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WARREN COCHRAN ET AL. V. L. LETITIA COCHRAN.

FILED JULY 10, 1901. No. 10,084.

Commissioner's opinion, Department No. 2.

1. **Finding of Execution Duly Issued by Proper Court and of Return Nulla Bona Sufficient.** Upon proceedings in error from a decree in equity, the error assigned in the motion for new trial being that the decision is contrary to law, the finding that execution was duly issued out of the proper court, directed to the sheriff and against the proper defendant in execution, and that the execution was returned unsatisfied, is a sufficient finding that defendant had no property subject to execution.
2. **Court May Subject Beneficial Interest in Realty to Payment of Judgment.** If a defendant owns real estate having the entire beneficial interest therein, the legal title being in another, a court of equity may, in proper proceedings, subject such real estate to the payment of a judgment against the owner without finding that the title was so placed in another with fraudulent intent.
3. **Finding of Facts Sufficient, of Fraudulent Intent Not Necessary.** If the court finds all of the facts from which the law will infer a fraudulent intent, a decree based thereon will not be reversed as contrary to law because the court failed to state in its finding that the fraudulent intent existed.

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

B. F. Cochran, for plaintiffs in error.

Jno. Porter, Bartlett & Baldrige and *William V. Allen, contra.*

SEDGWICK, C.

This action was begun in the district court for Douglas county. It was tried to the court without a jury, and there were findings and decree in favor of the defendant in error, L. Letitia Cochran. The decree was entered on the 1st day of June, 1897, and directed the sale of the land involved in the suit upon an order for the payment of permanent alimony in favor of this defendant in error and against the plaintiff in error, Warren Cochran, and the defendants in the court below prosecute in this court a petition in error from the decree.

Nearly all the questions argued in the briefs upon the petition in error may be disposed of by the suggestion that no bill of exceptions nor any pleadings appear in the record. There is in the motion for a new trial in the court below an assignment of error that "the decision of the court is contrary to law," and in the assignments of error in this court it is alleged "The decision of the court expressed in the decree is contrary to law and the court erred in rendering judgment for the plaintiff," and "The decision of the court is not sustained by the findings," and upon these assignments of error it is argued in the brief that the finding of the trial court, that the defendant had not sufficient property to satisfy an execution, is not sufficiently definite. The court found that the execution was duly issued out of the proper court and directed to the sheriff against the proper defendant in execution, and that the execution was returned unsatisfied, and we do not think it can be said that the decree is contrary to law on account of any insufficiency in this finding.

It is next urged that the decision is contrary to law, because as to one of the pieces of property described therein there was no finding of fraud, and the judgment seeks to subject an equitable interest of defendant. The finding was "That the title to [describing the land] is in the name of the defendant Elmer G. Cochran in trust for the defendant Warren Cochran and that Warren Cochran is the owner of all the beneficiary interest in and to the said premises and that the said defendant Warren Cochran is not in possession of the said premises and that the said property is subject to the payment of said debt." In the absence of the evidence and the pleadings, we can not say that this is not a sufficient finding to support the decree directing the sale of the land upon the judgment against Warren Cochran. If the judgment debtor owns real estate, the legal title to which is in another, but without any beneficiary interest, and the judgment debtor owns all the beneficiary interest in the land, a court of equity may, in proper proceedings, direct the defendant's interest in the

land to be sold whether or not the title was so placed in the third person with fraudulent intent. If the result is to prevent the creditor from enforcing his claim against the land, the impediment may be removed by a court of equity and the land sold to satisfy the judgment.

In regard to another piece of real estate embraced in the decree it is objected that although it is found that the co-defendant paid a valuable consideration for the land the court subjects the whole estate to the payment of the judgment without finding fraudulent intent on the part of the purchaser or that he knew of fraudulent intent on the part of the seller. It is true the words "fraudulent intent" do not appear in this finding, but the court finds the facts in detail, from which it appears that the fraudulent intent must have existed, and this finding is, we think, sufficient to justify the decree. Upon this point many references are made in the briefs to the pleadings in the case, which of course can not assist us, as the pleadings do not appear in this record.

There are no errors discussed in the briefs which were brought to the attention of the trial court by the motion for a new trial, and we recommend that the decree of the trial court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

HENRY HARMAN, ADMINISTRATOR, v. G. BENSON HARMAN.

FILED JULY 10, 1901. No. 10,197.

Commissioner's opinion, Department No. 2.

1. **Surety of Decedent Compelled to Pay, May Proceed Against Estate Under Assignment by Substitution.** One who, as surety for a decedent, is compelled to pay a claim while pending against the estate of his principal, may take an assignment of the claim and proceed thereon in the name of the original claimant; or may be substituted and proceed in his own name.

2. **Time of Payment Immaterial; Appeal Will Lie in Either Event.** It is immaterial whether the surety pays the claim before or after the hearing thereon in probate court; and in either case he may appeal in the name of original claimant.

3. **Evidence.** Evidence found to support the findings of trial court.

ERROR from the district court for Johnson county. Tried below before STULL, J. *Affirmed.*

S. P. Davidson, for plaintiff in error.

M. B. C. True, contra.

SEDGWICK, C.

This cause comes here upon petition in error from a judgment of the district court of Johnson county. It was tried there by the court without a jury, upon appeal from the county court upon disallowance of a claim against the estate of George W. Harman, deceased. The claim was upon a promissory note given to one Henry Hahn for $500 and interest, and signed by George W. Harman and his son, G. Benson Harman. After the death of George W. Harman a controversy arose as to which was the principal debtor, the estate claiming that George W. Harman signed as surety for Benson, and Benson claiming that he signed as surety for George W. Harman. The claim was filed by Henry Hahn, the original payee in the note, and, before the hearing in the probate court upon the claim, suit was brought upon the note against Benson and judgment obtained, and a transcript of the judgment filed in Nemaha county, where Benson had land. Benson was attempting to procure a loan upon this land, and when he had done so, the money sufficient to pay the judgment against him on this note was retained. After the hearing in the county court and the claim against the estate disallowed, Benson took an assignment of the claim against the estate from Henry Hahn and paid off the judgment against him on the records in Nemaha county out of the said loan. An appeal was then taken in the name of Hahn to the district court from the disallowance of the claim in this case by the county court. Benson filed his peti-

tion in the case in the district court, in which he set out the foregoing facts, and alleged that he was surety on the note in question and that his father, George W. Harman, was the principal thereon. The district court, upon the trial, found this allegation to be true; and the evidence being sufficient to support this finding, the questions arising upon this record must be determined with reference to the fact that Benson was surety only for his father, who was the principal maker of the note.

