagees, under such circumstances and in the face of a record pointing so conspicuously to fraud and wrongdoing, be said to hold title free from the consequences of such acts, and as *bona fide* grantees? There can be but one answer, and that is in the negative.

In *Bachelor v. Korb*, 58 Nebr., 122, a case where the proper application of the rule as to notice imported by the public records to subsequent purchasers was under consideration, and where the questions involved are analogous to those in the case at bar, it is held: "The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward. * * * But the defendants in error, though they may have paid a valuable consideration for this real estate, are not innocent purchasers of it. One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of *caveat emptor* applies to purchasers at guardians' sales. * * * We are not deciding

that where a guardian's sale is absolutely void that anyone can be protected as an innocent purchaser for value of the real estate sold; but what we do say is that, if these defendants in error are to suffer a loss, it is the result of their own negligence. There was enough upon the face of this record to have deterred any prudent man from investing his money in this property."

The supreme court of Michigan, in the case of *McKay v. Williams*, 67 Mich., 547, holds to the same rule, as is indicated by a paragraph of the syllabus in that case, in which it is stated: "In such a case, a purchaser of the land from the attorney in fact is not a good-faith purchaser, but is bound by what appears in the chain of title through which he claims, and is chargeable with the fraud which appeared upon the face of the conveyances." Of the same tenor are the following: *Winter v. Truax*, 87 Mich., 324; *Michoud v. Girod, supra.*

It is, however, pleaded in the answer and cross-petition of the appellee, Fillion, and argued in brief of counsel, that the real estate in controversy in fact belonged to Aaron B. Veeder, who was the equitable owner thereof; that his wife, in her lifetime, held the legal title only in trust for his use and benefit; and that even though the proceedings by which he acquired the legal title from the estate were unauthorized, appellee, having in good faith relied upon his title being sufficient, should be protected as the grantee of his beneficial interest in the land by virtue of his alleged equitable ownership. We are unable to give our assent to this view of the case. Conceding for the moment, and for the present purpose only, that the administrator was the equitable owner when the wife died, we can not bring ourselves to believe that he or his grantees can be heard to defend the title acquired through the void proceedings mentioned, by asserting an equity in the administrator prior thereto. His every act as administrator of the estate is utterly repugnant and inconsistent with the idea that he was the equitable owner of the land. He can not, under fundamental prin-

ciples relating to those acting in a fiduciary capacity, after accepting the trust and administering the property as belonging to the estate, be heard to say that he acted fraudulently for the purpose of gaining a personal advantage over the estate he represented. He can not profit by his own wrong or deny the title to the real estate which by his every act he has solemnly declared belonged to the estate and not to himself. As an individual, he presents a demand against the estate in his favor for a specified sum of money, and as administrator, he applies for and obtains a license to sell the real estate as the property of the intestate to satisfy the demand, and indirectly becomes the purchaser thereof. His grantee now seeks to defend the title thus acquired, on the ground that he was the equitable owner and obtained by the proceedings mentioned only that which belonged to him. It must be borne in mind that the administrator acted with full knowledge of all the facts regarding his alleged equitable title. He deliberately chose the course of conduct adopted and followed, and now to permit him, or those claiming under him, to deny the title of the estate and claim through another source, is to invite and sanction a course of wrong-doing contrary to law and good morals. Assuming for the purpose of argument that the administrator's sale was valid and passed a good title to the purchaser and the present contest was between the heir or a creditor of the estate on the one side and the administrator or those in privity with him on the other, over the proceeds of the sale, would it be seriously contended that the administrator could lay claim to the proceeds on the ground that he was the equitable owner of the land? And yet, as between him and his grantees and the appellant, as sole heir at law, the same principle is contended for in the case at bar. We do not think it can be sustained. The administrator must be held to be estopped by his own acts from now setting up a claim to the property in his own right. The appellee, as grantee, claiming under and by virtue of the title ac-

quired by the administrator in the attempted sale of the property, in the manner mentioned, is in no better position to urge the equitable claim of the administrator than he is, and is bound by the rule of estoppel to the same extent. They each are now estopped from asserting the alleged equitable title as against the heir of the deceased. In Herman on Estoppel and Res Adjudicata, section 1125, it is said: "An estoppel *in pais* may arise from the acts of an administrator and be set up against him. Thus an administrator, who finds property among the assets of the estate, and takes possession of it as the property of the estate, and sells it, having no claim to it himself, it not being claimed by any other person, is estopped from setting up a claim adverse to the estate, and is liable to the estate for the property thus sold." The following authorities are also cited in support of the conclusion reached on the point of estoppel: *Irby v. Kitchell*, 42 Ala., 438; *Miller v. Wilkins*, 4 S. E. Rep. [Ga.], 261; *Henderson v. Segars*, 28 Ala., 352; *White v. Swain*, 3 Pick. [Mass.], 365.

Eliminating entirely the question of estoppel and passing directly to the proposition of the existence of a trust in the real property in favor of the husband of the deceased, we think this proposition must, under the evidence, also be resolved against the appellee, Fillion. If an express trust is sought to be established under the alleged agreement of the deceased to reconvey to her husband, then the agreement, resting in parol, comes within the statute of frauds and is ineffectual to create an express trust. *Thomas v. Churchill*, 48 Nebr., 266. If the existence of a resulting trust is relied on, then the evidence is insufficient to raise the legal presumption of such a trust, even though it be conceded, as was found by the trial court, that the conveyances by which the deceased acquired the legal title were without a valuable or money consideration on her part. If made to defraud the creditors of the grantor, the instrument would be valid as between the parties, and a court of equity would not

lend itself to grant relief to the parties from the consequence of their fraudulent acts. This could only be accomplished by the creditors of the grantor who were such at the time of the making of such fraudulent conveyances. If a homestead and not subject to fraudulent alienation, the grantee being the wife of the grantor, the *prima facie* presumption of law is that it was intended as a gift or advancement, and that the parties intended that the full and absolute title, both legal and equitable, should pass together at the same time and by the same conveyance. Underhill, Trusts & Trustees, art. 23, p. 160, and cases cited; 1 Perry, Trusts, sec. 164, 165, and authorities cited. There is no competent evidence in the case to rebut the legal presumption that the conveyances passed to the deceased all the title held by her grantors, or warrant the inference of a resulting trust, justifying a decree in favor of the appellee under the issue raised in that regard. The defendant, Veeder, testified that the property belonged to his deceased wife and not to himself. His acts as administrator were consistent with her ownership and not his. His attempt to obtain title to the property in the manner stated, while possibly it may be said was because he considered himself the equitable owner, and adopted such means to acquire title, we are of the opinion can not be construed as evidence in his favor for the purpose of establishing his alleged ownership. There is no other evidence, save the mere want of consideration on the part of the deceased at the time the property was conveyed to her, that will justify the conclusion that a resulting trust was created in favor of the husband, and this we think entirely insufficient. The security and stability of titles to real estate requires that the property shall not be impressed with an unrevealed trust upon doubtful or uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based, by clear and satisfactory evidence. This, in the present case, has not been done.

The appellee, the Omaha Loan & Trust Company, claims

that it should be subrogated to the rights of the administrator, Veeder, as a creditor of the estate as to the amount of the claim allowed in his favor as a just debt against the estate. We do not think this can upon legal grounds be done as to the indebtedness claimed for repairs and improvements upon the real estate and the interest on the incumbrance thereon. As to these items, it was the legal duty of the life tenant himself to pay by reason of his tenancy. 1 Washburn, Real Property [5th ed.], 129, secs. 24*a*, 25*a*; Tiedeman, Real Property, 66, 68. The mortgage was a valid incumbrance on the estate of the appellant, and its satisfaction was probably obtained by the loan made by the mortgage company. In any event, under the pleadings and the evidence, we are disposed to the view that to the extent of the face of the mortgage and the cost of administration the right of subrogation exists; and a lien in their favor for the sum of $396 should be adjudged accordingly.

It also appears from the record that at the time of the death of the owner of the land in controversy she left surviving her two children, the appellant and one other, who soon thereafter and in infancy died. Under the provisions of the sixth subdivision of section 30, chapter 23, Compiled Statutes, entitled "Decedents," the surviving brother succeeded to the inheritance of all the real estate of the deceased parent, subject only to the life estate of the father as tenant by curtesy. *Burke v. Burke*, 34 Mich., 451; *Runey v. Edmands*, 15 Mass., 291; *Estate of De Castro v. Barry*, 18 Cal., 97. We are aware that the view thus expressed is not in harmony with the opinion in *Shellenberger v. Ransom*, 31 Nebr., 61, and same case on rehearing, 41 Nebr., 631. In that case, however, this provision of the statute was entirely overlooked; and, in the face of the plain statutory enactment, the case can no longer be considered authority.

Our conclusions are that the sale made by the administrator, by which he became the indirect purchaser of the property, is fraudulent and void, and that the subse-

quent mortgagees and purchaser are not entitled to protection as good-faith grantees. We also conclude that the appellee, the Omaha Savings Bank, is entitled to be subrogated to the rights of the administrator as a creditor of the estate to the amount of $396, the same being the principal sum of the incumbrance on the land in controversy, and costs of administration, which is a valid lien on the property; that the mortgagees and purchaser at execution sale have acquired, by the conveyances under which they claim, and in the order of priority as decreed by the trial court, only the interest and title had and held by the said Aaron B. Veeder in said property, to wit, a life estate as tenant by curtesy, and that the plaintiff should have the title to the property quieted and confirmed in him subject to the rights and interests of the appellees therein as heretofore indicated.

The findings and decree of the trial court are reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

REVERSED AND REMANDED.

SULLIVAN, J., concurring.

While concurring in the judgment of reversal, I express no opinion on the question of estoppel.

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9. Assignments of error that (1) the court erred in overruling a demurrer to the petition, and (2) in giving judgment in favor of the plaintiff call only for an inquiry as to whether the petition states a cause of action. *Seven Valleys Bank v. Wise*..... 880

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10. A written stipulation of facts filed in a cause forms no part of the record unless made so by a bill of exceptions. *Keeler v. Manwarren* 663

11. An assignment that the damages are excessive can not be considered in the absence of a bill of exceptions. *Elkhorn Valley Bank v. Marley* 583

12. In the absence of a bill of exceptions duly allowed, this court can not consider the evidence adduced at the trial. *Bankers Life Ass'n v. Commissioners of Douglas County*..... 202

13. An agreed statement of facts not incorporated in a bill of exceptions is not properly in the record. *Idem*.....202, 204

14. The evidence relative to the impaneling of a jury must be incorporated in the bill of exceptions and designated in the certificate to make the rulings of the court in denying a challenge for cause the subject of review. *Dinsmore v. State* 418

Dismissal.

15. The failure of a litigant to file a motion for a new trial is no sufficient cause for dismissing his petition in error. *Rhea v. State* 15

Evidence.

16. Where a decree in equity is reversed and remanded for want of sufficient evidence and on a second trial *de novo* additional evidence is introduced, a second appeal will be considered on the record then presented. *First Nat. Bank of Sutton v. Grosshans* 575

17. Where a trial court makes a finding of fact it is not unreasonable to hold that there exists some testimony relating to the subject, even though it be claimed the evidence does not support the conclusion reached. *Blue Valley Lumber Co. v. Conro* 39

18. The competency of opinion evidence is largely in the discretion of the trial judge, and unless it is clearly inadmissible the ruling will not be disturbed. *Jerabek v. Kennedy*... 349

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19. Where it has been held on error that a petition states a good cause of action, evidence sustaining the allegations thereof will support a verdict for the plaintiff. *Garneau v. Kendall* 396

20. Error can not be predicted upon the admission of evidence in a cause tried without a jury. *Sheibley v. Dixon County*... 409

21. A finding without any evidence to support it, will be set aside. *Ackerman v. Ackerman* 72

22. Evidence *held* insufficient to support the verdict or finding:

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23. A finding based on conflicting evidence, will not, ordinarily, be disturbed on review.

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Exceptions and Objections.

25. Where no exception is taken to a ruling sustaining a demurrer but leave to amend is given, error is waived. *Robertson v. Hamilton* 791

26. Objections to the confirmation of a judicial sale, not argued in the briefs, are waived. *State v. German Savings Bank* 87

27. Rulings on instructions can not be considered, unless the objections were first presented to the trial court. *Missouri P. R. Co. v. Tipton*..... 49
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Final Orders.

28 A decree is not final and appealable until nothing remains to be done but to execute its provisions. *Parmele v. Schroeder*, 553

29. A decree on foreclosure, authorizing a deficiency judgment if the property did not sell for enough to satisfy the decree, is not final and appealable. *Idem.*

30. A judgment fixing the personal liability of a defendant in a foreclosure-suit, can be reviewed only after a deficiency judgment has been rendered. *National Life Ins. Co. v. Fitzgerald* 692

31. A decree foreclosing a real estate mortgage, with provisions for sale, is a final order. *Schuyler Building & Loan Ass'n v. Fulmer* 68

Harmless Error.

32. To justify the reversal of a decision of the trial court, prejudicial error must be shown. *Buck v. Stuben*..... 70

33. To obtain a reversal of an order of the trial court, prejudicial error must be shown. *State v. German Savings Bank*... 87

Issues.

34. In a trial on an appeal from a justice court, the identity of issues must be preserved, except in case of new matter arising after the trial below. *Robertson v. Hamilton*..... 791

Law of the Case. Subsequent Appeal.

35. Questions decided on a former review become the law of the case. *Chicago, B. & Q. R. Co. v. Yost*..... 530

36. Decisions on review become the law of the case and settle conclusively the points adjudicated. *Anheuser-Busch Brewing Ass'n v. Hier* 582

37. When a question in controversy has been once squarely decided, the decision, if acquiesced in or if not recalled, be-

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comes the law of the case and is binding upon the parties and those claiming through or under them, in all subsequent stages of the litigation. *Smith v. Neufeld*.....699, 701

38. Where, on appeal, a question is clearly presented and fully determined, the decision will be deemed the law of the case in all subsequent proceedings. *Holt v. Schneider*..... 370

39. A judgment for the defendant upon sufficient pleadings and evidence will not be reversed because another judge of the same court had sustained a general demurrer to the answer, the answer having afterward been amended, and this is the rule although no evidence is offered sustaining the new allegations of the answer. *Perry v. Baker*..... 841

40. Where, on review, it has been held that the evidence in the trial was insufficient to support an allegation, but on retrial such evidence is substantially the same, the former ruling is the law of the case. *Bank of Stockham v. Alter*..... 359

41. Questions of law determined on a former appeal will not, ordinarily, be re-examined on a subsequent appeal. *School District v. Fiske* 3

Motion for New Trial.

42. No motion for a new trial is necessary where the error complained of is that the pleadings, taken together, do not support the judgment. *Ames v. Parrott*..... 847

Motion for Rehearing.

43. Arguments or citations of authorities have no place in a motion for a rehearing. *Crawford Co. v. Hathaway*..... 317

44. A motion for a rehearing should concisely state the ground upon which the decision is assailed. *Idem.*

Parties.

45. A party not prejudiced by a ruling complained of has no ground for complaint. *First Nat. Bank of Sutton v. Grosshans*, 575

46. A party whose rights are not affected by an erroneous decree, is not entitled to have such decree set aside or modified. *Pinkham v. Pinkham* 336

47. A party can not complain of an adverse ruling upon an objection which is so indefinite as to be unintelligible. *McPherson v. Commercial Nat. Bank*..... 695

Pleading.

48. A decision of this court holding that a petition states a cause of action is an adjudication that the facts pleaded will, if admitted or proved, entitle the plaintiff to the relief demanded. *Smith v. Neufeld* 699

Presumptions.

49. Nothing appearing to the contrary, it will be presumed

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that the judgment appealed from was within the pleadings and justified by proof. *Carter v. Gibson* 207

50. Where the court sets aside an order of dismissal in an action by an administrator and substitutes the heir at law as plaintiff, it will be presumed proper in the absence of a bill of exceptions. *Tecumseh Nat. Bank v. McGee*..... 709

51. In the absence of a bill of exceptions, it will be presumed that there was evidence sufficient to support an order approving the report of a receiver. *State v. Nebraska Savings & Exchange Bank* 496

52. An order confirming a sale of real estate is presumed, in the absence of a bill of exceptions, to have been supported by sufficient evidence. *Keeler v. Manwarren* 663

53. Where no reply appears in the record and there are other issues on which the cause was properly triable, it will not be presumed that the cause was tried on matters admitted by the pleadings. *Ames v. Parrott* 847

54. An order denying a motion to vacate an appraisement as too low will, in the absence of a bill of exceptions, be presumed to be correct. *Johnston v. Craig*..... 98

Reversal. Determination of Causes. Proceedings Below.

55. On reversing a cause, it is within the discretion of the appellate court to either render such judgment as should have been rendered by the lower court, or to remand the cause for a new trial, or with instructions to enter judgment without a second trial. *Chicago, B. & Q. R. Co. v. Yost*.. 530

56. The burden of proof is upon the one asserting error, and until the error is made to appear from the record the judgment complained of will not be disturbed. *State v. Nebraska Savings & Exchange Bank* 496

57. If the record shows jurisdiction of the taxing authorities in levying a special assessment and no substantial defect is pointed out the judgment denying the enforcement of the lien will be reversed. *John v. Connell* 267

58. Where a decree was rendered denying one of the litigants any relief and taxing him with half the costs, and it was reversed, it also reversed the decree as to costs. *Olson v. Lamb* 484

59. Where a finding in favor of one of the litigants does not include interest, the trial court does not, by refusing to render judgment for interest, disobey the mandate of this court directing it to render judgment for the amount found due. *State v. Norris*..... 461

60. Where on appeal to this court in an equity action the de-

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cree is reversed and the cause remanded with instructions to retake an accounting, the trial court may permit an amendment to the pleadings and a trial *de novo*. *Olson v. Lamb* 484

61. Where the findings of a referee have the effect of a special verdict and the judgment is reversed for error not affecting the findings, this court will render the proper judgment or remand the cause with directions. *Hayes County v. Christner* 272

62. An opinion filed on appeal on consideration of a motion, having fully disposed of the merits of the controversy, and determined the final judgment to be rendered, the final judgment, already determined, will be entered. *Armstrong v. Mayer* 355

Supersedeas. Stay.

63. Confirmation of a judicial sale made under a decree of foreclosure after the expiration of the stay, but during the pendency of the appeal, is proper. *Johnston v. Craig*..... 98

64. A bond conditioned solely as required to supersede a judgment directing the payment of money, does not arrest a confirmation of sale. *Idem*.....98, 100

Transcript.

65. Error can not be successfully predicated upon a ruling where the record is contradictory as to what the ruling was. *Dinsmore v. State* 418

66. The record must show facts from which it may be inferred that a reply was waived, or that the appellate court may know the issues in fact tried, in order that no advantage may be taken of want of reply; the trial having proceeded on the theory that a reply had been filed. *Ames v. Parrott*.. 847

Appointment. See RECEIVERS.

Appraisement. See EXECUTION.

Argument of Counsel. See TRIAL, 3-5.

Assault. See HOMICIDE.

1. On the trial of a person charged with the crime of maliciously shooting with intent to kill and wound it is not error to permit the state to show that the motive for the act was robbery. *Jerome v. State* 459

2. It is not error to tell the jury in a prosecution for assault with intent to wound that they have nothing to do with the question of punishment. *Clary v. State*..... 688

Assessment. See DRAINS. MUNICIPAL CORPORATIONS. TAXATION.

Assignments. See ESTOPPEL, 3. INSURANCE, 6. JUDGMENT, 3. LANDLORD AND TENANT. TAXATION, 18.

Where plaintiff, after suit commenced, transfers his interest, the action may be continued in the name of the original plaintiff or his transferee. *McCullough v. Dovey*.... 675

Assignments of Error. See APPEAL AND ERROR, 6-9.

Associations. See BUILDING AND LOAN ASSOCIATIONS.

Attachment. See GARNISHMENT.

Levy. Lien.

1. Statutory provisions for the levy of an attachment are to be strictly pursued. *Ames v. Parrott*..... 847
2. Under section 205 of the Code the plaintiff in attachment is not a proper witness of the levy thereof. *Idem.*
3. Where an attachment is levied on real estate fraudulently conveyed by an attachment debtor to hinder, delay and defraud creditors, the attaching creditor acquires a lien on the interest of the debtor, though the title is in another. *Westervelt v. Hagge* 647
4. Where the attached premises, which have been fraudulently alienated before the levy, are reconveyed, the lien becomes enforceable, as though no conveyance had been made. *Idem.*
5. Under the facts as disclosed by the record, the attachment creditor was not guilty of laches in enforcing the lien. *Idem.*
6. Where, pending litigation after levy of attachment, another acquires a lien, he is chargeable with notice of the rights of the plaintiff in the attachment. *Idem.*
7. Evidence *held* to show a levy of attachment on real estate to have been made in compliance with the statutes. *Idem.*
8. An attachment creditor *held* to have acquired no valid lien as against a creditor of a grantor acquiring a lien by the voluntary incumbrance of the debtor. *Idem.*
9. An attachment lien on land, the title to which is in the attachment debtor, is subject to every equity existing against the debtor at the time of the levy. *Idem.*
10. Service of order on occupant of real estate is a compliance with the statute. *Idem.*

Attorney. See COUNTY ATTORNEY. TRIAL, 3-5.

Admission to Practice.

1. By the act of 1895 (Session Laws, ch. 6) the power to license attorneys to practice in the courts of this state has been lodged exclusively in the supreme court. *In re Admission to the Bar* 58

Attorney—*concluded.*

2. No one but a citizen of the United States and a resident of the state of Nebraska can be admitted to practice generally in the courts of said state. *Idem.*

3. A practicing attorney in good standing in the courts of a sister state, a territory or a foreign country, having an interest in a cause pending in any of the courts of this state, may, in the discretion of such courts, be permitted to appear, for some purposes. *Idem.*

4. A minor can not be admitted to practice in the courts of this state. Compiled Statutes, ch. 2, sec. 7. *Idem.*

5. Under the provisions of section 2, chapter 7, Compiled Statutes, attentive study in the office of a practicing attorney for two years, or regular graduation from the college of law of the university of Nebraska, is absolutely required. *Idem.*

6. The "practicing attorney," in whose office the statute requires the studies of the applicant to be duly pursued, is one who resides and practices in this state. *Idem.*

7. A district court has no authority to admit a person to practice law in this state. Such admission and any action taken in reliance thereon is wholly void. *Idem.*

8. A foreign attorney is not permitted to commence actions or to sign pleadings or papers on behalf of any litigant. *Idem* 58, 60

9. An alien can not well take the oath required of attorneys and counselors at law by section 4 of chapter 7, Compiled Statutes, 1899. *Idem* 58, 59

10. Graduation at a foreign university of law, is not a sufficient statutory qualification for admission to practice in the courts of this state. *Idem* 58, 60

Attorney and Client. See MALICIOUS PROSECUTION. PRINCIPAL AND AGENT. WITNESS, 5.

1. Advice of attorney no defense in an action for malicious prosecution unless he is in possession of all the facts. *Jensen v. Halstead* 249

2. An attorney may have authority to collect a note and mortgage for his principal without having the same in his possession. *Orient Ins. Co. v. Hayes* 173

3. An attorney in fact for one against whom a judgment has been rendered on the docket of a justice of the peace has such an interest as to entitle him to demand a transcript of such judgment. *State v. Ellsworth* 444

4. Where the value of an attorney's services rendered by a receiver is admitted or established it is an abuse of discre-

Attorney and Client—*concluded.*

tion to reduce the amount below the value because the corporation is insolvent and the attorney had received a large volume of business. *Stone v. Omaha Fire Ins. Co*..... 834

Bankruptcy.

A discharge in bankruptcy is no defense to an action based upon the defendant's fraud while acting as an officer or in any fiduciary capacity. *Gerner v. Yates*..... 100

Banks and Banking. See JUDGMENT, 12.

1. Money collected by a bank for another is not a part of the assets of the bank and on its insolvency is a preferred claim for the use of the owner. *State v. Bank of Commerce*..... 181

2. The failure of a creditor to file a claim within the time fixed by the order of the court, does not warrant another creditor charged with knowledge to act on the assumption that it will not be presented. *Idem*..... 22

3. Where security on real estate has been taken by a national bank on a contemporaneous loan, the same may be enforced, notwithstanding the provisions of the United States statutes prohibiting that character of security. *First Nat. Bank of Sutton v. Grosshans* 575

4. In an action on a certificate of deposit, a petition which alleges that the certificate was duly issued, that plaintiff is the owner of it, that it was duly presented and payment refused, and that defendant claims to have a partial defense, can not be successfully assailed by general demurrer. *Seven Valleys Bank v. Wise*..... 880

False Report.

5. A published report of the financial condition of a bank in which the resources and liabilities are equally inflated is not such a material misrepresentation as will support an action for deceit, unless the condition of the bank is thereby made to appear better than it actually is. *Gerner v. Yates* 100

6. A published statement of a bank in which a portion of its overdrafts is described as "loans and discounts" is materially false. *Idem.*

7. A report of a national bank to the comptroller of the currency can not be made the basis of an action for deceit because the item of interest on rediscounts was deducted from undivided profits instead of being made to appear specifically in such report. *Idem.*

8. In an action for deceit against the officers of a national bank, who published a false report as to its financial con-

Banks and Banking—*concluded.*

dition, one of the directors can not escape liability on the ground that there was no special reliance on him if it appear that the plaintiff relied on the report and the entire directorate. *Idem.*

Bastardy. See HABEAS CORPUS.

1. A suit against the putative father of a bastard child, is a civil action accompanied by the extraordinary remedy of arrest and imprisonment to enforce a judgment. *In re Walker* 803

Jurisdiction.

2. A justice of the peace obtains jurisdiction in a bastardy case by the filing of a verified statutory complaint, the issuance of a warrant and its execution. *Idem.*
3. The jurisdiction of the district court in a bastardy proceeding is acquired by the filing of the transcript. *Idem.*

Non-appearance. Trial.

4. Where the defendant fails to appear in the district court, and enters no plea, the case may be tried by the court without a jury. *Idem.*
5. The district court, having acquired jurisdiction, may hear the case and render judgment, even in the absence of the defendant. *Idem.*

Police Power.

6. The bastardy act is an exercise of the police power of the state to enforce a moral obligation. *Idem.*

Process.

7. The execution of the process in a bastardy case serves the same office as the service of a summons in an ordinary civil action. *Idem* 803, 817

Recognizance.

8. An action upon a forfeited recognizance taken under the provisions of section 3, chapter 37, Compiled Statutes, 1899, must be brought in the name of the state, the obligee named in the recognizance. *Myers v. Baughman*..... 818
9. A recognizance given under section 3 of chapter 37, Compiled Statutes, 1899, is not a bond of indemnity for the payment of the judgment which may be ultimately recovered in the action. *Idem.*
10. The amount of liability upon a forfeited recognizance in bastardy is the penal sum named therein with interest thereon from the date of the forfeiture. *Idem.*

Bigamy.

1. The mere allegation or averment of a marriage as a fact implies that the marriage was legal. *Hills v. State*..... 589
2. A wife is a competent witness against her husband in a prosecution for bigamy. *Idem.*

Bill of Exceptions. See APPEAL AND ERROR, 10-14.

A motion to quash a bill of exceptions is of no avail where no bill has been settled. *Rhea v. State* 15

Bills and Notes. See EVIDENCE, 13. GUARANTY. LIMITATION OF ACTIONS, 10.

1. Evidence *held* to sustain finding as to fraud or mistake in weight of cattle for which the note sued on was given. *Bank of Stockham v. Alter* 359

Pay Check.

2. An order or "pay check" drawn by a paymaster of a railroad company on the assistant treasurer is not drawn against a third party but on the party from whom the debt, for which the pay check is given, is due. *Chicago, B. & Q. R. Co. v. Burns* 793
3. A pay check given to an employee of a railroad company, drawn on the assistant treasurer, and made payable at either of several banks, is not a check on either of the banks, and the company, not the bank, is the drawee. *Idem.*
4. In an action to recover on a pay check stolen from the plaintiff, the question of negligence was for the jury. *Idem.*

Payment.

5. Where the payee of a pay check drawn to him or his order is robbed of it, and his indorsement forged, and payment made to an unauthorized holder, the payee may recover from the drawee the amount due him as evidenced by the order. *Idem.*
6. Where the drawee of a pay check pays it under a forged indorsement, he can not predicate an estoppel by negligence thereon, unless the negligence is the proximate cause of the forgery being taken as genuine. *Idem.*

Transfer.

7. Where a negotiable promissory note is indorsed and transferred before due as collateral security, the pledgee without notice is a holder for value. *Connecticut Trust & Safe Deposit Co. v. Fletcher* 166

Usury.

8. Where the defense of usury is established, the mere introduction of a promissory note duly indorsed is insufficient to prove that the plaintiff is an innocent holder for value before naturity. *Male v. Wink* 748
9. Where the defense of usury is established the burden is on plaintiff to show that the note was indorsed before maturity to a *bona fide* purchaser for value without notice. *Idem.*

Blue Prints. See EVIDENCE, 3.

Bona Fide Purchaser. See BILLS AND NOTES, 7. EXECUTORS AND ADMINISTRATORS, 7.

Bonds. See BASTARDY. COSTS. COUNTY, 23. OFFICE AND OFFICERS, 8.

Bridges.

1. Is an approach a part of a bridge? *Sioux City Bridge Company v. Dakota County* 76, 81
2. Bridge in question *held* to be part of railroad. *Chicago, B. & Q. R. Co. v. Richardson County*.....519, 530

Briefs. See APPEAL AND ERROR, 7, 26.

Building and Loan Associations. See STATUTES, 20-23.

1. The policy of this state is to prohibit the transaction of business by foreign building and loan associations unless duly authorized by the proper authorities. *Henni v. Fidelity Building & Loan Ass'n*..... 744
2. A foreign building and loan association, having failed to comply with the laws of this state, is not entitled to enforce a contract made within the state, though it provided that it should be governed by the laws of the state where the association is a resident. *Idem.*

Bullet Mark. See EVIDENCE, 4.

Burden of Proof. See BILLS AND NOTES, 9. FRAUDULENT CONVEYANCE, 12, 13. HIGHWAYS, 4. INSTRUCTIONS, 2-4. MORTGAGES, 20. TRUSTS, 5.

Carriers.

Personal Injury.

1. When one is injured while a passenger on a railroad train, the presumption is that such injury was caused by the negligence of the carrier. *Chicago, B. & Q. R. Co. v. Wolfe*.... 502
2. A carrier is liable for damages resulting from injuries sustained by a passenger, unless the latter was guilty of criminal negligence. *Idem.*

Shipment of Live Stock.

3. A railroad company is bound to provide cars fit and suitable for live stock under existing conditions, and to exercise due care to transport safely. *Chicago, B. & Q. R. Co. v. Williams* 608
4. Where a shipper of live stock does not agree to furnish a caretaker, and some of the animals die or are injured for want of due care, the carrier is liable. *Idem.*
5. Where a shipper of live stock agrees to furnish a caretaker and fails to do so the carrier, with knowledge of such failure, is liable for any loss resulting for want of proper care. *Idem.*

Certiorari. See APPEAL AND ERROR.

Cestui Que Trust. See TRUSTS, 7.

Challenge. See JURY.

Chattel Mortgages.

1. An instruction in a suit for the proceeds of a foreclosure sale, *held* correct. *Bank of Stockham v. Alter*..... 359
2. A mortgage on a thing *non in esse* discussed. *Brown v. Neilson*, 765

Description.

3. Description in chattel mortgage *held* void for uncertainty. *Union State Bank v. Hutton*..... 571
4. The description of property in a chattel mortgage is sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property. *Idem.*

Sale by Mortgagor.

5. Where mortgaged property has been sold by the mortgagor without the knowledge or consent of the mortgagee, such mortgagee may either disavow the sale and retake the property or ratify it and recover the proceeds of the sale. *Burke v. First Nat. Bank*..... 20
6. Where the mortgagee of chattels receives notice of the rescission of a fraudulent sale to his mortgagor before the sale of property included in the mortgage, he must first sell the mortgaged goods not involved in such fraudulent sale. *Kellogg Co. v. Horkey*.....751

Checks. See BILLS AND NOTES.

Cities. See MUNICIPAL CORPORATIONS.

Claims. See COUNTY. EXECUTORS AND ADMINISTRATORS. INSOLVENCY.

Clerk of Court. See EVIDENCE, 9. INDICTMENT AND INFORMATION, 3. OFFICE AND OFFICERS, 8. RECORDS, 3.

1. Money paid to the clerk under an order of the court is received by him in his official capacity. *Bantley v. Baker*... 92
2. Where notes evidencing part of the purchase price of land are deposited with the clerk of the court pending the execution of a deed, the clerk has not the right to collect or receive in his official capacity the money due thereon. *Idem.*
3. The non-performance of some condition in a decree for the specific execution of a contract of sale is no defense to an action against the clerk of the court for conversion of money paid to him under the decree, if it be made to appear that the party for whose benefit the condition was inserted has waived it. *Idem.*

Collateral Attack. See JUDGMENT, 4-6.

Collateral Security. See BILLS AND NOTES, 7. PLEDGES.

Comity. See CORPORATIONS, 7.

Common Carriers. See CARRIERS.

Common Law. See CORPORATIONS, 4. CRIMINAL LAW, 1.

Compensation. See ATTORNEY AND CLIENT, 4. COUNTY. MUNICIPAL CORPORATIONS, 16. WITNESSES, 1-4.

Conditions. See ESCROW.

Confession. See CRIMINAL LAW, 4, 5. JUDGMENT, 12.

Confession and Avoidance. See COVENANTS, 1, 2.

Conflict of Laws. See COURTS, 12, 13.

Consideration. See DEEDS, 2. MORTGAGES, 1, 2.

Constitutional Law. See COUNTY, 24. INTOXICATING LIQUORS. JURY. LICENSE. MUNICIPAL CORPORATIONS. REFORMATORIES. SECTION. STATUTES. STREET RAILWAYS.

1. Section 664 of the Code is not inimical to section 19, article 6 of the constitution as respects uniformity. *Dinsmore v. State* 418
2. Chapter 54 of the Criminal Code authorizes the filing of an information or indictment in each county in the state, and applies to every county and every district court and hence is not special legislation. *Idem.*
3. The mere fact that a district court may elect whether a grand jury shall or shall not be called at any term of court does not make chapter 54 of the Criminal Code lacking in uniformity. *Idem.*
4. Chapter 54 of the Criminal Code is not obnoxious to section 19, article 6 of the constitution merely because it permits the prosecution of one person by information and another by indictment in the same court. *Idem.*
5. The proceedings and practice of the several district courts are uniform, though the prosecution in one case may be by information in one county and in another case in another county by indictment. *Idem.*
6. Section 584 of the Criminal Code relating to the drawing of grand juries is not special legislation within the purview of section 15, article 3 of the constitution. *Idem.*
7. Neither the framers of section 10, article 1, of the constitution, nor the people in adopting it contemplated that the legislature must abolish the grand jury system and permit criminal prosecutions by information only, but rather that the legislature might authorize prosecutions in either form. *Idem.*
8. Chapter 54 of the Criminal Code, which authorizes the prosecution of criminal offenses by information, does not

Constitutional Law—*concluded.*

violate the rule of uniformity prescribed by section 19, article 6, of the constitution. *Idem.*

9. The office of police judge or police magistrate of an incorporated city is called into existence by the constitution. *State v. Moores* 9

Construction. Enforcement.

10. Where there is a conflict between an act of the legislature and the constitution, the statute must yield only to the extent of the repugnancy. *Scott v. Flowers*..... 620
11. Where, after striking out the unconstitutional part of a statute, the residue is capable of execution, it will be enforced. *Idem.*
12. The act of 1887 providing that street railway companies shall pave their right of way, and authorizing the levy of an assessment to pay the costs thereof on their refusal so to do, is not unconstitutional because no provision is made for the redemption from a sale of real estate for non-payment of special assessments; the constitutional provisions granting exemption being self-executing. *Lincoln St. R. Co. v. City of Lincoln* 109
13. The eleventh amendment to the federal constitution would be effectually emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions. *State v. Chicago, R. I. & P. R. Co*....545, 548
14. Section 103 of the charter of metropolitan cities (Session Laws, 1897, ch. 10) to the extent that it assumes to confer on district courts authority to remove police magistrates is unconstitutional. *Gordon v. Moores* 345

Distribution of Powers.

15. Can the power to remove an officer for misconduct be concurrently exercised by two departments of the government? *Idem.*
16. Section 584 of the Criminal Code by leaving it discretionary with the district court whether or not a grand jury shall be called, does not confer upon the judiciary legislative powers. *Dinsmore v. State*..... 418

Due Process of Law.

17. Section 3, article 1, chapter 72, Compiled Statutes, does not contravene the fourteenth amendment to the constitution of the United States. *Chicago, B. & Q. R. Co. v. Wolfe*..... 502

Obligation of Contract.

18. The right of the legislature to require street railway companies in cities of a certain class to pave the part of the streets occupied by their tracks does not impair the obligation of contracts with respect to the charter of such street railway company. *Lincoln St. R. Co. v. City of Lincoln*.....

Consul.

Under section 6, chapter 73, Compiled Statutes, 1899, the word consul means any person invested by the national government with the functions of consul-general, vice-consul-general, consul or vice-consul. *Morris v. Linton*..... 537

Contempt.

Inability to obey a writ resulting from an act done knowingly and willfully does not purge of contempt. *Huckins v. State* 871

Continuance.

1. An application for a continuance, *held* properly denied. *Tatum v. State* 229
2. The granting or refusing of a continuance rests in the sound discretion of the court, and a ruling in that regard will not be disturbed unless an abuse of discretion appears. *Dinsmore v. State* 418

Contracts. See ACCORD AND SATISFACTION. BUILDING AND LOAN ASSOCIATIONS. CARRIERS. CONSTITUTIONAL LAW, 18. CORPORATIONS, 13, 15. COUNTY. COVENANTS. ESTOPPEL, 3. EVIDENCE, 12. GUARANTY. INSANITY. INSURANCE. PARTNERSHIP. SALES. STATUTE OF FRAUDS. USURY.