The first question is presented by the motion filed in behalf of the estate to strike the petition from the files. This motion was predicated upon the theory that Benson Harman could not avail himself of the appeal taken by Henry Hahn, the original claimant. We think this motion was rightly overruled. Section 45 of the Code provides: "In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action." This applies to the prosecution of a claim against an estate in probate proceedings. In this case, Benson Harman, being surety on the note, was compelled to pay the same, and upon so doing took a written assignment of the claim from the owner of the note in which he was authorized to prosecute the claim in the name and stead of the original claimant; and there is no doubt of his right to do so. When the appeal was afterwards taken to the district court in the name of the original claimant, the court might allow the assignee to be substituted as the claimant in the action. It is true this was not formally done, but the assignee having filed the petition therein in his own name setting up the facts, the order of the court refusing to strike the petition from the files was equivalent to substituting the assignee for the original claimant.

The motion to dismiss the appeal because it had been abandoned by the original claimant may be disposed of upon the same grounds. There was nothing to show any abandonment of the appeal, except that the petition was filed in the name of the assignee instead of the original

claimant, and in that petition the facts were shown justifying such proceeding. The ruling of the court refusing to dismiss the appeal was, therefore, correct.

It is insisted that the judgment of the district court is not sustained by sufficient evidence, and in that connection it is suggested that at the time of the trial of this cause in the county court the then claimant, Henry Hahn, had no sort of claim against the estate; but to this we can not agree. The note on its face appears to be a joint note, but the fact was that the estate was the principal debtor and Benson was liable as surety only. Hahn, therefore, had a valid claim against the estate; the fact that he proceeded also against the surety would not invalidate his claim against the principal. When the surety was compelled to, and did, pay the claim, he succeeded to the rights of the claimant as hereinbefore shown, and he could either proceed in the name of the original claimant or be substituted for him, as he saw fit. He did proceed in the name of the original claimant until the time for filing petition in the district court, and it is immaterial whether he paid the claim before or after the hearing in the probate proceedings. The finding that he was entitled to recover upon this claim is supported by the evidence.

It is insisted that there was a settlement between Benson Harman and the other parties interested in the estate in which it was agreed that Benson Harman should pay this note in consideration of the favorable terms which he obtained in the settlement; but the trial court found otherwise, and we are satisfied that the evidence abundantly supports the finding of the trial court. We do not find any error in the record requiring a reversal of the case.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. CHARLES ANDREESEN AND JOHN HARMSEN, EXECUTORS.

FILED JULY 10, 1901. No. 10,005.

Commissioner's opinion, Department No. 2.

1. **Railroad Can Not Obstruct Watercourses; Must Construct Drain.** A railroad company in building its road has no right to obstruct natural watercourses, and must construct a culvert or drain with a proper grade to carry off the water from such natural stream which it crosses.

2. **Damages Notwithstanding Damages.** Damages are recoverable by a landowner against a railway company for maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner.

3. **Damages Accrue at Actual Overflow.** The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the railroad is built, but when the overflow actually results.

ERROR from the district court for Sarpy county. Tried below before SCOTT, J. *Affirmed.*

M. A. Low, W. F. Evans, C. S. Montgomery, Lorenzo W. Billingsley and *Robert J. Greene*, for plaintiff in error.

Charles L. Hover, contra.

OLDHAM, C.

The defendant in error, herein styled the plaintiff, sued the plaintiff in error, herein styled the defendant, in the district court of Sarpy county, Nebraska, for damages alleged to have been caused to the pasture lands, walnut grove and fish-pond of plaintiff's testator. These lands adjoined the right of way of the defendant, and were alleged to have been damaged by the negligent reconstruction of defendant's road-bed, by which a natural stream of running water was dammed and caused to flow back on the lands of plaintiff's testator. Plaintiff had judgment below, and defendant brings error.

The facts from which this controversy arises are, that on the lands of plaintiff's testator there was a running stream fed by a spring, which flowed down a narrow, deep ravine in a northeasterly direction and emptied into Pappio creek. Before defendant's railroad was built plaintiff's testator had constructed two fish-ponds by damming this ravine below the springs. A sluice-box was placed at the bottom of the dam of the first fish-pond through which the water passed into the second fish-pond and by a similiar appliance the water from the second pond was conducted back into the natural channel, through which it flowed into Pappio creek. This basin drained about ten acres of the land claimed to have been damaged by overflow on account of defendant's obstruction of this stream. In 1890 the defendant, by condemnation proceedings, procured a right of way running east and west through the lands of plaintiff's testator and across this running stream. By this proceeding the lower fish-pond and a portion of the upper fish-pond were condemned for defendant's right of way. When defendant first constructed its railroad it erected a trestling over the ravine, but destroyed the artificial connection between the two fish-ponds and filled up the second fish-pond with the exception of the lower end of it, which was left still connected with the natural channel of the stream that flowed into Pappio creek. Plaintiff's testator constructed a ditch from the upper fish-pond through the trestling of defendant's road and back into the lower part of the second pond for the purpose of conducting the water back into its natural channel, and, according to the testimony of all of plaintiff's witnesses, this furnished a sufficient drainage basin for these waters. In 1896 the defendant filled up this trestling with a solid embankment of earth, thereby destroying the artificial ditch that had been constructed for drainage under their right of way. Defendant placed a twenty-four inch tiling under its road-bed to take the place of this ditch for drainage purposes; and as to the sufficiency of this tiling to properly drain the lands on

the south side of the right of way this controversy depends. The negligence in the reconstruction of the road-bed which the evidence of plaintiff imputes to the defendant is that the tiling was placed about four feet higher than the bottom of the ditch which drained the lands before the fill was made, and that because of this elevation the water that was formerly conducted away by the ditch was dammed and caused to flow back on the lands of the plaintiff's testator, destroying about ten acres of his pasture lands and a walnut grove thereon. Plaintiff's testimony tended to show that prior to the reconstruction of this road-bed there had been no swamps or back-water on the lands in controversy and that the lands were good pasture lands and contained a valuable grove of walnut timber, and that on account of the overflow of the lands the walnut trees had been killed and the grass had been greatly injured. Defendant, in its brief, does not complain of the damages awarded as having been excessive, but contends that under the evidence and the law it was entitled to have had a verdict directed in its favor by the court below. It seems to contend that all the injuries complained of in this suit were included in the claim for damages which was awarded plaintiff's testator in the condemnation proceedings by which the land was taken for defendant's right of way. It also contends that there is no proof of any negligence in the reconstruction of the road, and that the statute of limitations has barred plaintiff's claim for damages.