Construction. Validity.

1. A contract is to be construed by the laws of the state in which it is made. *Antes v. State Ins. Co*..... 55
2. It is the duty of the court to interpret the contract between the parties. *McCormick Harvesting Machine Co. v. Davis*..... 406
3. Whether a contract creates a partnership depends upon the intention of the parties. *Garrett v. Republican Pub. Co*..541, 544
4. A power of attorney as a contract has the same power without an acknowledgment as with one, except where it authorizes the alienation of a homestead. *Morris v. Linton* 537, 539
5. The validity of a contract affecting real property is to be determined by the law of the place where the property is situate. *Idem.*

Performance.

6. A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation. *State v. Chicago, R. I. & P. R. Co*... 545

Public Policy.

7. Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof. *Henni v. Fidelity Building & Loan Ass'n*..... 744

Conversion. See CLERK OF COURT. TROVER

Conveyance. See DEED. HUSBAND AND WIFE. MORTGAGES.

Corporations. See BANKS AND BANKING. GARNISHMENT. STATUTES, 20-23.

Charter. Liability.

1. Under the constitution and laws of this state, special charters to corporations, with the exceptions mentioned, are prohibited. Corporations receive their franchises only by general law, and are subject to all the legal rules and statutes as to the reserve power of the lawmaking body of alteration and amendment; the laws of the state and the articles of incorporation are considered in the nature of a grant and constitute the charter of the company. *Lincoln St. R. Co. v. City of Lincoln*..... 109

2. The charter of a corporation is to be construed strictly, and a claim of exemption can not be sustained which is not clearly granted or implied under the terms thereof. *Idem.*

De Facto.

3. Evidence *held* sufficient to establish the existence of a *de facto* corporation, within the rule announced in *Braithwaite v. State*, 28 Nebr., 832. *Sharp v. State*.....187, 192

Foreign Corporations.

4. Sections 3 and 4 of the "Anti-Trust law" (Compiled Statutes, 1899, ch. 91*a*), providing for ousting corporations by civil action from the exercise of powers and privileges which have been abused, is declaratory of the common law. *State v. Standard Oil Co*..... 28

5. The action provided for in section 4 of the "Anti-Trust law" (Compiled Statutes, 1899, ch. 91*a*), to prohibit foreign corporations from doing business in this state in contravention of our laws, is a civil action both in substance and form. *Idem.*

6. A foreign corporation doing business in violation of the "Anti-Trust law" may be, by injunction or quo warranto, excluded from the state. *Idem.*

7. Foreign corporations do business in this state not by right, but by comity. *Idem.*

8. The state may revoke, at its pleasure, the privilege granted a foreign corporation to do business in this state. *Idem.*

9. The revocation of the privilege given a foreign corporation to do business here, is not the infliction of a penalty. *Idem.*

10. A foreign corporation doing business in violation of the "Anti-Trust law," may be required, under section 394 of the Code, to furnish evidence against itself. *Idem.*

Corporations—*concluded.*

Insolvency.

11. In an action for winding up the affairs of an insolvent corporation an assessment upon stockholders is conclusive only to the extent that it ascertains the amount of corporate assets and liabilities and declares the necessity for making the assessment. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.* 454

12. A court having jurisdiction of an insolvent corporation can not render a personal judgment against a stockholder, not a party, by service of process or voluntary appearance. *Idem.*

Ratification.

13. Where the evidence tends to show that a corporation, by acquiescence and acceptance of benefits, ratified a contract made by an unauthorized agent, an instruction withdrawing such evidence from the jury is erroneous. *Alexander v. Culbertson Irrigation & Water Power Co.* 333

14. An act done in behalf of a corporation by one having no authority to represent it, may be ratified by conduct implying approval and adoption. *Idem.*

15. A corporation having power to ratify or repudiate a contract made by an unauthorized agent should do the one or the other within a reasonable time or it will be presumed to have consented. *Idem.*

Costs.

1. An undertaking for costs is enforceable although no obligee is named therein. *McPherson v. Commercial Nat. Bank.* 695

2. There is no substantial difference between a "bond for costs" and an "undertaking for costs." *Idem.*

3. A demand by a party claiming the proceeds of the sale of mortgaged property from another *held* unnecessary to affect the question of costs, where both parties claim a prior right. *Bank of Stockham v. Alter* 359

4. A court is without jurisdistion to act upon a motion to retax costs given by a decree filed at a subsequent term. *Olson v. Lamb* 484

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

County. See SET-OFF AND COUNTER-CLAIM. STATUTES, 16.

Claims. Right of Taxpayer.

1. Ruling of the trial court, refusing an instruction requested to the effect that the claims filed by the plaintiffs were in part only of their demands against the county, was proper. *Green v. Lancaster County* 473

2. A claim against a county must be presented, in writing,

County—*continued.*

to the county board before that body has jurisdiction to act upon it. *Shepard v. Easterling* 882

3. The only claim which the county board is, by section 37, chapter 18, article 1, Compiled Statutes, 1899, authorized to examine, adjust and allow, or reject, is one which must be paid by the issuance of a warrant upon the county treasurer. *Idem.*

4. The right of a taxpayer to test the validity of a claim against a county does not arise until there has been an adjudication by the county board in favor of the claimant. *Idem.*

5. Where a judge performed extra-official services for the county without special contract, which were accepted, a taxpayer was not entitled to maintain an equitable action to restrain the county from paying for the services. *Idem.*

Contract With County Judge.

6. A county board may contract with a county judge to perform extra-official services. *Idem.*

7. Where a county judge rendered extra-official services without an express contract, the county may accept the product of the labor and pay the judge therefor. *Idem.*

County Board. Appeal From Board.

8. Where the minutes show a session of the county board it will be presumed to have been legally convened. *Green v. Lancaster County* 473

9. The power exercised by a county board in determining the necessity for a drainage ditch is a delegated political or administrative power conferred by sovereign authority through the legislative branch of the government. *Dodge County v. Acom* 376

10. In determining the question of the necessity for a drainage ditch the county board is not acting as a court in a judicial sense. *Idem.*

11. County boards are not courts in the constitutional sense. *Sheibley v. Dixon County* 409

12. The rule requiring identity of issues in the original and appellate court, does not apply in an appeal from the county board on the rejection of a claim. *Idem.*

13. A full and complete settlement of a county officer with the county commissioners is final and conclusive unless there is fraud or mistake. *Douglas County v. Bennett*..... 660

14. The approval by the county board of the report of an officer in compliance with section 43, chapter 28, Compiled Statutes, 1899, is not a judicial order or judgment, hence is not appealable. *Shepard v. Easterling*..... 882

County—*concluded.*

County Clerk. Fees. Salary. Care of Ballots.

15. A county clerk must account for all fees earned by him whether collected or not. *Sheibley v. Dixon County*..... 409
16. Where, through mistake, a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account, as between him and the county, is not a bar to an action by it to recover the excess. *Idem.*
17. A county clerk must account to the county board for all money received by him as salary. *Hayes County v. Christner*, 272
18. An agreement between the county board and county clerk that the latter shall receive compensation in excess of the limit fixed by law is void. *Idem.*
19. Where a claim for compensation of a county clerk is allowed by the county board, the order is available to the clerk as an adjudication only to the extent that the board acted judicially. *Idem.*
20. Where a county clerk relies on the action of the board allowing compensation as an adjudication in his favor, he must show what part of the claim allowed was for extra compensation and what part for salary. *Idem.*
21. It is official misconduct for a county clerk to permit ballots committed to his official care to be abstracted from his office. *Stewart v. Bole* 193
22. A county clerk can not urge as a defense in a proceeding to remove him from office on a charge and specification that he allowed official ballots to be abstracted from his office, that they had no evidential value. *Idem.*

Officers. Action on Bond.

23. In an action by a county on an official bond of a county officer for fees, an answer alleging a full settlement with the county commissioners presents a good defense, and in the absence of a reply entitles the defendant to a judgment on the pleadings. *Douglas County v. Bennett*..... 660

Taxation.

24. Section 6, art. 9, of the constitution does not prohibit the legislature from conferring the power to make local improvements by special assessments upon counties. *Dodge County v. Acom* 376

County Attorney. See INDICTMENT AND INFORMATION, 2, 4. OFFICE AND OFFICERS.

1. The words "prosecuting attorney" in sections 579 and 580, Criminal Code, construed to mean county attorney. *Trimble v. State* 604
2. Where a county attorney is disqualified, the court may appoint other counsel to prosecute. *Spaulding v. State*..... 289

County Attorney—*concluded.*

3. The legislature had the constitutional power to create the office of county attorney. *Dinsmore v. State* 418
4. It is the duty of a county attorney to file informations for crimes and to prosecute all criminal cases in his county. *Idem.*

County Board. See COUNTY.

County Clerk. See COUNTY.

County Court. See COURTS, 1.

County Judge.

1. A county judge, in whatever official capacity he may act, is a judge of a court of record. *Scott v. Flowers*..... 620
2. A county judge is not a justice of the peace, even when exercising the ordinary powers and jurisdiction of a justice. *Idem.*

Court Records. See RECORDS.

Courts. See BASTARDY. CLERK OF COURT. CONTRACTS, 7. COUNTY. COUNTY JUDGE. IRRIGATION. JUSTICE OF THE PEACE. MANDAMUS. TRIAL.

County Court.

1. The county court is always a court of record. *Scott v. Flowers* 620

Jurisdiction.

2. Compiled Statutes, 1899, chapter 75, section 6 *et seq.*, of the reform school law confers on the county court only revisory jurisdiction. *Idem.*
3. The county court has final jurisdiction of complaints filed under section 5 of the reform school law, Compiled Statutes, 1899, ch. 75, art. 1. *Idem.*
4. Where the subject-matter jurisdiction belongs to a special tribunal of inferior jurisdiction the consent of parties can not invest a superior court with jurisdiction in the premises. *Crawford County v. Hathaway*.....317, 320
5. The jurisdiction of a county court in the settlement of estates is derived purely from the statute. *Whalen v. Kitchen* 329, 331
6. The English rule giving courts of equity jurisdiction in the settlement of estates does not obtain in this country. *Idem* 329, 330
7. The jurisdiction of the district court to hear and determine actions for the enforcement of claims against counties arising *ex contractu* and embraced within the provisions of section 37, chapter 18, article 1, Compiled Statutes, 1899, is derivative and not original. *Shepard v. Easterling*..... 882

Courts—*concluded.*

8. The enforcement of the provisions of section 848 of the Code, as it existed prior to its amendment in 1897, belongs to a court of equity. *Garneau v. Kendall*..... 396

9. The sufficiency of the petition is not a test of jurisdiction. *Dryden v. Parrotte* 339

Presumptions as to Jurisdiction.

10. In a court of general jurisdiction, jurisdictional facts and the regularity of the proceedings will be presumed. *Parsons v. State* 244

Rulings of Different Judges.

11. A judgment for the defendant upon sufficient pleadings and evidence will not be reversed because another judge of the same court had sustained a general demurrer to the answer, the answer having afterwards been amended, and this is the rule although no evidence is offered sustaining the new allegations of the answer. *Perry v. Baker*..... 841

United States Courts.

12. The judicial power of the United States does not extend to actions brought by individuals or corporations against a state. *State v. Chicago, R. I. & P. R. Co*..... 545

13. An injunction issued by a circuit court of the United States can not restrain the attorney general from suing for penalties claimed under the Maximum Freight Law. *Idem.*

Covenants.

1. In an action for breach of a covenant against incumbrances, a plea in the answer to the effect that the plaintiff had retained out of the money due the defendant a certain sum in settlement of the incumbrance is a plea of confession and avoidance. *Johnson v. Hesser* 631

2. A plea in confession and avoidance in an action for breach of a covenant admits the existence and validity of the incumbrance. *Idem.*

3. An action on a covenant against incumbrances in a deed conveying real estate in Colorado is an action on a written contract, within the meaning of section 10 of the limitation law of this state. *Idem.*

Creditors. See BANKRUPTCY. FRAUDULENT CONVEYANCE. INSOLVENCY. SUBROGATION.

Criminal Law. See ASSAULT. BASTARDY. BIGAMY. CONTINUANCE. COUNTY ATTORNEY. EXTRADITION. FORGERY. HABEAS CORPUS. HIGHWAYS, 6, 7. HOMICIDE. INDICTMENT AND INFORMATION. INSTRUCTIONS. INTOXICATING LIQUORS. JURY. LARCENY. RAPE. REFORMATORIES. ROBBERY. WITNESSES.

1. The Criminal Code provides a rational system for the trial

Criminal Law—*continued.*

of persons accused of crime, and abolishes the hypertechnical rules of the common law. *Burlingim v. State*..... 276

2. The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it. *Clary v. State* 688

3. A statute which denounces an act as criminal does not cease to be effective because another statute declares the same act to be a crime when done at a particular place or under special circumstances. *Chapman v. State* 888

Confession.

4. A confession of a prisoner, voluntarily made, is admissible when not prompted by any inducement of hope or fear. *Hills v. State* 589

5. It is not error to receive a voluntary confession not made under the influence of hope or fear. *Burlingim v. State*..... 276

Evidence.

6. It is error to exclude evidence which tends to put an innocent complexion upon inculpatory circumstances proved by the state. *Idem.*

7. It is proper to exclude evidence not relevant to the issue and having no tendency to impeach a witness on a material point. *Idem.*

8. On the trial of a criminal case every hypothesis that implies the defendant's guilt is pertinent, and any evidence fairly tending to sustain such hypothesis is relevant to the issue. *Jerome v. State* 459

9. The exclusion of testimony relating to a collateral fact and corrobating the defense, is not error where its relation to the main fact is uncertain. *Smith v. State*..... 296

10. To justify a conviction on circumstantial evidence, facts essential to the conclusion sought must be proved beyond a reasonable doubt, and be inconsistent with any reasonable hypothesis of innocence. *Idem.*

11. Self-serving statements made soon after the commission of a homicide, even under apprehension of impending death, are inadmissible as part of the *res gestæ*. *Idem.*

12. In a criminal prosecution, the state may show that, shortly after the commission of the alleged offense, the defendant left the locality with the apparent attempt to escape punishment. *George v. State* 669

13. In the trial of a criminal prosecution the county attorney can not be compelled to produce his private memoranda or brief of evidence for the inspection of the defense. *Dinsmore v. State* 418, 436

Criminal Law—*continued.*

14. An act of the legislature providing that the possession of liquor by one not having a license shall be presumptive evidence of a violation of the act, is not violative of the constitutional provision that no person shall be compelled, in a criminal case, to give evidence against himself. *Parsons v. State* 244

15. On the trial of a criminal case the state is under no legal obligation to produce evidence in rebuttal. *Jerome v. State*.. 459

Former Jeopardy.

16. The fact that the accused was prosecuted for burglary, resulting in a mistrial, is not a bar to a prosecution for larceny resulting from burglary. *Sharp v. State* 187

17. Whether a mistrial resulting from the discharge of a jury because of the illness of one of its members constituted former jeopardy, not decided. *Idem.*

Jurors. Officer. Misconduct.

18. An officer who is a material witness in a case is guilty of prejudicial misconduct when he remains in the jury-room during their deliberation on their verdict. *Cooney v. State*.. 342

19. Separation of one of the jurors from the remainder of the jury while they were at meals, where he held no communication with any other person regarding the case, *held* not ground for new trial. *Spaulding v. State* 289

Pleas.

20. The pendency of a former information for the same offense, in the same court, furnishes no sufficient ground for plea in abatement. *Roby v. State* 218

21. A plea in abatement, grounded on the fact that defendant had two preliminary examinations and that on the first he was held for a lower grade of crime than upon the one which is the basis of the information filed against him, is demurrable. *Thompson v. State* 210

22. A judge at chambers may, on reasonable notice to the prosecuting attorney, receive a plea of guilty and pass sentence on one charged with a felony. *McCarty v. Hopkins*... 550

23. A plea of guilty may be received and sentence pronounced by a judge at chambers in a county of the judicial district other than the one in which the prosecution was initiated. *Idem.*

Preliminary Examination.

24. Evidence that would justify a committing magistrate in finding that probable cause existed for holding a defendant to appear need not necessarily be sufficient to uphold a verdict of guilty, *Rhea v. State* 15

Criminal Law—*concluded.*

25. The objection that the defendant has not had a preliminary examination is waived unless raised before he enters a plea of not guilty. *Dinsmore v. State*..... 418

Principal and Accessory.

26. Where the defendant is charged as principal, an instruction that, if he advised the crime, he can be convicted as an accessory, is erroneous. *Sandage v. State* 240

27. The criminal intent of the principal is an essential element in the guilt of the accessory. *Burlingim v. State*..... 276

Venue.

28. Where the evidence tends to prove the commission of the crime in two or more counties, the court should instruct the jury to acquit if no act was committed in the county in which the information was filed. *Idem.*

Waiver of Rights.

29. A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article 1, of the constitution. *McCarty v. Hopkins*..... 550

Witness. Fees.

30. A witness can not demand fees in advance in a criminal case. *Huckins v. State* 871

Cross-Examination. See WITNESSES.

Damages. See HIGHWAYS. MUNICIPAL CORPORATONS, 3.

1. The measure of damages from the overflow of lands caused by the erection of a mill-dam is the difference between the market value of the land immediately before and immediately after the erection of the mill-dam. *Jerabek v. Kennedy* 349, 351

2. In the condemnation of land for a schoolhouse site, the measure of damages is the value of the land taken and the damage to the remainder, exclusive of the value of the building. *Burns v. School District No. 18 of Rock County*..... 351

3. The true measure of damages for injury to fruit trees is the difference between the value of the trees immediately before the injury and their value immediately after. *Missouri P. R. Co. v. Tipton*..... 49

Decedents. See EXECUTORS AND ADMINISTRATORS. WITNESSES, 11, 12.

Deceit. See FRAUD.

Decree. See JUDGMENT.

Dedication. See EMINENT DOMAIN. HIGHWAYS.

Deeds. See COVENANTS. FRAUDULENT CONVEYANCE, 1, 2. MORTGAGES.

1. Where it is intended that a deed shall operate as a transfer of title, in contemplation of law it has been delivered. *Home Fire Ins. Co. v. Collins*..... 198
2. The assumption by the grantee of an incumbrance upon property conveyed to him, is a valuable consideration for the conveyance. *Idem.*
3. The recording of a deed by the grantor is evidence both of delivery and acceptance, if the conveyance is beneficial to the grantee. *Idem.*
4. The delivery of an instrument is a question of fact to be determined by ascertaining the intention of the parties. *Idem.*
5. A deed, unaided by other proof, is not ordinarily evidence of title to land described therein. *Lesieur v. Custer County*.. 612
6. Presumption of the delivery of a deed at the date of its execution *held* overcome by the evidence. *Blair State Bank v. Bunn* 464

De Facto Corporations. See CORPORATONS, 3.