With reference to the contention that the damages sued for in this cause were only such as were included in the award of damages allowed in the condemnation proceedings we can not agree with the conclusion of defendant's able counsel. Damages awarded in condemnation proceedings for a right of way are allowed on the supposition that the road will be skillfully constructed, not only with reference to the safety of the traffic on such railroad, but also that it shall be constructed in harmony with the spirit of the maxim which says, "So use your own as not to in-

jure another." Hence it has been held that injuries resulting from the unskillful construction of railroad culverts can not be estimated as a part of the damages for the right of way of a railroad company, and that proceedings for condemnation of the land to which the landowner and the company were parties shall not operate as an estoppel in an action for injury to his lands caused by the unskillful construction of culverts. *Ohio & M. R. Co. v. Wachter,* 123 Ill., 440, 5 Am. St. Rep., 532. *Emery v. Raleigh & G. R. Co.,* 102 N. Car., 209, 11 Am. St. Rep., 727. It is universally held to be the duty of a railroad company when its right of way passes over a stream of running water to so construct its road-bed as to carry off the water of the running stream, and any failure to perform this duty, on account of imperfect culverts or any other means of defective drainage which causes the water to flow back upon the lands adjoining the right of way, is actionable negligence. *Omaha & R. V. R. Co. v. Brown,* 29 Nebr., 492; *Sullens v. Chicago, R. I. & P. R. Co.,* 38 N. W. Rep. [Ia.], 545; *Bryant v. Bigelow Carpet Co.,* 131 Mass., 491; *Ohio & M. R. Co. v. Thillman,* 32 N. E. Rep. [Ill.], 529; *Johnson v. Atlantic & St. L. R. Co.,* 35 N. H., 569, 69 Am. Dec., 560.

The contention that the statute of limitations has barred this action seems to be founded on the theory that because the road was built in the year 1890 plaintiff should have immediately anticipated all the injury that might ever accrue to his land by reason of any defective construction of defendant's road, and have brought his action within the statutory period from the date of the completion of defendant's road. But this is not the law. A man has no right to anticipate an injury from the probable negligence of some one else. The statute of limitations does not run until the injury has been actually received. Plaintiff had no right to sue defendant until defendant injured him by a negligent act. His right of action did not accrue in this case until his land had been overflowed; hence the statute of limitations would run from the date of the over-

flow of the land, and not from the date of the completion of defendant's railroad. *Sullens v. Chicago, R. I. & P. R. Co. supra; Chicago, B. & Q. R. Co. v. Schaffer,* 16 N. E. Rep. [Ill.], 239; *Omaha & R. V. R. Co. v. Standen,* 22 Nebr., 343.

Defendant, in its brief, attacks the instructions of the court or rather some isolated paragraphs of them. These instructions were all given orally to the jury by consent of both parties to the suit, and they are not free from criticism on account of being illogically connected and lacking the clearness and precision that characterizes commendable instructions. But taken as a whole they certainly give the defendant the benefit of everything it was entitled to in this controversy—in fact two instructions were given, at the request of the defendant, that would appear to be clearly erroneous, and given as they were, without a proper qualification, might have misled the jury, to plaintiff's material damage; but as plaintiff prevailed below, these instructions will be held to be error without prejudice. The policy of giving oral instructions in the trial of important cases is never to be commended; and it is only permitted when consented to by both parties. It invites inaccuracy and a want of precision in the phraseology of the charge, which always leaves it open to criticism by the unsuccessful party in the suit. The parties who invite oral instructions, do so with notice of the probability of this defect. When the instructions so given, taken as a whole, fairly present the issues to the jury, we will not examine for fly-specks on the sentences and phrases that compose the charge.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

NOTE.—A Natural Watercourse.—Where surface-water having no definite source is supplied by falling rains and the melting snow from a hilly region or high bluffs, and owing to the natural formation of the surface of the ground is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains, and such has always been the case so far as the memory of man runs, such accustomed channel through which the waters flow may fairly be said to possess the atttributes of a natural watercourse. *Palmer v. Waddell*, 22 Kan., 352. Reaffirmed in *Union P. R. Co. v. Dyche*, 31 Kan., 120, cited in 33 Kan., 776.

A railroad company, in constructing its railroad across a natural watercourse, constructed a culvert of such insufficient dimensions that it would not permit all of the water of the stream during floods to flow naturally or through the culvert. Afterward the railroad was placed in the hands of a receiver, and while in his hands and during a flood, the water in the stream, by reason of the railroad and insufficient culvert, overflowed the plaintiff's land and injured his crops. The railroad company was liable in damages. *Union Trust Co. v. Cuppy*, 26 Kan., 754, cited in 43 Kan., 156, 53 Kan., 317, 423.—REPORTER.

STATE OF NEBRASKA, EX REL. F. D. HUNKER, V. FRANK WEST.

FILED JULY 10, 1901. No. 10,161.

Commissioner's opinion, Department No. 2.

Township: SUPERVISORS CAN FILL VACANCY IN THEIR BOARD. Where a vacancy occurs in a board of supervisors in a county under township organization the remaining members of the board constitute the proper authority to fill such vacancy.

ERROR from the district court for Cuming county. Tried below before EVANS, J. *Affirmed.*

F. D. Hunker, M. McLaughlin, J. C. Crawford and *T. M. Franse*, for plaintiff in error.

McNish & Oleson, contra.

OLDHAM, C

This was an information in quo warranto filed by the county attorney of Cuming county, Nebraska, to test the

legality of the appointment of the respondent to the office of supervisor of the third district of Cuming county. All the facts were set up in the information. The respondent demurred to the information, and his demurrer was sustained by the court below, the information dismissed, and relator brings error.

The only question involved in the controversy is as to the proper appointing power when a vacancy occurs by resignation in a board of supervisors in a county under township organization. It appears from the information that a vacancy occurred in the board of supervisors of Cuming county on account of the resignation of the member from the third supervisor district of said county. After this vacancy occurred the county clerk, the county treasurer and the county judge attempted to fill the vacancy by the appointment of Owen Kane, who immediately filed his bond, subscribed to the oath of office and demanded the office. The remaining members of the board of supervisors refused to recognize the appointment so made, and proceeded to appoint the respondent, Frank West, who immediately qualified and entered upon the discharge of his duties under the appointment made by the members of the board. Relator claims that the appointment in this case should be made as provided for in section 103, chapter 26, of the Compiled Statutes of 1897. In the case of the *State v. Taylor,* 26 Nebr., 580, it was held that this section of the statute did not apply to vacancies in a board of supervisors in a county under township organization under the law as it existed in 1883. It was there held that a supervisor, in respect to his election and appointment, was a township and not a county officer. Chapter 28 of the Laws of 1895, which is now chapter 18, article 4, of the Compiled Statutes of 1899, repealed all former acts governing township organization and substituted a new and complete act in lieu thereof. Section 7 of this act provides: "The county commissioners of any such county having adopted township organization shall each be assigned to the supervisor district in which he may

reside, or if two reside in one district then the one residing nearest the center of such district shall be the supervisor of such district and the other shall be the supervisor for the district nearest to his residence, and the three shall forthwith, appoint four supervisors to fill the vacancies in the other four supervisors' districts, and the newly appointed supervisors shall duly qualify and file their oath to office and bond with the county judge within ten days after such appointment. Any vacancy shall be filled by appointment by the remaining supervisors." We think that a fair construction of this section makes the concluding sentence confer the authority on the remaining members of the board to fill any vacancies that may occur in the board. If it had been the intention of the framers of this act to limit the power of the board in filling vacancies to such vacancies as existed at its first meeting, the last sentence of this section should have been eliminated, because the power to fill vacancies existing at the time a change is made in a county from the commissioner to the supervisor system is fully provided for with the last sentence of this section stricken out. In construing a statute, every word and sentence should be given full effect, if possible; and to give the concluding sentence of this section any force or effect whatever it must be interpreted to confer the power of filling any vacancy, occurring in a board of supervisors, on the remaining members of the board. In the case of *State v. Rankin,* 33 Nebr., 266, it was held: "Where a law creating an office specifically provides how vacancies occurring in such office shall be filled, such provision, and not the general law on the subject of vacancies, governs and controls the method of filling vacancies in such office."

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

LAURA A. GILBERT, APPELLANT, V. CATHERINE A. GARBER ET AL., APPELLEES.

FILED JULY 10, 1901. No. 10,218.

Commissioner's opinion, Department No. 2.

1. **Power of Collecting Agent Limited to Receipt of Money.** The power of a collecting agent, by the general law, is limited to the receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money and passes as such at par.

2. **Where Debtor Pays to Person Not Owner and Not in Possession of Note, the Burden is Upon Him to Show Payee's Authority.** One who makes payment to a second person, not the owner of the note and not in possession of it, of money to be applied in payment of the debt thereby evidenced, assumes the burden of proving that the party to whom payment was made was empowered to collect the money. *Richards v. Waller*, 49 Nebr., 639, followed.

3. **Receipt of Interest Payments Not of Itself Sufficient to Establish Authority.** A course of dealing by which a loan company has received and receipted for interest payments on a negotiable promissory note from the mortgagor or his assigns will not of itself be sufficient proof of its agency to receive and receipt for the payment of the principal of said note when said note is in the hands of an innocent person, for value, before maturity.

4. **Evidence Insufficient.** Evidence examined, and *held* not sufficient to show an agency for the collection of a negotiable promissory note.

APPEAL from the district court for Webster county. Heard below before BEALL, J. *Reversed.*

James McNeny, for appellant.

J. S. Gilham, Lorenzo W. Billingsley, Robert J. Greene, R. H. Hagelin and *A. H. Kidd, contra.*

OLDHAM, C.

This was an action to foreclose a real estate mortgage instituted by the appellant, herein styled the plaintiff, in the district court for Webster county, Nebraska. This

mortgage was given on lands in said county by the defendants, Catherine A. Garber and Joseph Garber, her husband, to secure the payment of a coupon note executed and delivered to James H. Tallman, of the firm of Moore & Co., of Hartford, Connecticut, which note was transferred before maturity for a valuable consideration, in the ordinary course of business, by James H. Tallman to the plaintiff herein. This loan had been negotiated through the agency of the Nebraska & Kansas Farm Loan Company of Red Cloud, Nebraska. As the interest coupons fell due the defendants would pay the amount due thereon to the Nebraska & Kansas Farm Loan Company at Red Cloud, Nebraska, and it would forward the same to the firm of Moore & Co., at Hartford, Connecticut, and that firm would pay the same to the holder of the note and the coupons would then be returned through the Nebraska & Kansas Farm Loan Company to the defendants. When the principal note became due the defendants Garber executed a new mortgage on the lands in controversy to secure a new note and coupons payable to the Nebraska & Kansas Farm Loan Company. The new note so executed was sold and transferred by said company to one Samuel Slocum, who was made a party defendant in this cause of action and filed an answer and cross-petition. The defendants Garber answered, admitting the execution of the note and mortgage and pleading payment of the full amount due thereon to the Nebraska & Kansas Farm Loan Company, which they allege was the duly authorized agent of Moore & Co. and of the plaintiff to receive such payment. At the trial below the cross-petition of Slocum was continued, and judgment was rendered for the defendants Garber and against the plaintiff, and plaintiff appeals.

Plaintiff contends that there was no evidence introduced below tending to show the agency of the Nebraska & Kansas Farm Loan Company to collect for the plaintiff the principal sum of the note in controversy, and certainly none in any way tending to show any authority to accept

a new loan in renewal of the old one. It is a well established rule of this court that a course of dealing by which even the mortgagee and payee of a negotiable promissory note has received and receipted for the interest payments on such note from the mortgagor or his assigns will not of itself be sufficient proof of his agency to receive and receipt for the principal of said note, when such note is in the hands of an innocent purchaser, for value, before maturity. *Eggert v. Beyer,* 43 Nebr., 711; *Stark v. Olsen,* 44 Nebr., 646; *Bull v. Mitchell,* 47 Nebr., 647. And if this kind of a course of dealing will not of itself prove an agency in a party named as payee in the note, much less would a similar course of dealing, by a stranger to the note, tend to prove such agency. We have looked carefully through the evidence preserved in the bill of exceptions in this case to see if there was anything proved beyond the course of dealing already set out in this opinion, tending to show any agency on the part of the Nebraska & Kansas Farm Loan Company to act for this plaintiff either in the collection of the principal sum of the note or in procuring a renewal of such note, and after a careful research we are unable to discover anything. Nor can we find anything in the record that tends to establish any relation, by any course of dealing between the plaintiff and the Nebraska & Kansas Farm Loan Company, that could give the latter the reasonable appearance of having been clothed with the authority of an ostensible agent by the plaintiff to perform such act. This court has held in the well-considered case of *Moore v. Pollock,* 50 Nebr., 900, "that the power of a collecting agent by the general law is limited to receiving for the debt of his principal, that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities." Now if we should be inclined to hold that the collecting of the interest on the principal debt and the remitting of same to the plaintiff by the Nebraska & Kansas Farm Loan Company did at least tend to show an osten-

sible agency for that purpose, still under the doctrine just announced the only agency that it could tend to show would be one to receive the payment of this debt in legal tender currency, and not an agency to extend the loan.