Default. See INSURANCE. JUDGMENT.

Deficiency Judgment. See MORTGAGES.

Delivery. See DEED.

Demand. See COSTS, 3.

Demurrer. See PLEADING, 8.

Description. See CHATTEL MORTGAGES. LARCENY.

Detectives. See WITNESSES, 13.

Discharge. See BANKRUPTCY.

Dismissal. See APPEAL AND ERROR, 15.

Distribution of Powers. See CONSTITUTIONAL LAW, 15, 16.

District Attorney. See OFFICE AND OFFICERS.

Ditches. See DRAINS.

Docket. See RECORDS.

Domicile. See HOMICIDE.

Drains.

Establishment.

1. The findings of the county board as to the necessity of a proposed drainage ditch can not be made the subject of controversy as to whether they are correct and well founded. *Dodge County v. Acom*..... 376

Drains—*concluded.*

2. Chapter 89 of the Compiled Statutes of 1899, relating to drainage ditches, is not violative of sections 3, 13, 21 and 24 of article 1 of the constitution. *Idem.*

3. A petition which describes with certainty the initial point, direction and terminus of a drainage ditch sufficiently complies with the statute. *Idem.*

4. Jurisdictional steps required to be taken in proceedings to establish a drainage ditch determined. *Idem.*

5. Jurisdiction in a drainage proceeding having been acquired by the county board, the presumption is in favor of the regularity of its acts. *Idem.*

6. Where, in a proceeding under article 1, chapter 89, Compiled Statutes, for the establishment of a drainage ditch, a county board acquires jurisdiction, a mere irregularity will not render the whole proceedings void. *Idem.*

7. The engineer appointed by the board having surveyed the route of the drainage ditch, and his report having been confirmed by the board, his action will be deemed the action of the board. *Idem.*

8. Where the record shows that the county board in a drainage proceeding adjourned to view the *locus in quo* and thereafter resumed its sitting, it is a sufficient compliance with the statute. *Idem.*

Assessment.

9. Under the provisions of section 28, chapter 89, Compiled Statutes, 1899, an assessment will not be set aside for any irregularity or non-compliance with the strict provisions of the statute. *Idem.*

10. In determining special benefits to land for the construction of a drainage ditch it is proper to consider benefits arising from increased valuation for tillage or desirability as a place of residence. *Idem.*

11. An irregularity in not apportioning the number of lineal feet and cubic yards to each lot according to benefits, *held* harmless error. *Idem.*

12. Estimate of engineer as to costs, with report of assessment on each parcel of land for benefits, *held* to impart all the information necessary in case of the apportionment of the number of lineal feet and cubic yards to each lot or tract according to resulting benefits. *Idem.*

13. Evidence examined and held to support an order of the county court levying special assessments for benefits received from construction of drainage ditch. *Idem.*

Due Process of Law. See CONSTITUTIONAL LAW, 17.

Ejectment.

A defendant in the actual occupancy of land may show under a general denial that he is the equitable owner. *Pinkham v. Pinkham* 336

Election of Remedies.

1. The principle of election of remedies applies only where there are two or more co-existing remedies so inconsistent that a party can not choose one without renouncing all others. *City of Omaha v. Redick*..... 163
2. Where the law affords but a single remedy a party is not precluded from resorting thereto because he sought to avail himself of another remedy to which he was not entitled. *Idem.*
3. Before a case can arise for the application of the principle of election of remedies, there must be two co-existing remedies inconsistent with each other. *State v. Bank of Commerce* 22
4. Where the law gives but one remedy a party is not precluded from resorting to that because he has attempted to avail himself of another to which he was not entitled. *Idem.*
5. A beneficiary, by taking judgment against his trustees for the price of property wrongfully sold, waives his right to pursue the purchaser. *Carter v. Gibson*..... 207

Elections.

1. Where a plurality of legal votes is cast for one ineligible to public office, the election is void. *Gardner v. Burke*..... 534
2. An agreement of electors to vote for a person who was ineligible, thus to prevent an election, does not render their votes illegal. *Idem.*

Eminent Domain. See HIGHWAYS.

1. Where a city appropriates lands of an individual for a street and he recovers the value thereof, it invests the city with title. *City of Omaha v. Redick* 163
2. Where a schoolhouse has been erected upon mortgaged land, the authorities may, after the erection thereof, condemn the land required for a site; and the measure of damages is the value of the land taken, exclusive of the value of the building, and the damage to the remainder. *Burns v. School District No. 18 of Rock County* 351

Equity. See CORPORATIONS, 5, 6. ESTOPPEL. JUDGMENT.

1. Where a court of equity acquires jurisdiction for any purpose, it will try all issues raised. *Bank of Stockham v. Alter*, 359

Equity—*concluded.*

2. An action by a mortgagee for an accounting as to priority of liens, and to charge a junior incumbrancer as trustee of the proceeds of the sale of mortgaged property, should be treated as a proceeding in equity. *Idem.*

3. A verdict in an equity case on a finding of fact is advisory only, and not binding upon the trial court. *Idem.*

4. A personal judgment may be predicated upon a prayer for an accounting and general equitable relief. *Olson v. Lamb*, 484

5. One who seeks relief on the ground of mistake of fact must show that he was free from negligence. *Farrell v. Bouck* 874

Escrow.

1. A deed or other similar instrument placed in the hands of a third person for delivery to the grantee when he shall have performed some condition, is a nullity if delivered by the depositary before the condition is performed. *Matteson v. Smith* 761

2. Evidence examined and found to warrant a judgment enjoining the registration of a mortgage-release claimed to have been delivered as an escrow. *Idem.*

Estoppel.

1. A party having received benefits of an executed contract with a county is estopped from denying the legality of the session of the county board at which such contract was entered into. *Green v. Lancaster County* 473

2. One who has secured a loan from a national bank on real estate security is estopped to deny the right of the bank to enforce the mortgage. *First Nat. Bank of Sutton v. Grosshans* 575

3. The assignment of a contract for a sale of lumber construed, and *held* that the assignor was estopped to set up against the other party claims held by him against the assignee. *Blue Valley Lumber Co. v. Conro*..... 39

4. Plea of estoppel in this case is sufficient to support the introduction of evidence. *Idem.*

Evidence. See APPEAL AND ERROR, 16-24. BILLS AND NOTES. COVENANTS. CRIMINAL LAW, 6-15. DEEDS. FORGERY. FRAUDULENT CONVEYANCE. HOMICIDE. INSANITY. INSTRUCTIONS. INSURANCE. LARCENY. MORTGAGES. PLEADING. RAPE. ROBBERY. SALES. STATUTES. TRIAL, 9-11.

Admissions.

1. An admission, when tax receipts are offered in evidence, "that the taxes described in the receipts were duly levied

Evidence—*continued.*

and assessed" is an admission that the assessments were made at the dates mentioned in the receipts. *National Life Ins. Co. v. Butler* 449

Blue Prints. Tax Receipt.

2. A tax collector's receipt, in which a special assessment is described by reference to the date at which it was made, is of itself evidence that the assessment was made at the date named. *Idem.*

3. Blue prints of architectural plans offered are not subject to the objection that they are not the best evidence. *School District v. Fiske* 3, 5

Bullet Mark.

4. Evidence of bullet mark *held* improper as uncertain and too remote. *Smith v. State*.....296, 299

Expert Testimony.

5. The written laws of a sister state can not be proved by the testimony of an expert witness. *Johnson v. Hesser*..... 631

6. One who has kept a team for another is competent to testify as to the value of such keep. *McCormick Harvesting Machine Co. v. Davis* 406

Hearsay Evidence.

7. Hearsay evidence is inadmissible. *Keeley Institute v. Wade*.. 313

Hubbell's Legal Directory.

8. The written laws of a sister state can not be proved by Hubbell's Legal Directory. *Johnson v. Hesser* 631

Judicial Notice.

9. A court will take judicial notice of its clerk. *Trimble v. State* 604

10. Courts will take judicial notice of legislative enactments and of legislative records. *State v. Frank* 679

Opinion Evidence.

11. Objection to certain testimony of witnesses, who were permitted to testify as to the value of services claimed to have been rendered by plaintiffs, *held* not well taken. *Green v. Lancaster County*..... 473

Parol Evidence.

12. Evidence of a prior or contemporaneous parol agreement between the parties to a written contract, which varies or contradicts the terms of the latter is inadmissible. *Faulkner v. Gilbert* 602

13. The terms of a promissory note can not be contradicted, altered or varied by evidence of a prior or contemporaneous parol agreement. *Garneau v. Cohn*..... 500

Evidence—*concluded.*

Privileged Communications.

14. A communication to a minister of the gospel, or a priest, is not privileged where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret. *Hills v. State* 589

15. Where the relation of attorney and client exists, confidential communications are privileged. *Spaulding v. State*.. 289

Exceptions. See APPEAL AND ERROR. BILL OF EXCEPTIONS. INSTRUCTIONS, 14, 15.

Execution. See APPEAL AND ERROR, 63, 64. ATTACHMENT. GARNISHMENT.

Appraisement. Valuation.

1. Where there was one valid appraisement and a sale for more than two-thirds thereof, it is good, though there was another invalid appraisement. *National Bank of Commerce v. Kinkead* 264

2. An order of court setting aside the first appraisement on foreclosure without an application therefor, does not affect the rights of the parties. *Brand v. Garneau*..... 287

3. Under section 495 of the Code, when real estate ordered to be sold under a decree of foreclosure has been appraised and twice offered for sale and not sold for want of bidders, a new appraisement is authorized. *Idem.*

4. It is not error to refuse to vacate a judicial sale on the ground that the appraisement was fraudulent, where the objections to the confirmation contain no allegation of fraud or other improper conduct. *Insurance Co. of North America v. Ackerman* 312

5. An appraisement of property made for the purpose of a judicial sale can not be successfully attacked after the sale except on the ground of fraud. *Idem.*

6. On foreclosure by a junior mortgagee where the senior mortgagee was not a party, *held* that the interest of the mortgagor and owner in the premises was properly appraised, and the sale was regular. *Globe Loan & Trust Co. v. Eller* 226

7. Within the meaning of the appraisement law the value of the judgment debtor's interest in land is the difference between the gross value and the amount of all prior liens. *Eddy v. Kimerer* 498

Confirmation.

8. On the hearing of objections to the confirmation of a judicial sale the court will not inquire whether the person designated in the decree to make the sale is an agent or

Execution—*concluded.*

attorney of the creditor, unless fraud or misconduct in making the appraisement or sale is alleged. *Idem.*

9. Where the officer has made the sale in accordance with the decree of foreclosure the court should confirm it. *National Bank of Commerce v. Kinkead* 264

10. Proceedings confirming a sale of real estate under foreclosure found regular. *Brand v. Garneau* 287

11. A mortgage foreclosure sale may be confirmed though the sheriff did not make the sale within sixty days from the time he received a copy of the decree. *Philadelphia Mortgage & Trust Co. v. Hutchins* 2

12. A failure to return an order of sale within sixty days is no objection to confirmation. *Philadelphia Mortgage & Trust Co. v. Buckstaff Bros. Mfg. Co.* 54

Plaintiff as Purchaser.

13. A plaintiff in a foreclosure proceeding may lawfully purchase the property sold to satisfy a decree in his favor. *Stover v. Stark* 374

Sheriff's Authority.

14. The power of an officer under a decree of foreclosure is derived from the decree itself, and not from the order of sale issued by the clerk. *National Bank of Commerce v. Kinkead* 264

Executors and Administrators. See LIMITATION OF ACTIONS, 6.

Actions. Substitution of Heir at Law.

1. An action to foreclose a mortgage on the death of the mortgagor is not a suit to recover money only and not within the prohibition of section 227, chapter 23, Compiled Statutes, 1899. *National Life Ins. Co. v. Fitzgerald* 692

2. Under section 848 of the Code, is a mortgagee entitled to have his debt against the general estate of a deceased mortgagor allowed in the county court while his foreclosure suit is pending? *Idem.*

3. Where an administrator settles matters in litigation in a manner prejudicial to an heir, such heir may be substituted as plaintiff. *Tecumseh Nat. Bank v. McGee* 709

4. An order of the trial court substituting an heir at law in an action by an administrator of a decedent's estate found not to be erroneous, the other heirs having settled and compromised their claims. *Idem.*

Sale. Adminstrator as Purchaser.

5. A license to sell real estate granted at chambers to an administrator must be filed with the clerk of the district

Executors and Administrators—*concluded.*

court of the county in which the letters of administration are issued before the administrator is authorized to sell. *Veeder v. McKinley-Lanning Loan & Trust Co* 892

6. The statute declaring a purchase of land by an administrator at his own sale to be void should be construed to mean voidable only. *Idem.*

7. Where the records showed that an administrator indirectly purchased at his own sale, a subsequent purchaser or mortgagee of the property is not a *bona fide* purchaser for value, precluding a vacation of the sale as against him. *Idem.*

8. When an administrator is authorized to sell land belonging to the estate, he can not directly or indirectly become a purchaser in his own right. *Idem.*

Exhibits. See PLEADING, 8.

Expert Testimony. See EVIDENCE, 5, 6.

Extradition.

1. A defendant brought into the jurisdiction of this state on requisition from another state is not entitled to immunity from service of process until a reasonable time elapses in which to withdraw from jurisdiction. *In re Walker*..... 803

2. A defendant brought to this state under a requisition in good faith, may be prosecuted on any other charge of violating the laws of the state. *Idem.*

3. A defendant brought to this state under a requisition in good faith may be prosecuted for any civil liability or obligation. *Idem.*

False Pretense.

Evidence *held* insufficient to convict of obtaining signature to note. *Roby v. State*..... 218

Federal Courts. See COURTS, 12, 13.

Fees and Salaries. See ATTORNEY AND CLIENT. COUNTY. OFFICE AND OFFICERS, 6, 7. RECEIVERS. WITNESSES.

Final Orders. See APPEAL AND ERROR, 28, 31. COUNTY. JUDGMENT.

Findings. See APPEAL AND ERROR. TRIAL.

Foreclosure. See EXECUTION. MORTGAGES.

Foreign Corporations. See BUILDING AND LOAN ASSOCIATIONS. CORPORATIONS, 4-10.

Foreign Judgment. See JUDGMENT, 13, 14.

Forfeiture. See INSURANCE.

Forgery. See BILLS AND NOTES. INDICTMENT AND INFORMATION, 10.

1. An instrument in the following form is the subject of forgery: "Mr. Sage: Please let this boy have a single rig, a good one, and oblige. I will bring it back myself. [Signed] George Klinger." *Hickson v. State* 763
2. The instrument, as set forth in the preceding paragraph, is a writing obligatory within the meaning of section 145 of the Criminal Code. *Idem.*
3. A fraudulent intent is an essential element of the crime of aiding and abetting the commission of a forgery. *Burlingim v. State* 276
4. On a trial for having aided another in the forgery of a deed it is proper to show that the person who committed the forgery had, shortly before, forged another deed conveying the same property. *Idem.*

Former Jeopardy. See CRIMINAL LAW, 16, 17.

Fraud. See BANKS AND BANKING. EXECUTION, 4. FRAUDULENT CONVEYANCE. JUDGMENT.

1. Fraud is never presumed and the burden is always upon the party making the charge. *Steinberg v. Buffum*..... 778
2. Facts relied on to constitute fraud must be specifically pleaded. *First Nat. Bank of Sutton v. Grosshans* 575

Fraudulent Conveyance. See CHATTEL MORTGAGES.

Badge of Fraud.

1. A mortgage in the form of an absolute deed, given by an insolvent debtor, is a badge of fraud. *Ellis v. Musselman*.... 262
2. The statement in a deed of a false and exaggerated consideration is a badge of fraud. *Idem.*
3. Under certain circumstances the withholding of an instrument from record is a badge of fraud. *Idem.*

Conveyance to Relatives.

4. A transfer of property by a debtor to a relative will be scrutinized very closely, yet it will be sustained if made in good faith and for an adequate consideration. *Blair State Bank v. Bunn* 464
5. Where land was sold by a debtor to a creditor for an ample consideration and the purchaser afterward contracted to reconvey the land to the wife of the grantor, *held* such subsequent contract was not evidence of a fraudulent conveyance in the first instance. *Idem.*

Evidence. Intent. Burden of Proof.

6. Evidence held to show sale of merchandise to be with intent to defraud creditors, of which vendee had knowledge. *Ogg v. Schultz* 221

Fraudulent Conveyance—*continued.*

7. Conveyance by an insolvent of practically all his property, not exempt, to creditors, and receipt of note for value above debt, *held* fraudulent as to other creditors. *Idem.*

8. Where a vendor sells his property to hinder, defraud or delay his creditors and the vendee purchases with knowledge thereof, or with notice, such sale is void as to creditors of the vendor. *Brown v. Sloan*..... 237

9. Instructions in case of fraudulent transfer requested and refused, *held* properly refused. *Idem.*

10. Instructions in case of fraudulent transfer copied in the opinion were properly given. *Idem.*

11. In a contest between creditors of an insolvent debtor, an instruction whereby the jury were authorized to infer a fraudulent intention on the part of a preferred creditor to hinder and delay other creditors because of his failure to point out to an officer holding an attachment writ the goods of the debtor, *held* erroneous. *Steinberg v. Buffum*.... 778

12. In proceedings between creditors to set aside a fraudulent conveyance, fraud can not be presumed, and the burden of proof is on the plaintiff to prove the same by a preponderance of the evidence. *Idem.*

13. In a contest between a preferred creditor of an insolvent debtor and other creditors it is erroneous to instruct the jury that if it is shown that the vendor was disposing of his property for the purpose of delaying and defrauding his other creditors, and the vendee had notice thereof, the burden to establish good faith would be upon the vendee. *Idem.*

14. In a contest between creditors over the proceeds of mortgaged property, evidence *held* not to support a finding that the mortgage did not represent a *bona fide* indebtedness and was void as to creditors. *Greenwood v. Ingersoll*..... 785

15. Answer to petition of intervention in case of fraudulent conveyance *held* to state facts sufficient to constitute a defense. *Idem.*

Homestead.

16. The family homestead to the value of $2,000 is not the subject of fraudulent alienation. *Plummer v. Rohman*..... 61

Preferring Creditors.

17. A debtor has a right to secure one or more creditors, though the property given as security was all the debtor had, if it was reasonably proportionate to the debt secured. *Blair State Bank v. Bunn*..... 464

Fraudulent Conveyance—*concluded.*

18. Proceedings by a debtor to dissolve an attachment, and after dissolution securing a certain creditor to the exclusion of the attachment creditor, *held* not evidence of a fraudulent transfer. *Idem.*

19. A creditor may lawfully accept security from an insolvent debtor, but not with the intent of defrauding other creditors. *Ellis v. Musselman* 262

Garnishment.

1. One can be garnished only in the state where the debt is payable, if that is the place of residence of his creditor. *Bullard v. Chaffee* 83

2. An attaching creditor acquires no greater rights by garnishment than had his debtor. *Cahn v. Carpless Co*..... 512

3. Stock subscription to the stock of a corporation may be garnished by a creditor to the extent that it is due and unpaid. *Bohrer v. Adair* 824

Grand Jury. See CONSTITUTIONAL LAW. STATUTES, 15.

Guaranty.

1. In the construction of a guaranty, contemporaneous contracts between the parties pertaining to the subject and the meaning which they intend their language to convey may be taken into consideration in interpreting the contract. *Rice v. McCague* 861

2. Where a guarantor of a note, secured by mortgage, on the principal's default secures the securities, and, without consulting the holders, pursues the debtor by remedies of his own selection to recover the debt, he thereby becomes liable to the holder for negligence in pursuit of the principal debtor. *Idem.*

3. A creditor is not required to exhaust his legal remedies against the principal before demanding payment from the guarantor, where there is ample evidence that the principal was insolvent. *Idem.*

Habeas Corpus.

1. The regularity of the proceedings leading up to a sentence in a criminal case can not be inquired into on an application for a writ of habeas corpus. *McCarty v. Hopkins*..... 550

2. A petition for a writ of habeas corpus, when based upon alleged want of probable cause, should set out all the testimony taken before the examining magistrate. *Rhea v. State,* 15

3. A prisoner held under a process upon a judgment issued in due form can not avail himself of the writ of habeas corpus unless the judgment is void. *In re Walker*..... 803

Habeas Corpus—*concluded.*

4. Failure to impanel a jury to try the issues in a bastardy proceeding will, at most, render the judgment erroneous, the correction of which could not be had by habeas corpus. *Idem.*

Harmless Error. See APPEAL AND ERROR, 32, 33. DRAINS, 11. INSTRUCTIONS, 16.

Highways. See ADVERSE POSSESSION.

Establishment.

1. Evidence of long-continued use of a road by the public, or the surveying, marking out, platting and improvement of the same by public authority, tends to show establishment by dedication. *Streeter v. Stalnaker*..... 205
2. Under the provisions of section 2477, Revised Statutes of the United States, lands of the general government not reserved for public purposes may be taken and used for public roads. *Idem.*
3. Where a public road has been established under the statute and traveled for more than ten years, the court will not examine the original proceedings for the laying out of the road to determine whether they were valid. *Lydick v. State* 309
4. In an action to recover damages for the location of a public road, the burden is on the plaintiff to show that his land has been regularly condemned, or at least physically appropriated. *Lesicur v. Custer County*..... 612
5. The filing of a petition in accordance with section 4 of the road law (Compiled Statutes, 1899, ch. 78) and the giving of notice in compliance with section 18 of said law, are conditions precedent to the making of an order by the county board establishing a public road. *Idem.*

Obstruction.

6. In a prosecution for obstructing a highway under section 107 of the Criminal Code, the question whether compensation has been made for the taking of the real estate for a highway, can not be inquired into. *Lydick v. State*..... 309
7. The complaint copied in the opinion charges an offense under section 107 of the Criminal Code, of obstructing a highway. *Idem.*

Homestead.

The family homestead to the value of $2,000 is not the subject of fraudulent alienation. *Plummer v. Rohman*..... 61

Homicide.

1. Extent of domiciliary right; popular sentiment. *Thompson v. State* 210, 213

Homicide—*concluded.*

2. A man may defend his domicile even to the extent of taking life if it be actually or apparently necessary to do so in order to prevent the commission of a felony therein. *Thompson v. State* 210

3. An instruction on the question of the extent of resistance which would be lawful in an assault on defendant's domicile, *held* erroneous. *Idem.*

4. The occupant of a dwelling may kill, as a measure of defense, a person attempting to break in with the intent of extorting money by charging him with a crime and threatening to expose him to public contempt. *Idem.*

5. In a prosecution for murder occasioned by a gunshot wound, the theory of the defense being suicide of the deceased, a physician who has examined the body and surroundings may testify as to the position in which the body must have lain for the blood to have taken the course from the wound it did. *Dinsmore v. State*..... 418

6. Rulings on evidence examined and approved. *Idem.*

House Journals. See STATUTES, 8, 9.

Hubbell's Legal Directory. See EVIDENCE, 8.

Husband and Wife. See BIGAMY. MARRIAGE. WITNESSES, 7.

1. A married woman may, through a duly authorized agent, incumber lands as if she were single. *Morris v. Linton*..... 537

2. Where real estate is conveyed by a husband to his wife without pecuniary consideration, the legal presumption is that the parties intended the conveyance as a gift or advancement to his wife. *Veeder v. McKinley-Lanning Loan & Trust Co.*. 892

Illegitimate Children. See BASTARDY.

Impeachment. See WITNESSES.

Imprisonment. See HABEAS CORPUS.

Indictment and Information. See CONSTITUTIONAL LAW. COUNTY ATTORNEY. HIGHWAYS, 7. LARCENY. RAPE, 2, 3.

Filing. Verification.

1. It is unnecessary to obtain leave of court before filing an information. *Sharp v. State* 187

2. It is sufficient if an information is verified by the county attorney on information and belief. *Idem.*

3. A clerk of the district court may properly take verifications of informations in criminal cases. *Idem.*
Trimble v. State 604

Indictment and Information—*concluded.*

4. Informations must be by the county attorney, verified by his oath. *Trimble v. State* 604

5. Criminal Code, sections 579, 580, providing that information shall be filed by the prosecuting attorney, *held* to mean county attorney. *Idem.*

Language of Statute.

6. Where a statute states the elements of a crime, it is generally sufficient, either in an indictment or information, to charge such crime in the language of the statute. *Chapman v. State* 888

7. An information need not negative the exceptions of a statute which are not descriptive of the offense. *Sofield v. State,* 600

Names of Witnesses.

The rule requiring the name of a person other than the accused to be set forth in an information is subject to the qualification that if the name is unknown that fact may be so alleged. *Idem.*

9. The name of an additional witness discovered after the filing of the information may be indorsed thereon before trial. *Trimble v. State* 604

Variances.

10. Certain variances between an instrument as described in an information and that introduced in evidence, *held* immaterial, as in no manner prejudicing the rights of the defendant upon the merits of the case. *Burlingim v. State*..... 276

Waiver of Defects.

11. Plea of not guilty *held* a waiver of all defects in an information that can be reached by a motion to quash. *Trimble v. State* 604

Industrial School. See REFORMATORIES.

Information. See INDICTMENT AND INFORMATION.

Injunction. See CORPORATIONS, 6. COURTS, 13. ESCROW. MUNICIPAL CORPORATIONS.

Insanity.

1. The commissioners of insanity have cognizance not only of applications for admission to the hospital for the insane, but also for the safe-keeping otherwise of insane persons in their respective counties. *Biddle v. Jenkins*..... 400

2. An affidavit filed with the commissioners of insanity alleging that a person resident of their county is insane and his being at large is dangerous to the community, confers jurisdiction upon the board to act. *Idem.*

Insanity—*concluded.*

3. Insanity can not be established by proof of the reputation of the party in that regard. *Idem.*

Contract. Defense.

4. The insanity of the obligor at the time the contract was made is a good defense to an action thereon. *Boyd v. Mulvihill* 878

Insolvency. See BANKS AND BANKING. BANKRUPTCY. CORPORATIONS, 11, 12. FRAUDULENT CONVEYANCE. GUARANTY.

1. A court may permit a creditor to share in the assets of an insolvent bank, though his claim was not filed within the time limited. *State v. Bank of Commerce* 22

2. A petition charging that an insolvent bank is indebted to the plaintiff in a sum named is not demurrable because it also states that the ownership of the claim is disputed and in litigation between the plaintiff and another party. *Idem.*

3. A creditor who has not been deprived of any legal right by the allowance of a belated claim against an insolvent bank can not complain of such allowance. *Idem.*

Instructions. See CRIMINAL LAW.

Argumentive.

1. It is not error to refuse an instruction which is argumentative and singles out and gives undue prominence to some portions of the evidence. *Chapman v. State*..... 888

Burden of Proof.

2. Where the burden is on the defendant it is not error to instruct accordingly as to the preponderance of the evidence. *Tecumseh Nat. Bank v. McGee*..... 709

3. An instruction in a criminal prosecution which casts the burden of proof on a defendant to establish his defense by a preponderance of the evidence, is erroneous. *Howell v. State* 391

4. An instruction which casts the burden upon the defendant to establish a defense beyond a reasonable doubt, is erroneous. *Idem.*

Cautionary.

5. In a criminal prosecution the trial court may, in its discretion, give a cautionary instruction. *Dinsmore v. State*... 418

Circumstantial Evidence.

6. An instruction as to circumstantial evidence *held* properly given. *Smith v. State* 296

7. An instruction on circumstantial evidence *held* properly refused. *Idem.*

8. Instructions given in this case embodied the rule of law

Instructions—*continued.*

that circumstantial evidence must exclude every reasonable hypothesis save that of the guilt of the accused. *Tatum v. State* 229

Construction.

9. Instructions must be construed together. *Clary v. State*.... 688

Contradictory Statements.

10. An instruction is erroneous which contains conflicting statements of law. *Jensen v. Halstead* 249

11. An instruction which misstates the law is not cured by giving another which states it correctly. *Thompson v. State,* 210

12. An instruction incorrectly stating the law is not cured by one stating it correctly. *Howell v. State* 391

13. An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous, and is not cured by another instruction which covers the point. *Dobson v. State* 584

Exceptions and Objections.

14. Instructions will not be reviewed where they were not excepted to in the trial court. *Elkhorn Valley Bank v. Marley,* 583

15. The giving or refusal of instructions, can not be considered for the first time on review. *Missouri P. R. Co. v. Tipton,* 49

Harmless Error.

16. An instruction as to the measure of damages, even though incorrect, is harmless error, where the jury found against any recovery whatever. *Bank of Stockham v. Alter*..... 359

Language.

17. It is not error to designate the defendant in an instruction as the "prisoner." *Dinsmore v. State* 418

Motive.

18. The giving of an instruction as to the want of motive for the commission of a crime, *held* not error. *Smith v. State*..296

Province of Jury. Witnesses.

19. A court should instruct hypothetically upon the facts which the evidence tends to prove, and permit the jury to decide whether witnesses are credible, and whether their testimony is forceful or weak. *Strong v. State* 35

20. An instruction pregnant with disparaging suggestions, not based upon the evidence and invading the province of the jury by undertaking to fix for them the probative value of impeaching testimony, is erroneous. *Idem.*

21. An instruction to the effect that just censure of a witness or his testimony can not be grounded on the fact that he has performed a duty imposed on him by law, is not erroneous. *Cooney v. State* 342

Instructions—*concluded.*

22. An instruction regarding the testimony of witnesses which deprives the jury of the right to judge of the weight and credibility of such witnesses, is erroneous. *Howell v. State*, 391

Punishment of Accused.

23. It is not error to instruct the jury that questions of mercy are for the executive. *Dinsmore v. State*..... 418

24. It is not error to tell the jury that they have nothing to do with the question of punishment. *Clary v. State* 688

Repetitions.

25. It is not error to refuse an instruction regarding a proposition which is substantially covered by another instruction already given. *Green v. Lancaster County* 473

26. It is not error to refuse a special instruction embodying an idea which has been given by the court to the jury in the general charge. *Chapman v. State* 888

27. Where an instruction is requested the substance of which is contained in another instruction given, it is not error to refuse it. *Spaulding v. State* 289

Requests.

28. Before a party can complain of an instruction because not sufficiently specific, he must request an instruction covering the point. *Dinsmore v. State* 418

29. One can not successfully assail an instruction where one tendered by him has been given which is subject to the same criticism. *Idem.*

30. An instruction requested which is inapplicable to the issues and not based on the evidence, is properly refused. *Spaulding v. State* 289

Theory.

31. Submission to the jury of a theory which has no basis in the evidence, is error. *Thompson v. State* 210

Waiver.

32. Parties may waive the giving of written instructions in a civil action. *Kuhn v. Nelson* 224

Insurance.

Accident Policy.

1. Where the insured is capable of performing a portion of his duties, he is not wholly disabled within the terms of an accident policy authorizing a recovery for injuries. *Coad v. Travelers Ins. Co*..... 563

2. Where there were different branches of business pertaining to the occupation in which the insured was engaged, an injury which would prevent his carrying out only some of such work would not be a total disability within the accident policy. *Idem.*

Insurance—*concluded.*

3. Evidence in action on accident policy *held* not to warrant finding of total disability. *Idem.*
4. The term "wholly disabled," in an accident policy, should be given a practical construction to carry out the intention of the parties. *Idem.*
5. Where an accident policy provides for indemnity when the insured is wholly disabled, a partial disability pertaining to his occupation will not justify a recovery. *Idem.*

Assignment of Policy.

6. One may lawfully insure his own life and assign the policy to another having no insurable interest. *Chamberlain v. Butler* 730

Change of Title.

7. A condition in a contract of insurance forbidding a "change of the title, interest or possession of the assured," is violated by a conveyance of the insured property, even though there be no consideration for the transfer. *Home Fire Ins. Co. v. Collins* 198
8. Evidence found insufficient to sustain the verdict for plaintiff. *Idem.*

Default.

9. The failure of the insured to pay premium note is a complete defense in an action on a policy containing a lapsing clause. *Antes v. State Ins. Co*..... 55
10. A mortgagee to whom a policy is payable as her interest may appear can not enforce a policy where the premium note is in default, if the insured could not do so. *Idem.*

Intent. See CRIMINAL LAW, 2. FORGERY. FRAUDULENT CONVEYANCE.

Interest. See MUNICIPAL CORPORATIONS, 8. USURY.

1. A decree of foreclosure draws interest from the date of its rendition until it is paid. *Stenger v. Carrig* 753
2. A judgment creditor is entitled to interest on his judgment until the same is actually paid. *Trompen v. Hammond*..... 446
3. In case real property is sold to satisfy a judgment or decree, the creditor is entitled to interest upon his claim up to the date of confirmation. *Idem.*

Intoxicating Liquors.

Keeping for Unlawful Sale. Prosecution.

1. Section 20, chapter 50, Compiled Statutes, 1899, with respect to keeping intoxicating liquors for sale without a license, is valid legislation. *Cooney v. State*..... 342
2. The legislature can provide that the possession of intoxicating liquors by one not having a license shall be pre-

Intoxicating Liquors—*concluded.*

sumptive evidence of a violation of the liquor law. *Parsons v. State* 244

3. On the trial in the district court for keeping liquors unlawfully, where it is shown that they were seized under a general warrant, it is not necessary to introduce evidence of the affidavit on which the search warrant was issued. *Idem.*

4. On the trial in the district court for keeping liquors unlawfully, where it is shown that they were seized under a general warrant, it is not necessary to introduce in evidence the statutory affidavit on which the search warrant was issued. *Idem.*

5. In a prosecution for keeping intoxicating liquors for unlawful sale, instruction as to the time of the commission of the offense, *held* properly given as to the requirement that the intention to sell must be a present intention within the meaning of the statute. *Idem.*

6. In a prosecution for keeping intoxicating liquors for unlawful sale, possession of such liquors is presumptive evidence of guilt. *Idem.*

7. An instruction on the possession of intoxicating liquors by the accused in a prosecution for keeping liquor for unlawful sale, *held* proper. *Idem.*

Irrigation.

1. Irrigation company. *Alexander v. Culbertson Irrigation & Water Power Co* 333

2. A company, in the exercise of the power of condemnation, can exercise it only for a public purpose. *Crawford Co. v. Hathaway* 317, 321

3. The statute creating irrigation companies confers nothing upon such companies except the power to condemn for right of way and the power to borrow money. *Idem.*

4. The state board of irrigation is not a court in the sense in which that word is used in the constitution, but is a special tribunal of limited jurisdiction. *Idem*.....317, 319, 320

Issues. See APPEAL AND ERROR, 34. COUNTY, 12. PLEADING, 13-15.

Jeopardy. See CRIMINAL LAW, 16, 17.

Judges. See COUNTY. COUNTY JUDGE. COURTS. JUSTICE OF THE PEACE. MANDAMUS.

Judgment. See APPEAL AND ERROR. COURTS. EQUITY. INTEREST. MORTGAGES. MUNICIPAL CORPORATIONS. RECORDS.

1. Judgment *held* to be in conformity with mandate. *Holt v. Schneider* 370

Judgment—*continued.*

2. A petition defective in substance will support a judgment if the basic facts are intelligibly set forth and the court has authority to grant the relief. *Dryden v. Parrotte*..... 339

Assignment.

3. An assignment of a judgment which excepts a portion previously assigned is not equivalent to an assignment subject to the interest of the first assignee. *Cahn v. Carpless Co.* 512

Collateral Attack.

4. On motion to vacate a sale made upon a decree giving a party a lien, the correctness of such decree can not be inquired into. *Dryden v. Parrotte* 339

5. A judicial order or judgment can not be attacked collaterally unless affected by some jurisdictional infirmity. *Idem.*

6. A judgment void on the face of the record for want of jurisdiction may be attacked collaterally. *Fogg v. Ellis*..... 829

Conclusiveness of Adjudication.

7. A party is not concluded by a judgment in an action to which he was not a party. *State v. Chicago, R. I. & P. R. Co.*, 545

8. The foreclosure of a mortgage on premises upon which a schoolhouse has been erected is not an adjudication that the schoolhouse was a part of the realty and included in the mortgage lien. *Burns v. School District No. 18 of Rock County* 351

9. Where a mortgagee, in whose favor a decree has been obtained and satisfied by an agent, repudiates the agency, and sues in equity on the debt, alleging a less sum due, he can not rely upon the first decree as establishing the amount due. *Holt v. Schneider* 370

10. Where two judgments of the same purport are rendered in the same case at the same term of court, the first judgment will not sustain a plea of *res adjudicata. Johnson v. Hesser* 631

11. Where two judgments of the same purport are rendered in the same case at the same term, an order of the court made at a subsequent term expunging the first judgment will bind the parties until set aside in a direct proceeding. *Idem.*

Confession.

12. The president and cashier of an incorporated state bank are not authorized to confess judgment against it, under section 433 of the Code, on notes executed by the cashier in the name of the bank, after it has ceased doing business. *Fogg v. Ellis* 829

Judgment—*concluded.*

Foreign Judgment.

13. A judgment rendered against a party in one state is conclusive upon him when made the basis of an action in another state, unless the court rendering the judgment was without jurisdiction. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros* 454

14. A judgment rendered by a court of one state is entitled to full faith and credit in the courts of another state, only to the extent that jurisdiction appears or may be presumed. *Idem.*

Merger.

15. Where twin judgments are entered it will be presumed that the first merged in the second, or was constructively vacated by it. *Johnson v. Hesser* 631

Opening or Vacating.