Defendants rely on the cases of *Phœnix Ins. Co. v. Walter*, 51 Nebr., 182, and *Thomson v. Shelton*, 49 Nebr., 644, as tending to support the judgment of the trial court in this case. The case of *Phœnix Ins. Co. v. Walter, supra*, is in some respects similar to the case at bar. In that case the note and mortgage were executed through the same instrumentalities as the one in the case at bar. The difference in the facts, however, which clearly distinguishes that case from this one is that the Phœnix Insurance Company, which was the holder of the note, had a course of dealing with the Nebraska & Kansas Farm Loan Company in which that company had acted as its collecting agent; while in this case no such course of dealing was ever shown to have existed between the plaintiff and that company; and while, in the case just cited, the loan was renewed, yet the renewal loan was sold and transferred by the Nebraska & Kansas Farm Loan Company and the proceeds thereof placed to the credit of the insurance company on their books, and the collecting agent of the insurance company was notified by the loan company of this collection, and a part of this collection appears to have been paid to the insurance company. Now in the case at bar there is no proof at all that one cent of the money received for the sale of the new note given to the loan company was ever credited to Moore & Co. or to this plaintiff, or that either of them was ever notified, either that the loan had been extended and a new note and mortgage taken, or that such new note had been sold or anything received from the sale thereof. In fact, the evidence shows that the plaintiff never had any knowledge of the existence of the Nebraska & Kansas Farm Loan Company, or any dealing of any kind whatever with it, so far as she knew. The case of *Thomson v. Shelton, supra*, differs from the case at bar in this, that the loan was paid in money to the mortgagee and payee of

the note; and in that case a course of dealing was shown between the mortgagee and the holder of the note which the court held was sufficient to show an ostensible authority on the part of the mortgagee to collect the note for the holder. To bring this case within that rule the payment should have been made in money to James H. Tallman and a course of dealing shown between Tallman, or his firm, with the plaintiff that would cause a prudent man to believe that Tallman had been authorized to make the collection for the plaintiff.

This case seems to stand on all fours, so far as the facts are concerned, with the case of *Richards v. Waller,* 49 Nebr., 639, in which it is said: "Where payment of a negotiable note secured by mortgage was made to an investment company and such payment was never forwarded to the party to whom such note had been transferred, held, that the mere fact that antecedent payments of interest made in like manner had been made to be forwarded to the transferee of such note, and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded, it being shown by the evidence that such holder had never in any way held out or recognized the investment company as her agent."

It follows from the above course of reasoning that the judgment of the district court is not founded on sufficient evidence to show the agency of the Nebraska & Kansas Farm Loan Company in taking a new loan from the defendants in payment of the plaintiff's claim, but as there has been no hearing in the court below on the answer and cross-petition of defendant Slocum, it is recommended that the judgment of the district court be reversed, with directions to the lower court to enter a judgment in favor of the plaintiff on her note and mortgage as prayed for in her petition.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed, with

directions to the lower court to enter a judgment in favor of the plaintiff on her note and mortgage as prayed for in her petition.

REVERSED.

December 4, 1901. Reversal modified. Case reversed generally.

PHILIP H. BENDER v. KINGMAN & COMPANY.*

FILED JULY 10, 1901. No. 9,810.

Commissioner's opinion, Department No. 2.

1. **Fraudulent Intent Always Question of Fact, But Not Always for Jury.** While by reason of section 20, chapter 32, Compiled Statutes, the intent of the vendor in an alleged fraudulent conveyance is always a question of fact, it does not follow that such question of fact must in every case be left to the jury.

2. **It is Proper to Direct Verdict, Where Evidence is Undisputed and Conclusions Are Foregone.** Where from uncontradicted evidence all reasonable men must conclude that the vendor's purpose in making a sale was to hinder creditors, and that the purchaser had notice of such intent prior to parting with the consideration, it is proper for the court to direct a verdict.

3. **Admissions of Vendor in Presence of Vendee Competent.** Admissions of the vendor in the presence of the vendee, before the latter parted with the consideration, as to the intent with which the sale was made, are competent, though coming after the vendee had taken possession, since they tend to show notice of the vendor's intent to the vendee.

ERROR from the district court for Thurston county. Tried below before EVANS, J. *Affirmed.*

George G. Bowman, R. G. Strong and *M. C. Jay,* for plaintiff in error.

James H. McIntosh, contra.

POUND, C.

This is an action of replevin involving possession of a

*Rehearing allowed.

stock of agricultural implements taken by defendants under attachments against Weiser Bros. and claimed by plaintiff as their vendee. The facts with respect to the transfer from Weiser Bros. to Bender are sufficiently set forth in the opinion in *Kingman & Co. v. Weiser Bros.*, 48 Nebr., 834. The trial court directed a verdict for the defendants, and such action and the receiving of testimony as to certain admissions made by Weiser Bros. are assigned as error.

Under section 20, chapter 32, Compiled Statutes, it is undoubtedly true that the intent of the vendor in an alleged fraudulent conveyance is always a question of fact. That is, certain circumstances appearing, it does not follow, as a matter of law, that there was fraudulent intent, but an actual intention to hinder, delay or defraud must have had a substantive existence in the mind of the vendor; and if there was no such intent, the law will not make one from his acts. But this question of fact differs in nowise from any other so far as the relative functions of the court and of the jury are concerned. Where, upon any issue of fact, the uncontradicted evidence is such that all reasonable men must reach the same conclusion, there is no need of submitting the issue to a jury and a verdict may be directed. *Elliott v. Carter White Lead Co.*, 53 Nebr., 458. The evidence as to the intent of Weiser Bros. in making the sale was the same as that set forth in *Kingman & Co. v. Weiser Bros., supra,* and could leave no doubt in the mind of any one that they intended to hinder and delay their creditors and sold the property for that purpose. It was no less clear from the plaintiff's own testimony and that of his witnesses that he had ample notice thereof before he parted with the consideration. He took possession before the attachments were levied. But an inventory was necessary to determine the exact amount to be paid, and whether he was to give notes to Weiser Bros. or they to pay him depended on whether the stock should prove to exceed or should fall below the value of a certain interest in lands to be conveyed by the plaintiff in payment or part

payment as the case might be. A bill of sale and a conveyance of the real property were drawn and were deposited in a bank pending the inventory, to be delivered "to the parties entitled thereto" on its completion. Before it was completed, notice of the intent of Weiser Bros. and of their financial condition was brought home to the plaintiff in more than one way, as the evidence conclusively establishes. He could and should have stopped then and there and rescinded, when these facts came to his knowledge. Until he had finally parted with the consideration, he could not claim to be an innocent purchaser. *Hedrick v. Strauss,* 42 Nebr., 485.

With respect to the evidence of admissions on the part of Weiser Bros. as to their purpose in making the sale, the case is no less clear. While these statements were made after plaintiff had taken possession, they were made in his presence, pending the inventory, and before the papers were exchanged. They were evidently received not to show the intent of the vendors, but to show that the vendee had knowledge of it. Coming before he parted with the consideration, they were clearly admissible for that purpose, and, under repeated rulings of this court, were sufficient to establish such notice. *Karll v. Kuhn,* 38 Nebr., 539; *Temple v. Smith,* 13 Nebr., 514.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

STURDEVANT BROTHERS & COMPANY V. FARMERS & MERCHANTS BANK OF RUSHVILLE.

FILED JULY 10, 1901. No. 10,060.

Commissioner's opinion, Department No. 2.