16. A decree will not be opened where the moving party could not be benefited thereby. *Oakes v. Ziemer* 6

17. On a motion to open a decree, the tendering of a sham answer does not meet the requirements of the statute. *Idem*.....6, 8

18. To have a decree entered on constructive service opened, under section 82 of the Code, defendant must present a full answer to the merits. *Idem.*

19. The intentional production by a litigant of false testimony will justify the annulment of a decree procured thereby. *Secord v. Powers* 615

20. Under section 602 of the Code, a judgment obtained by fraud or perjury will be set aside on a showing of due diligence. *Idem.*

21. In an action to vacate a judgment obtained by fraud, the plaintiff must allege and prove that he exercised due diligence, and that his failure to secure a just decision was not attributable to his own negligence. *Idem.*

22. A district court can vacate a decree, made at a previous term, only in the manner pointed out in the statute. *Schuyler Building & Loan Ass'n v. Fulmer* 68

Revivor.

23. In a proceeding to revive a dormant judgment, only the validity thereof can be inquired into. *Stover v. Stark*..... 374

24. In a proceeding to revive a dormant judgment the defendant must be held to have litigated in the original action any defense he then had. *Idem.*

Judicial Notice. See EVIDENCE, 9, 10.

Judicial Sale. See EXECUTION.

Jurisdiction. See BASTARDY. COURTS. DRAINS.

Jury. See CONSTITUTIONAL LAW. CRIMINAL LAW, 17-19. GRAND JURY. INSTRUCTIONS. TRIAL. WITNESSES.

1. Code of Civil Procedure, section 664, is not unconstitutional for want of uniformity. *Dinsmore v. State* 418

Competency. Challenge.

2. A hypothetical opinion formed solely on rumor and newspaper reports does not disqualify a juror. *Idem.*
3. The entertaining of conscientious scruples against capital punishment is a ground for challenge for cause in a prosecution for murder in the first degree. *Idem.*
4. An opinion formed by a venireman does not afford cause for challenge unless it is unqualified as to the guilt or innocence of the accused. *Idem.*
5. The ruling of a trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown. *Idem.*

Right to Trial by Jury.

6. The accused, by a judicial confession of guilt, may waive all rights secured by section 1, article 11, of the constitution. *McCarty v. Hopkins* 550

Summoning.

7. When there is no panel of petit jurors, the court may, under section 664 of the Code, direct the sheriff to summon them. *Dinsmore v. State* 418

Justice of the Peace. See APPEAL AND ERROR, 34. BASTARDY, 2. RECORDS.

1. Upon request, and the payment of the legal fee, a justice must furnish an authenticated transcript of a judgment in his docket to any one interested therein. *State v. Ellsworth* 444
2. An attorney in fact for one against whom a judgment has been rendered on the docket of a justice has such an interest as entitles him to demand a transcript thereof. *Idem.*

Laches. See ATTACHMENT, 5.

Landlord and Tenant.

1. Before a tenant can initiate an adverse holding, he must yield up possession or distinctly repudiate the relationship existing. *Ross v. McManigal* 90
2. The failure to pay rent, even in the absence of a demand, does not raise a presumption that the lessee has renounced the title under which his tenure commenced. *Idem*.....90, 92
3. A tenant must deal in good faith with his landlord. He is bound to surrender possession of the demised premises at the expiration of the lease. If he fail to do so it will

Landlord and Tenant—*concluded.*

be presumed that he continues to hold in the character of a tenant. This presumption can not be overcome by a secret purpose of the tenant to hold adversely. *Idem*.....90, 91

4. Lease of farm construed. It creates no lien for the lessor for rents due and in arrears on crops grown thereafter and other property *non in esse* at the time. *Brown v. Neilson*, 765
5. An assignee of a lease is not liable for the entire rent reserved in the lease, where a portion of the land demised is not covered by the assignment. *Hogg v. Reynolds*..... 758
6. Whether a transfer of a lease creates the relation of landlord and tenant between the transferee and landlord depends on the estate demised and the estate transferred being identical. *Idem.*
7. Where a lessee assigns his whole estate in the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. *Idem.*
8. The covenant to pay rent runs with the land, and the assignee of the lease being in privity of estate with the landlord, is directly liable to him for the installments accruing while the relation exists. *Idem*.....758, 760

Larceny. See CRIMINAL LAW, 16. ROBBERY.

1. To constitute larceny there must have existed a felonious intent at the time of the taking. *Dobson v. State* 584
2. An information charging larceny sufficiently described the stolen property as fifty-five coats, each coat of the value of five dollars; fifty-five vests, each vest of the value of three dollars; sixty pairs of trousers, each of the value of five dollars; four overcoats, each of the value of ten dollars." *Sharp v. State* 187
3. Proof of special ownership in property, the subject of larceny, will sustain a conviction of larceny under an information charging general ownership. *Idem.*
4. Evidence *held* to support verdict of jury. *Tatum v. State*... 229

Law of the Case. See APPEAL AND ERROR, 35-41.

Leases. See LANDLORD AND TENANT.

Legislature. See STATUTES, 11, 12.

1. The entire proclamation of the governor convening the legislature in special session should be considered in determining whether any given act at such session is germane to the objects stated in the call of the executive. *Chicago, B. & Q. R. Co. v. Wolfe*..... 502
2. At a special session of the legislature no business can be transacted except such as is included in the objects of legislation stated in the executive proclamation. *Idem.*

License. See ATTORNEYS.

1. The payment of an occupation tax can not be made a condition precedent to obtaining a license to conduct the business sought to be taxed. *State v. Aitken*..... 490
2. Where money is collected or paid as a condition of obtaining a license, it is license money, and not a tax, under the provisions of section 5, article 8, of the constitution. *Idem.*

Lien. See ATTACHMENT. LIMITATION OF ACTIONS, 11. STREET RAILWAYS. TAXATION.

Limitation of Actions.

Period of Limitation.

1. The statute of limitations does not begin to run until the cause of action has accrued. *City of Omaha v. Redick*..... 163
2. The right to commence and prosecute an action may be lost by delay. *Pinkham v. Pinkham*..... 336
3. The right to defend a suit for the possession of property is never outlawed. *Idem.*
4. The statute of limitations does not begin to run in an action for fraud until the fraud is discovered. *Gerner v. Yates*, 100, 107
5. Where, in an action to reach the proceeds of the sale of mortgaged property to apply on a mortgage note, the makers deny anything was due, the statute of limitations does not run during litigation, though the payee of the note had not declared thereon. *Bank of Stockham v. Alter*, 359
6. The substitution of an heir for the administrator, in an action against a decedent's estate, is not tantamount to the commencement of a new action and the statute of limitations does not apply. *Tecumseh Nat. Bank v. McGee*..... 709

Pleadings.

7. A reply alleging that the defendant's counter-claim did not accrue within the period provided by law, but alleging no facts upon which to base such conclusions, tenders no issue. *Pinkham v. Pinkham* 336

Statute of Limitations.

8. Ordinarily, a third party may not interpose the defense of the statute of limitations. *Plummer v. Rohman*..... 61
9. An action on an official bond is not barred until the expiration of ten years from the time the cause of action accrued. *Bantley v. Baker* 92
10. A note is barred after five years from maturity, though secured by a real estate mortgage. *Omaha Savings Bank v. Simeral* 741
11. A lien for taxes levied as special assessments for street

Limitation of Actions—*concluded.*

improvements is not barred by sections 11 or 13 of the Code. *Lincoln St. R. Co. v. City of Lincoln*..... 109

12. The fact that under the laws of Colorado the covenant against incumbrances runs with the land and inures to the benefit of every subsequent grantee, does not make it any the less a written contract within the meaning of section 10 of the Code of Civil Procedure. *Johnson v. Hesser*, 631, 634

Lis Pendens. See ABATEMENT AND REVIVOR. STATUTES, 1.

Live Stock. See CARRIERS.

Malicious Prosecution.

1. The advice of counsel, to be of any avail as a defense, must have been given after a full and fair statement of all the facts within the knowledge of the person seeking the same, and must have been relied upon in good faith. *Biddle v. Jenkins* 400
2. Where one makes a full and true statement to an attorney of all the facts within his knowledge as to the guilt of the accused, and acts on his advice, he will not be liable for malicious prosecution. *Jensen v. Halstead*..... 249
3. A defendant can not testify that he related to his counsel all the facts within his knowledge. *Idem.*
4. An instruction that information justifying a criminal complaint must be such that business men of ordinary care would feel authorized in acting on it, is erroneous. *Idem.*
5. After a witness has related what facts he detailed to his counsel before commencing an action for malicious prosecution he may further testify that what he did so relate was all he knew at the time of the communication. *Idem* 249, 252

Mandamus.

1. Mandamus is the appropriate remedy to make the mandate of a reviewing court effective. *State v. Norris*..... 461
2. An application for a writ of mandamus by a private person for the enforcement of private rights will not be advanced, unless some good reason is made to appear why the application in the first instance was not made in the district court. *Armstrong v. Mayer* 355
3. An original application for a writ of mandamus in the supreme court will be granted only when it is ancillary in character and protects the rights of parties which would otherwise be jeoparded. *Idem.*

Mandate. See APPEAL AND ERROR, 59. JUDGMENT, 1. MANDAMUS, 1.

Marriage. See BIGAMY.

1. A marriage legal where solemnized is valid everywhere. *Hills v. State* 589
2. A marriage solemnized in good faith is not void merely because the contracting parties may at some prior time have entered into an agreement or understanding that the marriage should be invalid. *Idem.*

Married Woman. See HUSBAND AND WIFE.

Maxims.

1. Falsus in uno, falsus in omnibus. *State v. Frank*.....679, 682
2. The lesser is always included in the greater. *Chicago, B. & Q. R. Co. v. Wolfe*.....502, 507
3. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield, never: *Pinkham v. Pinkham* 336, 338

Maximum Freight Rate Law. See COURTS, 13. RAILROADS, 3.

Measure of Damages. See DAMAGES.

Misconduct.

1. Of clerk. See COUNTY, 21, 22.
2. Of counsel. See TRIAL, 3, 5.
3. Of jury. See TRIAL, 7, 8

Mistake. See EQUITY.

Mortgages. See CHATTEL MORTGAGES. EXECUTION. EXECUTORS AND ADMINISTRATORS. INTEREST. PRINCIPAL AND AGENT. RECEIVERS. STREET RAILWAYS, 6.

Consideration.

1. Evidence *held* to show a consideration to support the mortgage in suit. *Morris v. Linton*..... 537
2. Where a grantee accepts and covenants to pay an incumbrance on land, the agreement is based on a sufficient consideration. *Garneau v. Kendall* 396

Default. Right to Declare Debt Due.

3. Where a mortgage provides that the failure of the mortgagor to comply with any of its conditions shall cause the entire debt to become due, and that the mortgagee may, if he so elect, proceed at once to enforce his security, the commencement of foreclosure suit is a sufficient notice of his election. *National Life Ins. Co. v. Butler*..... 449
4. Where a mortgage is conditioned that on default the mortgagee may pay delinquent taxes and assessments, and may declare the whole debt due and foreclose, the mortgagee may not only make such payments, but declare the debt due and proceed immediately to collect it. *Idem.*

Mortgages—*continued.*

Deficiency Judgments.

5. The finding of a trial court of the amount of a deficiency, and rendition of judgment, are judicial functions. *Parmele v. Schroeder* 553

6. A deficiency judgment in a suit to foreclose a real estate mortgage under the provisions of the Code as it existed prior to the amendment of 1897 could not be rendered until after the report of the sale. *Idem.*

7. The repeal of sections 847 and 849 of the Code, permitting recovery of deficiency judgments, did not affect actions pending. *Hanscom v. Meyer*..... 798

8. Where a plaintiff in a foreclosure proceeding purchases the property and obtains a deficiency judgment, and he afterward sells it for a sum equal to the decree and costs, it can not affect his rights as to the deficiency judgment. *Stover v. Stark* 374

Foreclosure. Judgments. Pleading.

9. Persons claiming adversely to a mortgagor are not proper parties to an action to foreclose a mortgage. *Joslin v. Williams* 859

10. It is no defense in an action to foreclose a mortgage that the mortgagor had no title to the premises, or that there is an outstanding paramount title. *Idem.*

11. The personal liability of a mortgagor does not arise on appeal. *Morris v. Linton* 537

12. A judgment fixing the personal liability of defendants in a foreclosure suit can only be reviewed after a deficiency judgment has been rendered. *National Life Ins. Co. v. Fitzgerald* 692

13. A decree of foreclosure in so far as it directs a sale of the mortgaged property is not affected by a modification as to the personal liability of the defendant. *National Bank of Commerce v. Kinkead* 264

14. If a decree of foreclosure is by its terms to be executed by a person disqualified by interest from making the sale, the party complaining should assail the decree directly and not by a motion to vacate the sale. *Eddy v. Kimerer*..... 498

15. Evidence in an action to foreclose examined, and found to sustain judgment for plaintiffs. *Orient Ins. Co. v. Hayes*, 173

16. A decree of foreclosure in a suit brought by a mortgagee who has transferred the notes to a holder for value is not a bar to a subsequent foreclosure by the holder. *Connecticut Trust & Safe Deposit Co. v. Fletcher*..... 166

17. The foreclosure of a mortgage on premises upon which a

Mortgages—*concluded.*

schoolhouse has been erected is not an adjudication that the schoolhouse was a part of the realty and included in the mortgage lien. *Burns v. School District of Rock County*... 351

18. An answer in a suit to foreclose a lien under a quit-claim deed *held* to plead a conclusion only, and that facts relied on to constitute fraud must be specifically pleaded. *First Nat. Bank of Sutton v. Grosshans* 575

19. Evidence in an action to foreclose a lien secured by quit-claim deed *held* to support a decree for plaintiff. *Idem.*

20. Where, in an answer, execution and delivery of a note and mortgage pleaded in the petition are admitted, the burden is on the defendant to prove some fact showing want of ownership. *Bank of Stockham v. Alter*..... 359

Payment.

21. The purchase of mortgaged land at a judicial sale under another lien by a mortgagee, credit being given on the purchase price for the mortgage debt, is a payment of the mortgage. *Perry v. Baker* 841

22. A quit-claim grantee of land purchased by his grantor at a judicial sale, on which the grantor's mortgage was credited as part of the price, is an innocent purchaser of the land and takes it free from the mortgage debt. *Idem.*

Registration.

23. The law providing for the registration of instruments affecting land titles gives to the assignee of a junior incumbrance priority over a senior incumbrancer only in case his assignment is in registerable form and recorded before the senior incumbrance. *Rumery v. Loy*..... 755

24. As a rule, the right of priority as between persons claiming liens upon real property is to be determined by the registry act. *Idem.*

Release.

25. A mortgagee may, after the death of the mortgagor, institute a suit to foreclose his mortgage, and the filing in the county court of a mortgage debt as a claim against an estate while a foreclosure suit is pending is not a release of the mortgage. *National Life Ins. Co. v. Fitzgerald*..... 692

Taxes.

26. An agreement to pay taxes before they become delinquent is not fulfilled by paying such taxes on the day they become delinquent. *National Life Ins. Co. v. Butler*..... 449

27. Special paving assessments are "assessments" within the meaning of a clause in a mortgage imposing on the mortgagor the duty of making prompt payment of all taxes "and assessments" lawfully charged against the mortgaged property. *Idem.*

Motions. See APPEAL AND ERROR, 42-44. BILL OF EXCEPTIONS. COSTS, 4. NEW TRIAL.

Multiplicity of Suits. See SET-OFF AND COUNTER-CLAIM.

Municipal Corporations. See CONSTITUTIONAL LAW, 12. EMINENT DOMAIN. STATUTES. STREET RAILWAYS.

Action. Corporate Name.

1. Where an action is brought by a city in its corporate name by its proper law officers, it will be presumed it was authorized until the contrary appears. *Lincoln St. R. Co. v. City of Lincoln* 109

Assessment. Levy. Interest. Grading. Paving.

2. Where a special assessment is shown by the record to have been levied in substantial compliance with the statute, and no substantial defect in the proceedings is shown, a judgment refusing to enforce the lien in favor of the public will be reversed. *John v. Connell*..... 267
3. The provision of section 117 of the Omaha charter (Session Laws, 1887, ch. 10) as to the ascertainment of damages before ordering the grading of a street, is mandatory. *Idem.*
4. The mayor and council of cities of the metropolitan class can raise, by special taxation of property benefited, a fund to defray costs and expenses of opening a street. *Parrotte v. City of Omaha* 96
5. A village can not levy a tax on property the situs of which is not within the corporate limits. *Sioux City Bridge Co. v. Dakota County* 75
6. A tax levied on a whole property, part of which is without the territorial limits of the body imposing the same, is invalid as to such part, rendering the whole assessment void, unless the tax against the part within the jurisdiction can be readily separated from that without. *Idem.*
7. Where the method for exercising the power to levy special assessments is pointed out by statute, that method must be followed; but where no particular method is specified, the city authorities may act by resolution or in other appropriate manner. *Lincoln St. R. Co. v. City of Lincoln*..... 109
8. Taxes levied as special assessments in cities of the first class draw interest at 12 per cent., and a decree predicated upon a tax lien draws interest at the same rate. *Idem.*
9. Under the city charter act of 1889, governing cities of the first class, levy of special assessment under an ordinance creating paving districts and providing for improvements of streets *held* valid, and that an independent ordinance making the final levy was not required. *Idem.*

Municipal Corporations—*concluded.*

10. The cost of grading preparatory to paving a street is properly charged as incidental thereto, and assessments against a street railway company for paving its right of way may include the cost of grading also. *Idem.*

11. The provisions of the act of 1887, governing cities of the first class, requiring street railway companies to pave their right of way and, in case of their refusal so to do, authorizing an assessment for the performance of the work by the city, is not violative of section 7, article 9 of the constitution, as imposing a tax on a municipal corporation or the property thereof for corporation purposes. *Idem.*

Rights and Remedies of Taxpayers.

12. A taxpayer has a right of equitable action to enforce a municipal corporate right which its governing body refuses to enforce, but he should make the corporation a party defendant. *Shepard v. Easterling*..... 882

13. A taxpayer may maintain a suit to restrain the governing body of a municipal or public corporation from making an illegal disposition of funds or property. *Idem.*

14. A property owner is not required to appear before a taxing board in opposition to the assessment of a tax on property whose *situs* is not within the jurisdiction of such board. *Sioux City Bridge Co. v. Dakota County*..... 75

15. A party seeking to enjoin the collection of a special tax must show that the taxing power was not lawfully exercised or that there are fatal infirmities in the proceedings leading up to the levy. *Parrotte v. City of Omaha*..... 96

Salary of Police Judge.

16. The compensation of a police judge of an incorporated city can not be varied pending his official term. *State v. Moores*, 9

Murder. See HOMICIDE.

National Banks. See BANKS AND BANKING.

Negligence. See CARRIERS. GUARANTY. BILLS AND NOTES. RAILROADS.

Negotiable Instruments. See BILLS AND NOTES.

New Trial. See APPEAL AND ERROR, 42.

1. Except on the ground of newly-discovered evidence, a motion for a new trial must be filed within three days after the judgment is rendered. *Schuyler Building & Loan Ass'n v. Fulmer*..... 68

2. The time within which a motion for a new trial is to be filed is to be reckoned from the date of rendition of the decision of the trial court, and not from the date of the entry thereof. *Ames v. Parrott*..... 847

Obligation of Contract. See CONSTITUTIONAL LAW, 18.