1. **Cashier Can Not Obligate Bank on Undertaking, Where It Has No Interest.** A cashier of a bank has no authority, merely by virtue of his office, to obligate the bank upon an undertaking in replevin in a cause wherein the bank has no interest.
2. **Bank Can Not Pledge Credit as Accommodation in Judicial Proceeding.** It is not within the powers of an incorporated state bank to pledge its credit, as a mere matter of accommodation, by executing undertakings in judicial proceedings.
3. **Where an Obligation is so Clearly Ultra Vires that No One Can Be Misled, No Estoppel Arises.** Where an incorporated bank becomes surety in such an undertaking, no estoppel to assert want of power to incur the obligation arises solely upon the ground that other parties have been misled and acted in reliance thereon to their disadvantage, since the obligation was so clearly *ultra vires* that the parties must have known it and taken their chances of the corporation carrying it out.
4. **The Bank Will Only Be Estopped Where It Has Acquired and Retains Property by Means of the Contract.** In such cases, the corporation will be held estopped only where it has acquired money or property by means of the contract in excess of its powers, and, having retained the same or the proceeds thereof, sets up want of power against the party seeking to enforce it.
5. **In Replevin, Defendant Being Required to Object to an Insufficient Surety, Can Not Rely on Estoppel by the Delivery of Property to Plaintiff.** The statutes make it the duty of a defendant in replevin to except to insufficient sureties upon the undertaking; and hence, where want of power in the surety is palpable, he can not rely upon delivery of property to the plaintiff by the sheriff as estopping the surety to make such defense.

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

Michael F. Harrington, Will H. Thompson and *James M. Kerr,* for plaintiffs in error.

William V. Allen, Willis E. Reed and *Harrison C. Brome, contra.*

Argued orally by *Will H. Thompson,* for plaintiffs; by *Willis E. Reed, contra.*

POUND, C.

This action was brought upon an undertaking in replevin, executed in the name of the defendant bank by its cashier. Trial was had to the court, without a jury, and the plaintiff prosecutes error from a judgment in favor of the defendant. The facts are substantially undisputed, and the only questions argued relate to their legal effect. At the time the undertaking in question was given, the defendant was a corporation organized under the state banking act. There were five stockholders: J. H. Armstrong, owning fifty-five shares; W. W. Wood, twenty shares; one Weeter, a non-resident, twenty shares; and W. D. Armstrong, the cashier, five shares. J. H. Armstrong was president and had the active management of the business. W. D. Armstrong was cashier, and these two, with Mr. Wood, who was vice-president, were directors. In November, 1890, one Ross, being about to bring an action of replevin against Sturdevant Bros., the plaintiffs herein, applied to Mr. Wood, who was a lawyer in Rushville, and had no part in the active management of the bank, to furnish a surety upon the required undertaking as an accommodation. Mr. Wood was not a proper surety under our statutes, and he referred Ross to W. D. Armstrong, at the same time cautioning the latter not to sign such a bond without the very best indemnity. W. D. Armstrong took an indemnity bond running to the bank and executed the required undertaking in the bank's name, signing it "Farmers & Merchants Bank of Rushville, by W. D. Armstrong, cashier." The sheriff accepted this undertaking and delivered the property in controversy to Ross. Trial was had about a month later, which resulted adversely

to Ross, and the property having been sold and disposed of by him after delivery under the writ, and the alternative judgment for its value remaining unsatisfied, suit was brought on the undertaking. The president and manager of the bank was absent at the time the undertaking was executed and did not even know that any person in the bank was upon the replevin undertaking till after trial and judgment in the replevin suit, nor did he know the exact status of the matter till about eight months after the bond was signed. Mr. Wood, as the evidence shows, had nothing to do with the conduct of the bank's business, but devoted his attention to the practice of law. Hence we do not think that his suggestion, made at his law office, that Ross apply to the cashier for a bond, is to be interpreted as an act in his capacity of director. He afterwards appeared in the cause as counsel, and the suggestion was evidently made as a lawyer, and not as a director of the corporation. What he may have said in his law office, while not engaged in the business of the bank, was not binding upon it. *Merchants Bank v. Rudolf,* 5 Nebr., 527. As the case stands, then, the bank must be held, if at all, by reason of the act of its cashier in executing the undertaking in its name. We feel clear that such an act was not within his authority, real or apparent, and we do not see how any one could have supposed that it was. The penalty of the bond and the amount for which judgment is sought are each within very little of the entire capital stock of the bank. Certainly the pledging of the bank's credit for so considerable an amount, as a mere accommodation, without benefit or advantage to the institution, was an act which ought to have received the serious consideration of the directors, if it could have been done at all. It is undisputed that the cashier had no actual authority so to do, and that the opinion of the directors was never taken. That it was not within his ordinary or ostensible authority is well settled. *Bank of Commerce v. Hart,* 37 Nebr., 197; *Rich v. State Nat. Bank,* 7 Nebr., 201; *Merchants Bank v. Rudolf,* 5 Nebr., 527; *Chase v. Swift*

& Co., 60 Nebr., 696; *Western Nat. Bank v. Armstrong*, 152 U. S., 346; *Farmers & Merchants Nat. Bank v. Smith*, 77 Fed. Rep., 129; *State Nat. Bank v. Newton Nat. Bank*, 66 Fed. Rep., 691; 4 Thompson, Corporations, secs. 4754, 4762. In *Farmers & Merchants Nat. Bank v. Smith* it was held that it was not within the powers of the bank to engage in the business of selling mortgage bonds on commission, and that no act of an officer in excess of the corporate powers could be said to be within the scope of his customary authority. In *Western Nat. Bank v. Armstrong* the court say, in speaking of a transaction out of the usual course of banking: "Such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority." Some attempt was made, indeed, to show that it was customary for banks in this state to execute bonds and undertakings in judicial proceedings. But the evidence shows merely that officers of banks as individuals were in the habit of accommodating each other and their customers, and falls far short of showing that the corporations themselves ever engaged in such practice. Even if the conversation of Ross and Wood out of the bank and the act of the cashier thereafter could be construed as an act of a majority of the directors, we do not think that the execution of a replevin undertaking in an amount nearly equaling the entire capital stock of the bank, as an accommodation, in a cause wherein the bank had no interest, was within the powers of the bank, so that, of itself, the act of a majority of the directors could bind it. *Western Nat. Bank v. Armstrong*, 152 U. S., 346; *Farmers & Merchants Nat. Bank v. Smith*, 77 Fed. Rep., 129; *Commercial Nat. Bank v. Pirie*, 82 Fed. Rep., 799; *Lucas v. White Line Transfer Co.*, 70 Ia., 541, 30 N. W. Rep., 771. Where so extravagant a liability is incurred without benefit to the bank and as a mere accommodation, the interests of depositors and stockholders have to be taken into account. It would be highly impolitic to permit the money of de-

positors placed in a bank on the faith of its capital, to be imperiled by sanctioning such transactions. If the act is of a nature which public policy or the very nature of the corporation prohibits it from doing, there could be no ratification. *Thompson v. West,* 59 Nebr., 677. Thus, in *Lucas v. White Line Transfer Co., supra,* the officers of a corporation engaged in the freight and transfer business signed its name to a bond as surety for a third person by way of guaranty of his credit. Afterwards the president of the company wrote a letter in its name agreeing to pay the amount called for by the bond. It was held that neither act created any liability. But even if the act here in question be held not to be of this class but to belong rather with such unauthorized transactions as that involved in *State v. Bank of Hemingford,* 58 Nebr., 818, and to be capable of ratification, yet we do not think any ratification has been shown. Cases such as the one last cited, where the bank enters into a systematic course of unauthorized dealing in merchandise, keeping and retaining the merchandise or its proceeds, are very different from the one at bar. This case is to be compared rather to *Western Nat. Bank v. Armstrong,* 152 U. S., 346, where, as the court said, it did not appear "that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction." The pledge of the bank's credit in this case was on its face purely an accommodation. The bank could in no possible way be better off by reason of such gratuitous assumption of liability.