Office and Officers. See CLERK OF COURT. COUNTY. JUDGES. JUSTICE OF THE PEACE. LIMITATION OF ACTIONS, 9. RECEIVERS.

1. Where the authority of an officer is derived from the statute, his action must be directed and controlled by its provisions. *Burns v. School District No. 18 of Rock County*....351, 353
2. The legislature can abolish any office it has created. *Dinsmore v. State* 418

District Attorney.

3. The office of district attorney has been abolished. *Idem.*
4. The office of district attorney was not created by the constitution but by general law before the adoption of that instrument. *Idem.*

Holding Over. Salary.

5. The period for which an officer holds over beyond the fixed term of an office, pending the election of a successor in pursuance of the requirements of the constitution, is a part of his term of office. *State v. Moores*..... 9
6. The salary of an officer created by the constitution can not be increased or diminished during his official term. *Idem.*
7. Where a person lawfully continues in an office created by the constitution, by virtue of his original election, after the expiration of the fixed term, but before his successor is elected and qualified, his salary can not be increased or diminished. *Idem.*

Liability on Bond.

8. An action on a clerk's official bond is not barred until ten years from the time the cause of action accrued. *Bantley v. Baker* 92

Opening Judgment. See JUDGMENT.

Ordinances. See MUNICIPAL CORPORATIONS. STREET RAILWAYS.

Parties. See APPEAL AND ERROR, 45-47.

Partnership.

1. The right of participation in the profits of a business indicates the existence of a partnership, but actual intention is the decisive test. *Garrett v. Republican Pub. Co*..... 541
2. Where no question of estoppel is involved, persons can not be held to be partners despite their intention not to be such. *Idem.*
3. Whether a written contract creates a partnership is to be determined by ascertaining the intention of the parties as disclosed by their language. *Idem.*

Partnership—*concluded.*

4. A contract by the terms of which the owner transfers to another the exclusive use and control of property and is to receive as rent therefor a portion of the profits arising from such use, is not a partnership contract. *Idem.*

Passengers. See CARRIERS.

Pay Check. See BILLS AND NOTES.

Payment. See ACCORD AND SATISFACTION. BILLS AND NOTES. MORTGAGES, 21. USURY.

The giving and acceptance of an order, bill of exchange or promissory note is not a payment of a prior indebtedness except upon express agreement. *Chicago, B. & Q. R. Co. v. Burns* 793

Penalties. See COURTS, 13.

Personal Injury. See ASSAULT. RAILROADS.

Pleading. See BANKS AND BANKING, 4. COUNTY, 23. COVENANTS. CRIMINAL LAW, 20, 23. ESTOPPEL. EVIDENCE. FRAUD. FRAUDULENT CONVEYANCE, 15. LIMITATION OF ACTIONS. MORTGAGES. TAXATION, 29. USURY.

Answer. Reply.

1. An answer is insufficient which denies on information and belief allegations which are matters of public record. *Oakes v. Ziemer* 6
2. A new cause of action can not be set forth in a reply. *Plummer v. Rohman* 61
3. The office of a reply is to deny facts alleged as a defense or to allege facts in avoidance. *Idem.*
4. Where a reply sets up a new cause of action and objection is made, for that reason, to the introduction of testimony thereunder, no waiver of the right to object in this court to the order of pleading has occurred. *Idem*.....61, 67
5. In case no reply to material allegations of new matter in an answer appears in the record, and other issues are disclosed upon which the cause was properly triable, it will not be presumed that it was tried upon the matters admitted by the pleadings. To bring the case within the exception that no advantage may be taken of want of reply where the trial proceeded upon the theory that a reply had been filed, there must be something in the record from which an inference may be drawn that reply was waived, or from which this court may know what issues were in fact tried. *Ames v. Parrott* 847

Conclusions of Law.

6. The allegation of a mere legal conclusion of the pleader

Pleading—*concluded.*

unaccompanied by the facts from which the conclusion can be deduced tenders no issue. *Pinkham v. Pinkham*.....336, 337

Counter-Claim.

7. Where the right to a counter-claim depends wholly upon statute, the defendant must not only plead a good cause of action, but he must allege facts which bring his claim within the provisions of the statute. *Gurske v. Kelpin*.... 517

Exhibits as Part of Pleadings.

8. For the purpose of passing upon a general demurrer to an amended petition, exhibits attached to the original petition, and by reference made a part thereof, will be considered a part of the pleadings, though not physically attached to the amended petition. *Bank of Stockham v. Alter*.. 359

Inconsistent Defenses.

9. One can not plead inconsistent defenses. *Oakes v. Ziemer*.. 6

Indefiniteness of Pleading. Demurrer.

10. The indefiniteness of a pleading is no ground for demurrer. *Stewart v. Bole* 193

11. Indefiniteness in a pleading should be reached by a motion to make more definite and certain. *Idem.*

12. Where a complaint against an officer for official misconduct fails to designate the day upon which the offense was committed, but such failure does not mislead the defendant, it is not prejudicial error to overrule a demurrer thereto or admit evidence thereunder. *Idem*.....193, 196

Issues. Proof.

13. Where both parties in their pleadings allege a given fact, proof of the averment is unnecessary. *McCullough v. Dovey*, 675

14. Where the answer admits the execution of the contract sued on it is prejudicial error to receive evidence that such contract did not exist at the time the answer admits its execution. *Faulkner v. Gilbert* 602

15. Under a general denial evidence of justification responds to no issue. *Chicago, B. & Q. R. Co. v. Williams*..... 608

Pledges.

Collateral security may be transferred by agreement to a third party as trustee. *Connecticut Trust & Safe Deposit Co. v. Fletcher* 166

Police Judge. See MUNICIPAL CORPORATIONS, 16. CONSTITUTIONAL LAW, 14.

Police Power. See BASTARDY, 6. STREET RAILWAYS, 1.

Power of Attorney. See ACKNOWLEDGMENT. PRINCIPAL AND AGENT.

Preferring Creditors. See FRAUDULENT CONVEYANCES.

Preliminary Examination. See CRIMINAL LAW, 24, 25.

Presumptions. See APPEAL AND ERROR, 49-54.

Principal and Agent. See ATTORNEY AND CLIENT. CORPORATIONS, 13-15.

1. Power of attorney *held* to authorize the agent to mortgage the land of his principal. *Morris v. Linton*..... 537
2. A power of attorney, properly executed, is valid though not acknowledged except to the extent that it may authorize the conveyance of a family homestead. *Idem.*

rincipal and Surety. See GUARANTY.

Priorities. See MORTGAGES, 23, 24. STREET RAILWAYS. TAXATION, 5. TRUSTS.

Privileged Communications. See EVIDENCE, 14, 15.

Process. See BASTARDY. EXTRADITION.

Promissory Note. See BILLS AND NOTES.

Public Policy. See BUILDING AND LOAN ASSOCIATIONS. CONTRACTS, 7.

Quieting Title.

1. A party, whether in actual possession or not, may maintain a suit to establish his title to land against any adverse claimant. *Ross v. McManigal* 90
2. In an action by the vendee of exempt property to quiet his title as against judgment creditors of the vendor, fraud is an immaterial issue. *Smith v. Neufeld*..... 699
3. A defendant in actual possession may show under a general denial that he is the equitable owner. *Pinkham v. Pinkham* 336
4. The right to defend a suit for the possession of property is never outlawed. *Idem.*

Quo Warranto. See CORPORATIONS, 6.

Railroads. See CARRIERS. STREET RAILWAYS. TAXATION.

1. It is the duty of one who is about to step upon a railroad track to look in each direction to ascertain whether a train is coming, and if his failure so to do results in his injury he can not recover therefor. *Chicago, B. & Q. R. Co. v. Yost* 530
2. A railroad acts in the capacity of common carrier of live stock which it receives for transportation. *Chicago, B. & Q. R. Co. v. Williams* 608
3. In a suit to recover penalties under the Maximum Freight Rate law, the defendant railroad can not plead that it has submitted to an injunction restraining its enforcement. If

Railroads—*concluded.*

rightfully enjoined a penalty can not be recovered; if the injunction was wrongfully issued, the defendant must pay the penalty and recover upon the bond. *State v. Chicago, R. I. & P. R. Co*.....545, 549

Rape.

1. Evidence *held* sufficient to support conviction. *Chapman v. State* 888
   Spaulding v. State 289
2. In an information under the Criminal Code, section 12, it is not necessary to allege that the prosecuting witness is other than the daughter or sister of the accused. *George v. State* 669
3. In an information under the Criminal Code, section 12, it is not necessary to allege that the offense was committed with consent. *Idem.*
4. Instructions in view of the evidence *held* proper. *Idem.*
5. Admission of testimony of mother and sister as to age of prosecutrix, was proper. *Idem.*
6. Evidence found sufficient to support conviction. *Idem.*

Ratification. See CORPORATIONS, 13-15. TRUSTS.

Rebuttal. See CRIMINAL LAW, 15.

Receivers.

1. The expenses of procuring a receivership are chargeable against the fund in the custody of the court. *Stone v. Omaha Fire Ins. Co* 834
2. The rule that the granting of an injunction is tantamount to the appointment of a receiver, and bars a subsequent suit for such appointment, does not apply when the parties are not the same. *Carter v. Dime Savings Bank*..... 587
3. Where one, in obedience to an order of court, turns over to a receiver assets in his hands, he can not be compelled in a suit in another court, between different parties, to account therefor. *Idem.*
4. A receiver is a special officer of the court. *State v. Nebraska Savings & Exchange Bank*..... 496
5. Unless it is made to appear that the compensation allowed a receiver is excessive, the order of allowance will be sustained. *Idem.*
6. The verified report of a receiver is *prima facie* evidence of its correctness, and is entitled to the same consideration as the return of any other officer of the court. In order to be impeached it must be overcome by other competent evidence. *Idem.*

Receivers—*concluded.*

7. The fact that the mortgaged premises are probably insufficient to satisfy the debt, and the facts that the property is allowed to deteriorate and taxes to accumulate, are sufficient grounds for the appointment of a receiver. *Philadelphia Mortgage & Trust Co. v. Oyler*, and *President and Directors Ins. Co. of North America v. Oyler*..... 702
8. A defendant liable for a deficiency judgment in a foreclosure proceeding, has such a beneficial interest in the result of the suit, as to entitle him to apply for the appointment of a receiver. *Idem.*
9. Evidence examined, and *held* sufficient to support an order for the appointment of a receiver. *Idem.*
10. The return of a receiver's sale is no evidence of an order of court directing such sale. *Ackerman v. Ackerman*.....72-74

Recognizance. See BASTARDY.

Records. See APPEAL AND ERROR, 65, 66. ESCROW.

1. Dockets of a justice of the peace containing the entry of judgments are public records. *State v. Ellsworth*..... 444
2. Public records are open to the inspection of all citizens of the state and other persons interested in their examination. *Idem.*
3. Where the clerk of a state court for a certain county has possession of the records of the territorial court for the same county, both courts being of the same description, it will be presumed his possession was rightful. *McPherson v. Commercial Nat. Bank* 695
4. A court may amend its records at a subsequent term upon satisfactory evidence. *Ackerman v. Ackerman* 72
5. Whether a correction of the record may be made at a subsequent term from the personal recollection alone of the trial judge, not decided. *Idem.*

Reformatories.

1. The legislature is without power to authorize the commitment to the state industrial school of children over the age of sixteen years who have not been convicted of crime. *Scott v. Flowers* 620
2. Section 5, article 1, chapter 75, Compiled Statutes, 1899, is valid and enforceable to the extent that it authorizes commitment to the state industrial school of children under the age of sixteen years, who, for want of proper parental care, are growing up in mendicancy and crime. *Idem.*

Registration. See ESCROW. MORTGAGE, 23, 24.

Rehearing, Motion for. See APPEAL AND ERROR, 43, 44.

Release. See MORTGAGE, 25.

Replevin.

1. Affidavit in replevin *held* sufficient. *Doherty v. Linn*..... 665
2. Where, in replevin by two, alleging joint ownership, judgment is found for one, and against the other, the defendant, as to the unsuccessful plaintiff, is entitled to only nominal damages. *Idem.*

Rescission. See CHATTEL MORTGAGE, 6.

Res Judicata. See APPEAL AND ERROR. JUDGMENT, 10. TRIAL, 16.

Review. See APPEAL AND ERROR.

Revivor. See ABATEMENT AND REVIVOR. JUDGMENT.

Roads. See HIGHWAYS.

Robbery.

1. Evidence that money or goods were obtained from a man by taxing him with an abominable crime and threatening to expose him, may establish the crime of robbery. *Thompson v. State* 210
2. In a prosecution for robbery from the person, where the whole testimony discloses non-consent to the taking of the property, testimony in so many words to that effect by the prosecuting witness, is not necessary. *Trimble v. State* 604

Rules of Court. See APPEAL AND ERROR, 3.

Rulings of Different Judges. See COURTS, 11.

Sales. See EXECUTION. EXECUTORS AND ADMINISTRATORS. INTOXICATING LIQUORS. TAXATION.

1. Evidence in an action for the price of a machine sold on a special warranty construed, and *held* that the retention of the machine did not estop the buyer from recovering damages for breach of the warranty. *Seymour v. Phillips*.. 282
2. Evidence in an action for the price of a machine *held* to show that the seller had waived its right to insist on the machine being returned under the provisions of the special warranty. *Idem.*
3. A mortgagee in good faith from a fraudulent vendee is an innocent purchaser to the extent of his debt. *Kellogg Co. v. Horkey* 751

School and School District. See TAXATION.

1. Under Compiled Statutes, chapter 79, section 7, subdivision 5, a school district has no authority to agree to build a frame schoolhouse on land to which it has no title without

School and School District—*concluded.*

the privilege of removal. *Burns v. School District No. 18 of Rock County* 351

2. Taxes levied to create a school fund constitute a fund against which warrants may be drawn, though the money has not in fact been collected. *School District v. Fiske*..... 3

Section. See *State v. Frank*, 679.

Set-Off and Counter-Claim.

1. Matters accruing subsequently to the bringing of an action can not be pleaded as a counter claim. *Gurske v. Kelpin*.... 517
2. A counter-claim, within the meaning of section 101 of the Code, must be one arising out of the transaction set forth in the petition. *Sheibley v. Dixon County*..... 409
3. The phrase "connected with the subject of the action," in section 101 of the Code, should be construed liberally to prevent a multiplicity of suits. *Idem.*
4. Where a county clerk seeks to recover from the county compensation for making and correcting the assessor's books, the county may set up fees collected and not reported by way of a counter-claim. *Idem.*

Special Findings. See APPEAL AND ERROR. TRIAL.

Statute of Frauds.

A parol agreement by a grantee to reconvey real estate to his grantor, is within the statute of frauds and does not create an express trust in such real estate in favor of the grantor. *Veeder v. McKinley-Lanning Loan & Trust Co*..... 892

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. CRIMINAL LAW, 1. LIMITATION OF ACTIONS. STATUTE OF FRAUDS.

Amendment.

1. Chapter 31, Session Laws, 1899, amending section 3, chapter 28, Compiled Statutes, 1897, is germane to the section amended, and its provisions are within its title. *State v. Frank* 679

Construction.

2. The legislature may not prescribe what construction the courts shall place upon a law. *Nebraska Loan & Building Ass'n v. Perkins* 254
3. A statute complete in itself is not repugnant to the constitution, though it may conflict with some other statute. *Idem.*
4. Where an invalid portion of an act formed an inducement for its passage, the whole act fails. *Crawford Co. v. Hathaway* 317, 326

Statutes—*continued.*

5. In construing an act of the legislature, all reasonable doubts must be construed in favor of its constitutionality. *State v. Standard Oil Co.* 28

6. The statute declaring a purchase of land by an administrator at his own sale to be void should be construed to mean voidable only. *Veeder v. McKinley-Lanning Loan & Trust Co.* 892

7. The provisions of the act of 1887, authorizing a judgment *in personam* for amounts levied as special assessments to pay the expenses of paving the right of way of a street railway in cities of the first class, do not, even if invalid, render the entire act unconstitutional. *Lincoln St. R. Co. v. City of Lincoln* 109

Enactment.

8. Where legislative journals are defective or incomplete, their silence will not, as against an enrolled bill, be taken as conclusive evidence that the yeas and nays were not taken and recorded on the final passage of a bill. *State v. Frank* 679

9. Extrinsic evidence is competent to supply missing portions of the legislative journals. *Idem.*

10. Enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of the regularity of its enactment. *Idem.*

11. Section 3, article 1, chapter 72, Compiled Statutes, was passed at a special session of the legislature held in 1867, and is within the scope of the third object designated by the governor in his proclamation. *Chicago, B. & Q. R. Co. v. Wolfe* 502

12. Under the constitution of 1866, providing that no business shall be transacted at a special session of the legislature except such as is within the object of such session as stated in the proclamation of the governor, a proclamation of the governor convening such session and stating a number of objects should be considered in its entirety in determining whether a law passed at such session is within the constitution. *Idem.*

Evidence.

13. The written laws of a sister state can not be proved by Hubbell's Legal Directory, or the testimony of an expert witness. *Johnson v. Hesser* 631

General and Special Laws.

14. Session Laws, 1897, chapter 10, section 103, to the extent that it confers on district courts authority to remove

Statutes—*concluded.*

police magistrates, *held* unconstitutional for lack of uniformity. *Gordon v. Moores*..... 345

15. Criminal Code, section 584, relating to the drawing of grand juries, *held* not special legislation within the meaning of section 15, article 3 of the constitution. *Dinsmore v. State* 418

16. A general law, though affecting a single county, is not for that reason special legislation. *State v. Frank*..... 679

17. An act providing that street railway companies of cities of the first class shall pave that part of the street occupied by their tracks is not special legislation because not applying to all street railways in cities of different classes throughout the state. *Lincoln St. R. Co. v. City of Lincoln*... 109

Repeal.

18. The repeal of the Code of Civil Procedure, sections 847 and 849, permitting recovery of deficiency judgments, did not affect actions pending. *Hanscom v. Meyer* 798

19. An action to foreclose a mortgage and to recover deficiency judgment, where a decree had been rendered for a sale of property prior to the repeal of the statute authorizing a deficiency judgment, is a pending action within section 2, chapter 88, Compiled Statutes, 1899, concerning enacting and repealing statutes. *Idem.*

Subjects and Titles.

20. The title to an act of the legislature of 1873, relating to building and loan associations (General Statutes, ch. 11), with sufficient clearness indicates the subject of legislation. *Nebraska Loan & Building Ass'n v. Perkins*..... 254

21. Chapter 11 of the General Statutes of 1873 embraces a single subject of legislation. *Idem.*

22. The purpose of section 19, article 2, of the constitution of 1866, relating to the title of acts, was to prevent surreptitious legislation and to obviate the evils following from including in one bill various subjects in nowise related to one another. *Idem.*

23. Where a title to a bill indicates the subject of proposed legislation, the essential requirements of the constitution are met, although such title is not a complete abstract of the bill. *Idem.*

Stay. See APPEAL AND ERROR, 63, 64.

Street Railways. See MUNICIPAL CORPORATIONS, 10, 11. STATUTES, 17. CONSTITUTIONAL LAW, 12, 18.

1. Whether or not the power of the legislature to require street railway companies to pave their right of way may

Street Railways—*continued.*

be exercised as a police regulation or as a taxing power, not fully determined. *Lincoln Street Railway Co. v. City of Lincoln* 109

2. The privileges of a street railway company are determined by the general law, and not by the ordinances under which, with the consent of the majority of the electors, it is given the right to use the streets of a city. *Idem.*

3. The provision for obtaining the consent of a majority of the electors before a street railway company is authorized to construct its roads over city streets does not authorize a city to contract in respect thereto with such railway. *Idem.*

4. The right of a street railway company, lawfully authorized to construct its road, under ordinance submitting to electors the proposition of consenting to such construction, construed. Assuming that provisions in the ordinance are a part of the charter of the corporation, an exemption from special assessment was not created, and the legislature was not prohibited from imposing a liabilty on such corporation to pave the part of the street occupied by its tracks, or, on its refusal so to do to authorize the levy of special assessments for the expenses thereof. *Idem.*

5. The authority to require a street railway company to pave its right of way depends on the statutory ground that when streets are improved by the city, it is incumbent on street railways occupying parts thereof to pave the portion they occupy, and on failure so to do the council is authorized to perform the work and assess the costs. *Idem.*

6. Where a mortgage was placed on a street railway which afterward consolidated with another company against which special assessment liens existed, the lien of the mortgage could not be impaired by the consolidation, and the tax lien could not be made prior to the mortgage lien on all the property after the consolidation, but the tax and mortgage liens attached to the specific property embraced in the levy and the mortgage, respectively. *Idem.*

7. Where street improvements are made and the cost of paving that portion of the street occupied by street railway companies is levied as special assessments against several street railways which are afterward consolidated, liens arising by reason of the several assessments against the different constituent companies attach to the new property in its entirety as owned by the consolidated company. *Idem.*

8. Under the Compiled Statutes of 1887, chapter 13*a*, section 77, the lien of a mortgage attaching to street railway prop-

Street Railways—*concluded.*

erty before street improvements were projected was prior to the lien of taxes levied thereafter as a special assessment for paving the right of way. *Idem.*

9. Under an ordinance providing for the payment of certain sums by a street railway for a permit to lay its tracks in paved streets, there is no authority for making the sums due thereunder a lien on the property of the company. *Idem.*

Subrogation. See TAXATION.

A mortgagee of land purchased by an administrator at his own sale, the money being used to satisfy a mortgage previously existing on the sale, is entitled to subrogation to the rights of the administrator as a creditor of the estate to the extent of such prior incumbrance and the cost of administration. *Veeder v. McKinley-Lanning Loan & Trust Co.* 892

Supersedeas. See APPEAL AND ERROR, 63, 64.

Supreme Court Practice. See MANDAMUS.

Taxation. See COUNTIES. DRAINS, 9-13. EVIDENCE, 2. LICENSE. MORTGAGES, 26, 27. MUNICIPAL CORPORATIONS. SCHOOL AND SCHOOL DISTRICT. STREET RAILWAYS.

Assessment. Jurisdiction.

1. The assessment of real estate in the name of the rightful owner is not absolutely essential to the validity of the tax. *Carman v. Harris* 635
2. A railroad bridge across a navigable river, owned, used and operated by a railroad company as a part of its line of road, is assessable for taxation by the state board of equalization and not by the local assessor. *Chicago, B. & Q. R. Co. v. Richardson County* 519
3. Neither the nature of a tenure nor the manner of its acquisition can be a criterion in determining a question of jurisdiction to impose a tax. *Idem*.....519, 524
4. The rate charged by the mile over a particular line of road is no test to be employed in ascertaining the legal question as to the manner in which taxes shall be imposed for public uses. *Idem*.....519, 526

Lien. Priority.

5. Taxes upon land, whenever levied, take precedence of all other liens. *Eddy v. Kimerer*..... 498

Payment Under Protest. Recovery.

6. One seeking to recover from a county taxes not paid under compulsion, must show a substantial compliance with

Taxation—*continued.*

the statute. *Banker's Life Ass'n v. Commissioners of Douglas County* 202

7. In an action to recover taxes paid under protest, the plaintiff must allege and prove that he made specific objection to the tax at the time of payment. *Idem.*

8. To avail himself of the right to recover taxes not paid under compulsion, the party must state specifically to the tax collector the ground of his objection and have it noted in the tax receipt, which is to be attached to the claim filed with the county board. *Idem.*

Property Exempt.

9. Property used exclusively for school purposes is exempt from taxation for general revenue. *Watson v. Cowles*..... 216

10. A person who claims that his property is not subject to taxation must show affirmatively the facts rendering it exempt. *Idem.*

11. A building used for school purposes and as a family residence by the person having charge of the school, is not exempt from taxation unless the residential use is incidental to the other. *Idem.*

Sale for Non-Payment.

12. By section 111, article 1, chapter 77, Compiled Statutes, a purchaser of real estate at a tax sale is required forthwith to pay to the treasurer the amount of his bid, and on failure so to do the property shall at once again be offered as if there had been no sale. *Green v. Hellman* 875
Leavitt v. Mercer Co..... 874

13. The failure of the treasurer to comply with the statute by offering the land for resale where the price is not forthwith paid, will not invalidate the tax. *Idem.*

14. The failure of the county treasurer to carry forward delinquent taxes for prior years will not invalidate a sale for taxes for subsequent years. *Carman v. Harris*..... 635

15. Evidence in suit by a purchaser at a tax sale to enforce his lien found not to justify a judgment for the defendant. *Idem.*

Situs of Property.

16. A village can not levy a tax on property the *situs* of which is not within the corporate limits. *Sioux City Bridge Co. v. Dakota County* 75

Tax Title. Validity. Rights and Remedies of Purchasers.

17. It is the policy of our revenue law to encourage men to become purchasers at tax sales by insuring them against loss of the money invested. *John v. Connell* 267, 271

Taxation—*continued.*

18. A tax certificate may be assigned by indorsement. *Green v. Hellman* 875
Leavitt v. Mercer Co..... 874
19. An assignee of a tax certificate acquires all the rights thereunder of the assignor. *Idem.*
20. A purchaser of lands at an invalid tax sale is subrogated to the rights of the county. *Idem.*
21. The holder of a tax sale certificate is not a volunteer even in case of property exempt from taxation. *John v. Connell,* 267, 270
22. A tax sale certificate based on a void levy gives no lien on the property described therein. *Idem.*
23. Whether a tax sale is void for irregularity or want of authority in the treasurer to sell, the lien of the tax is transferred from the public to the purchaser. *Idem.*
24. Where the owner of a tax certificate under a void sale pays prior or subsequent taxes, he is subrogated to the rights of the public in such taxes. *Idem.*
25. Where a tax sale is void, the lien for any prior or subsequent taxes paid by the purchaser is transferred to him. *Idem.*
26. The assessment of real estate in the name of the rightful owner is not absolutely essential to the validity of the tax, assessed against the real estate, and the lien acquired thereon by the purchaser of such property at tax sale. *Carman v. Harris* 635
27. In proceedings to foreclose a tax lien over land where a railroad has a right of way, the railroad company is not a necessary party, where the right of way is excepted in the petition. *Idem.*
28. A purchaser at a delinquent tax sale can not maintain an action at law against the owner of the property to recover such taxes. *Idem.*
29. A petition in equity for the foreclosure of a lien for taxes paid by a purchaser at a delinquent tax sale *held* not fatally defective because not alleging "no suit at law." *Idem.*
30. Where the levy of a tax is valid, the purchaser at a void sale is subrogated to the rights of the public. *Idem.*
31. Where a purchaser at a tax sale fails to acquire a good title because of the failure of public officers to comply with the law, he acquires the rights of the public against the real estate. *Idem.*
32. The giving of notice under General Revenue law, chapter

Taxation—*concluded.*

77, article 1, section 123, before a tax deed can issue, is not essential where the purchaser sues in equity to foreclose his lien. *Idem.*

33. The failure of the county treasurer to advertise for public sale real estate upon which delinquent taxes are due, will not affect the purchaser's lien on the property. *Idem.*

Tender of Payment.

34. Where an assessment is wholly void no tender of any sum is necessary to relief against the tax. *Sioux City Bridge Co. v. Dakota County* 75

Tender. See TAXATION, 34.

Title. See INSURANCE, 7, 8. QUIETING TITLE. STATUTES, 20, 22, 23. TAXATION.

Torts. See FRAUD.

Transcript. See APPEAL AND ERROR, 1-3, 65, 66. JUSTICE OF THE PEACE.

Trial. See APPEAL AND ERROR. BASTARDY, 4, 5. INSTRUCTIONS. WITNESSES.

1. The motive which induces a party to defend a suit brought against him will not be inquired into, but rather his legal rights in the premises. *State v. German Savings Bank*..... 87
2. The court can not adjudicate the rights of an adverse claimant in his absence. *Joslin v. Williams*..... 859

Argument of Counsel.

3. Strictures by counsel of a witness for the defense justified by the evidence. *Tatum v. State* 229
4. Where the issues are not complicated, and the amount involved is small, it is not error for the trial court to limit the argument to the jury to fifteen minutes on each side. *Seymour v. Phillips* 282
5. Counsel for the state in their argument to the jury may criticise the conduct of the defendant, as disclosed by the evidence, though he was not a witness in his own behalf. *Dinsmore v. State* 418

Jury. Impaneling. Misconduct.

6. The impaneling of a jury is no part of a trial. *Idem*..418, 430
7. An officer who is a material witness in a case is guilty of prejudicial misconduct when he remains in the jury room during their deliberations on their verdict. *Cooney v. State*, 342
8. The separation of a juror from his fellows during the trial of a cause is not misconduct *per se* to avoid a verdict. *Spaulding v. State* 289

Trial—*concluded.*

Rulings on Evidence.

9. A party can not be prejudiced in a legal sense by the failure of his adversary to produce evidence against him. *Jerome v. State* 459

10. A party should assume that his adversary will produce evidence to make good the averments of his pleading. *Secord v. Powers* 615

11. Where both parties in their pleadings allege a given fact, proof of the averment is unnecessary. *McCullough v. Dovey*, 675

Taking Question From Jury.

12. When there is no disputed question of fact it is proper to direct a verdict. *Keeley Institute v. Wade* 313

13. Where there is no conflict in the evidence, it is not error for the court to refuse to submit the question to the jury. *Garneau v. Cohn* 500

14. It is not error to direct a verdict for the plaintiff where a verdict for the defendant could not be allowed to stand. *Burke v. First Nat. Bank of Pender* 20

15. Action of trial court in withdrawing matters of law from the jury, *held* proper. *Tecumseh Nat. Bank v. McGee*..... 709

16. Where questions pleaded have been disposed of by the trial court during the pendency of an action they are *res adjudicata* and should not be passed on by the jury. *Idem.*

Verdict. Findings.

17. A verdict in favor of one defendant and against another, based upon conflicting evidence which is the same as to both can not stand. *Gerner v. Yates*..... 100

18. Error can not be predicated on the failure of the courts to make special findings of fact where none were asked. *Sheibley v. Dixon County* 409

19. When the court makes special findings of fact and they are silent as to a material issue, such omission will be construed against the party on whom rested the burden of establishing such issue. *Farrell v. Bouck*..... 874

Trover. See INSOLVENCY. TRUSTS.

Where both parties claim a prior right to the proceeds of a foreclosure sale, no demand is required. *Bank of Stockham v. Alter* 359

Trusts.

1. Where trust funds are wrongfully converted, the beneficiary is entitled to the funds, or the proceeds thereof, so long as he can definitely trace them, until they reach an innocent holder. *State v. Bank of Commerce*..... 181

Trusts—*concluded.*

2. Where trust money has been wrongfully commingled by a trustee with his own, and he makes payment from the common fund, it will be presumed that he paid out his own money. *Idem.*
3. The claim of a beneficiary for trust money may be preferred to the extent of the cash found among the assets of an insolvent trustee, where it is not affirmatively shown that the cash assets are not part of the trust fund. *Idem.*
4. The claims of the beneficiary of a trust fund against an insolvent bank is a lien upon cash on hand at the time of failure, including the amount of deposit in other banks, but upon no other assets of the bank. *Idem*.....181, 186
5. A resulting trust will not be declared upon doubtful or uncertain grounds. The burden is upon the one claiming its existence to establish the facts by clear and satisfactory evidence. *Veeder v. McKinley-Lanning Loan & Trust Co*..... 892
6. Evidence *held* insufficient to establish a resulting trust in land. *Idem.*
7. A *cestui que trust*, by taking a judgment against his trustee for the price of trust property wrongfully sold, thereby ratifies the sale and waives his right to pursue the purchaser. *Carter v. Gibson* 207

Undertaking. See COSTS.

United States Courts. See COURTS, 12, 13.

Usury. See BILLS AND NOTES.

1. The defense of usury is personal to the maker, his sureties and privies. *Male v. Wink* 748
2. The defense of usury is available to the mortgagor, notwithstanding he has sold the mortgaged premises, if made a party to the suit and under the petition a deficiency judgment could be rendered against him. *Idem.*
3. A purchaser of the equity of redemption, who assumes a mortgage on the premises, can not put up the usurious contract of his grantor as a defense. *Idem.*
4. Where the defense of usury is established, the plaintiff is entitled to no interest, and can recover only the actual amount loaned, diminished by all payments of principal and interest paid on the debt. *Idem.*

Vacation. See JUDGMENT.

Variances. See INDICTMENT AND INFORMATION, 10.

Vendor and Purchaser. See TAXATION.

Venue. See CRIMINAL LAW, 28.

Verdict. See APPEAL AND ERROR. TRIAL.

Villages. See MUNICIPAL CORPORATIONS, 5, 6.

Waiver. See ABATEMENT AND REVIVOR. CRIMINAL LAW, 29. ELECTION OF REMEDIES. ESTOPPEL. INDICTMENT AND INFORMATION, 11. INSTRUCTIONS, 32. JURY, 6. PLEADING.

Warranty. See SALES.

Water and Water Courses. See DRAINS. IRRIGATION.

1. Testimony as to injuries sustained by plaintiff by the erection of a mill-dam which caused the waters to rise above the natural flow, *held* admissible. *Jerabek v. Kennedy*..... 349
2. Sections 47 and 48, chapter 93*a*, Compiled Statutes, 1897, constitute no acceptance of any supposed grant to the state by the federal government of the waters on the public domain. *Crawford Co. v. Hathaway*..... 317

Witnesses. See INDICTMENT AND INFORMATION, 9. INSTRUCTIONS, 19-22.

Attendance. Compensation.

1. One subpœnaed as a witness before a grand jury is not entitled to fees merely because, in answer to the writ, he went to the court house in which the grand jury was sitting. *Dunn v. Douglas County* 179
2. One subpœnaed to attend as a witness before a grand jury does not perform his full duty by merely going to the court house. It is his duty to report to the bailiff in charge, the foreman or the county attorney. *Idem*.....179, 180
3. A witness, duly served with a subpœea in a criminal case, can not justify a failure to obey the writ on the ground that he has demanded his fees and they were not paid. *Huckins v. State* 871
4. Section 355 of the Civil Code, giving a witness the right to demand fees in advance, does not obtain in a criminal case. *Idem.*

Competency. Interest.

5. Where the relation of attorney and client exists, confidential communications are privileged. *Spaulding v. State*..... 289
6. A communication to a minister of the gospel, or a priest, is not privileged, where it is shown that it was not made in confidence of the relation, or was not to be kept as a secret. *Hills v. State* 589
7. A wife is a competent witness against her husband in a prosecution for bigamy. *Idem.*
8. The interest of a witness is for the jury. *Clary v. State*..... 688
9. If a judgment in a pending action would be evidence for or against a witness in a subsequent action, the witness is in-

Witnesses—*concluded.*

competent to testify as to transactions with the decedent. *Tecumseh Nat. Bank v. McGee* 709

10. An officer of a bank at the time of an alleged deposit, having transferred all his interest and severed his connection with the bank, is, after the death of the depositor, competent to testify as to the alleged deposit. *Idem.*
11. Testimony of a witness as to transactions with a decedent held incompetent by reason of his connection with the defendant bank in the action. *Idem.*
12. Where the testimony of a decedent given at a former trial is read in evidence, testimony of a witness as to a particular transaction of decedent is inadmissible, where the testimony of decedent did not refer thereto. *Idem.*
13. The testimony of a detective or an informer should be weighed with greater care than that of a witness wholly disinterested. *Sandage v. State* 240
14. Where a statute requires a witness to act, by implication he must be disinterested. *Ames v. Parrott* 847

Credibility.

15. Evidence of the reputation of a witness for truth and veracity must relate to his reputation at the place of his residence at the time he testifies. *Faulkner v. Gilbert*..... 602
16. The credibility of witnesses is for the jury. *Clary v. State,* 688 *Howell v. State* 391
17. The question whether witnesses are credible and whether their testimony is forceful or weak, is for the jury. *Strong v. State* 35

Examination.

18. The propounding of leading questions is within the discretion of the trial court. *Dinsmore v. State* 418
19. The rule that the re-examination of a witness should be limited to points arising out of the cross-examination is within the discretion of the presiding judge. *George v. State*.. 669

Impeachment.

20. A witness may be impeached by showing that he made contradictory statements out of court. *Tatum v. State*..... 229
21. On cross-examination of a witness, questions asked as to prior statements made by him regarding the conduct of the defendant *held* improper for the purpose of laying a foundation for impeachment. *Smith v. State*..... 296
22. A witness was asked on cross-examination if he had been convicted of a felony, to which he replied in the affirmative. It was not prejudicial error to not allow defendant to interrogate him as to the particular kind of felony. *Sharp v. State* 187. 192

Words and Phrases.

1. "Bond for costs." *McPherson v. Commercial Nat. Bank*..... 695
2. "Connected with the subject of the action." *Sheibley v. Dixon County* 409
3. "Consul." *Morris v. Linton* 537
4. "Counter-claim." *Sheibley v. Dixon County*..... 409
5. "Criminal negligence." *Chicago, B. & Q. R. Co. v. Wolfe*..502, 510
6. "Final decree." *Parmele v. Schroeder*..... 553
7. "Law of the case." *Smith v. Neufeld*.....699, 701
8. "Pay check." *Chicago, B. & Q. R. Co. v. Burns*..... 793
9. "Pending action." *Hanscom v. Meyer*..... 798
10. "Practicing attorney." *In re Admission to the Bar*..... 58
11. "Prosecuting attorney." *Trimble v. State*..... 604
12. "Right of way." *Chicago, B. & Q. R. Co. v. Richardson County*, 519, 523
13. "Section." *State v. Frank* 679, 685
14. "Term." *State v. Moores* 9
15. "Total disability." *Coad v. Travelers Ins. Co*..... 563
16. "Void." *Veeder v. McKinley-Lanning Loan & Trust Co*..... 892
17. "Wholly disabled." *Coad v. Travelers Ins. Co*..... 563