It is argued that the bank is estopped to assert want of authority by reason of silence on the part of its officers till after the trial of the replevin suit, and the retaining of an indemnity bond furnished by the plaintiff in replevin. But it appears that the chief managing officer of the bank and principal stockholder therein had no knowledge of the manner in which the bond had been executed till after the replevin case had been tried, and that he repudiated the act at once when he learned what had been

done, and caused the cashier to be removed. Silence while ignorant of the facts was no ratification (*Western Nat. Bank v. Armstrong,* 152 U. S., 346); if silence could in any event be treated as a ratification of such an act. *German Nat. Bank v. First Nat. Bank,* 55 Nebr., 86. Nor do we think that, had the facts been known, silence could be held to work an estoppel in a case of this kind, since the undertaking was so clearly outside of the bank's powers that no one had any cause to be misled thereby or to suppose that he was doing more than take his chances of performance. 5 Thompson, Corporations, sec. 6009; *Lucas v. White Line Transfer Co.,* 70 Ia., 541, 30 N. W. Rep., 771. The principle that a corporation, which has entered into a contract in excess of its powers and received the fruits or benefits thereof, will not be permitted to set up want of authority is not applicable to this controversy. The cases coming under that principle will be found to be those wherein the corporation has "acquired money or property by means of a contract in excess of its powers, and then, when the other party contracting seeks to enforce against the corporation the obligation which it has assumed therein, pleads that it had no power to enter into the contract, and at the same time keeps the money or the property." 5 Thompson, Corporations, sec. 6018. With respect to the indemnity bond taken by the cashier when he executed the replevin undertaking, it may be observed that the bank is not asserting, nor has it asserted, any rights under that bond. Nothing whatever has accrued to the bank's advantage by reason of it. Furthermore, no act of the directors adopting or accepting such indemnity is shown. In this respect *German Nat. Bank v. First Nat. Bank, supra,* is analogous.

It is said also that the bank is estopped to claim that the act was beyond its powers because the property replevied was taken away from the now plaintiffs by virtue of the undertaking. But the bank did not deprive the plaintiffs of any property. The sheriff was not bound to and should not have delivered the property upon such an undertaking.

The parties should not have acquiesced in his so doing by failure to except as required by law or to make objection at any time. The insufficiency of the surety on the undertaking was palpable, and the sheriff and the plaintiffs herein are fully as much to blame as the bank. Having themselves to blame for resting so long upon such doubtful security, plaintiffs may not invoke the rule as to incidence of liability where one of two innocent parties must suffer.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

CHARLES GROTTE V. SAMUEL N. WEIL & COMPANY.

FILED JULY 10, 1901. No. 10,241.

Commissioner's opinion, Department No. 3.

1. **Retiring Partner is Liable for Debts of Firm, Unless Released by Creditors.** A retiring partner remains liable for all the existing debts of the firm to the same extent as if he had not retired. The agreement between him and the remaining partner, that the remaining partner will assume and pay all existing debts of the firm while valid as between themselves, can not change their relation to the creditors, unless the creditors become parties thereto.

2. **Diligence is Required on the Part of Creditor.** The creditor of the firm, after notice comes to him of the retirement of one partner and the assumption of the firm debts by the other member, should deal with reasonable diligence in the management of any securities in his hands for the payment of his claim, and exercise due caution in seeing that no advantage is taken of the retiring partner; but this is all that can be required.

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

O'Neill & Gilbert, for plaintiff in error.

E. G. McGilton, Montgomery & Hall and *C. A. Goss, contra.*

DUFFIE, C.

Charles Grotte, the plaintiff in error, and Katy Grotte were partners engaged in the wholesale liquor business in the city of Omaha, and in July, 1895, the partnership became indebted to Weil & Co., of Cincinnati. On October 2, 1895, Charles Grotte sold his interest in the business to his copartner, Katy Grotte, she on her part agreeing to pay all outstanding liabilities of the firm and to hold him harmless from the same. October 3, 1895, what appears to be a circular letter was sent to Weil & Co. in which it was stated that Charles Grotte had retired from the firm and had no further interest therein, and that the new management had assumed and would pay all indebtedness. This letter was received by Weil & Co. in due course of mail. On October 4, Charles Grotte wrote a personal letter to Weil & Co. in which he stated that he had retired from the firm of Grotte & Co., and soliciting employment as traveling salesman for them. To this letter Weil & Co. replied on October 6, in which letter they called attention to the indebtedness of Grotte & Co., and said, "You are aware you are responsible to us for this debt." March 9, 1896, the indebtedness due Weil & Co. had been reduced to $296.80, and on that date Katy Grotte executed her note to Weil & Co. for the amount, Matthew A. Hall becoming surety thereon. This note was taken by the law firm of McCabe, Wood, Elmer & McGilton, to whom Weil & Co. had sent the account for collection. We wish to remark here that the plaintiff in error insists that Weil & Co. took this note in payment of the account, while defendants in error claim that the note was taken as collateral security and without prejudice to the right of Weil & Co. to sue the account any time. The note, when received by Weil & Co.,

was discounted at a bank in Cincinnati, and at its maturity the Cincinnati bank sent it to Omaha for collection, where it was protested for non-payment, returned to the Cincinnati bank and taken up by Weil & Co. The account of Grotte & Co. was credited with the amount of the note when received, and the account closed, but upon the note being protested and returned to Weil & Co., the account was charged with the amount of the note. On again coming into possession of the note Weil & Co. sent it to their attorneys in Omaha for collection, and when payment was demanded of Hall, the surety, he requested the attorneys to commence suit on the account, promising when judgment was obtained to purchase the judgment. At a later date, and as testified to by Hall and McGilton, who had the note in charge, Hall gave his personal check for the amount of the note, not as payment, nor to be sent to Weil & Co., but as an evidence of his good faith in agreeing to purchase any judgment that might be obtained against the members of the firm of Grotte & Co. on the account, it being understood that McGilton was to hold the check in his own possession until after the trial of the cause. Suit was brought on the account in the county court against the firm of Grotte & Co. and the individual members thereof, and judgment entered for the plaintiff in said action. Charles Grotte appealed to the district court, and the court, after the evidence was closed, directed the jury to return a verdict for the plaintiff, and from a judgment entered on this verdict the plaintiff in error has brought the case to this court. After the entry of judgment in the county court, Hall borrowed money from one Montgomery, with which he purchased the judgment from Weil & Co. and took an assignment thereof to Montgomery.

Several errors are assigned, but the material question for our consideration is whether the court erred in directing a verdict for the plaintiff. If the court was right in directing a verdict, the other errors assigned and argued are immaterial. The plaintiff in error is undoubtedly right in his contention that after a sale of his partnership

interest to Katy Grotte, one of the considerations of which was that she should assume and pay the firm indebtedness, she, as between themselves, became the principal debtor, and he a surety. Did Charles Grotte occupy the relation of a surety to Weil & Co.? At the time Grotte & Co. purchased from Weil & Co. the goods on account of which this indebtedness was contracted the firm of Grotte & Co., Charles Grotte and Katy Grotte, the individual members of the firm, were each and all primarily liable for the debt, and the question is, can two parties, each being primarily responsible to a creditor for the payment of a debt, change the relation of one of them by some agreement among themselves and to which the creditor is not a party, in such a way that one of those shall become a surety only for the payment of the debt and change the relation existing between them and the creditors so as to require the creditor to deal with that party as though he had been a surety only at the inception of the account? This is still an open question in this state, and as the courts of the country are divided, we are at liberty to adopt the rule that we see fit, and one which we think is the better rule. The following cases hold that partners, by an agreement among themselves, may make one partner a surety for the payment of the firm creditors and compel the creditors, in the collection of their claim, to deal with him upon the strict rules applicable to the rights of a surety: *Stone v. Chamberlin,* 20 Ga., 259; *Hoopes v. McCan,* 19 La. Ann., 201; *Barber v. Gillson,* 18 Nev., 89; *Bell v. Hall,* 5 N. J. Eq., 477; *Millerd v. Thorn,* 56 N. Y., 402; *Colgrove v. Tallman,* 67 N. Y., 95; *Gates v. Hughes,* 44 Wis., 332. The cases holding a contrary doctrine are: *Mason v. Tiffany,* 45 Ill., 392; *Williams v. Boyd,* 75 Ind., 286; *Aiken v. Thompson,* 43 Ia., 506; *Rawson v. Taylor,* 30 Ohio St., 389; *Whittier v. Gould,* 8 Watts [Pa.], 485; *Morton v. Richards,* 13 Gray [Mass.], 15; *McCoy v. Jack,* 34 S. E. Rep. [W. Va.], 991. The general rule relating to all contracts is that the parties thereto can not change their relation to each other except by a new contract to that effect based upon some

new consideration. This rule, in its application to cases like the one under consideration, is spoken of by Judge Story in the following language: "It frequently happens, that upon the retirement of one partner, the remaining partners undertake to pay the debts and secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners; and can in no respect be admitted to vary the rights of existing creditors of the firm." Story, Partnership, sec. 158. We do not wish to be understood as holding that the creditors of a firm, upon learning that one partner had retired, will not be held to the duty of acting in good faith in the management of security placed in his hands for the payment of his claim, or in the preservation of liens and in the application of payments made. Should the creditors fail, after notice to perform these duties, and such failure result in damage to the retired partner, it might well be regarded in a court of equity as cause to release him, at least to the extent of his damage. In such case the terms of the contract have not been changed; but the fact that new relations had arisen between the partners, by which one assumes as between them the burdens of all, might well call upon the creditors to act in such way as not to injure the retiring partner. We can not, however, go to the extent of holding that a contract upon which two persons agree with a third to be jointly and primarily liable for a debt can be changed by the agreement of the debtors themselves so as to require the creditor to accept one as a principal debtor and the other as a surety for its payment. With this as our view of the law, and with the remark that we can not discover in the record any bad faith on the part of Weil & Co. in the steps taken for the collection of their claims, it becomes unnecessary to examine other matters discussed in the brief of counsel for the plaintiff in error. We might say, however, that it appears to us that there was no consideration whatever existing for the note given by Mr. Hall. The evidence is undisputed that when the note was taken, McGilton, who

held the claim for collection, refused to make any agreement for the extension of time, and expressly reserved the right to sue the account whenever he saw fit. It was expressly agreed that this note should be held as collateral security, and a sale of the note by Weil & Co., if to discount it means that a sale was made, would simply be a conversion of the note upon the part of Weil & Co. The evidence is also undisputed that the check given by Hall was not to be used in the payment of this claim, but was to be held by McGilton in the nature of a security that Hall would perform his agreement and buy whatever judgment Weil & Co. might recover upon their account against Grotte & Co. and the partners of that firm.

We discover no error in the record, and recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

WILLIAM GLOVER ET AL. V. HARGADINE-MCKITTRICK DRY GOODS COMPANY ET AL.

FILED JULY 10, 1901. No. 10,168.

Commissioner's opinion, Department No. 3.

1. **Demurrer for Want of Equity, Presents the Question of Whether Plaintiff Has Adequate Remedy at Law.** When a petition is evidently framed for the purpose of setting out an equitable cause of action, a general demurrer thereto is equivalent to a demurrer for want of equity under the former practice, and presents the question whether the plaintiff has an adequate remedy at law.

2. **In Action to Set Aside Fraudulent Conveyance. Vendor Always Proper, But Not Always Necessary, Party.** The vendor in a conveyance alleged and proved to have been fraudulently made and to be for that reason void as against creditors is always a proper, but not in all cases a necessary, party to an action by the latter to set the instrument or transaction aside. If he has

reserved or retained no title or interest in or lien upon the property, but has parted with it both absolutely and completely, he has no rights to be affected by the result of the litigation and his presence may be dispensed with.

3. **Garnishment: LIEN: ACTION FOR DAMAGES: CREDITOR'S BILL.** By proceedings in garnishment, an attachment or judgment creditor may acquire a lien upon personal effects in the possession of a vendee who has acquired them by means of a sale or transfer fraudulent as against the creditors of the vendor, and in a case in which an action for damages, as at the common law, would not afford an adequate remedy, the lien may be enforced in equity by an action in the nature of a creditor's bill.

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

E. E. Carr, George B. France and *Tibbets Bros., Morey & Anderson*, for plaintiffs in error.

Hainer & Smith, contra.

AMES, C.

This is a proceeding in error to review a decree by Judge Sedgwick, sitting in the district court for Hamilton county. On the 5th day of September, William R. Smith, who was a merchant in business at the city of Aurora, in that county, made a sale and delivery, which the court found, upon sufficient evidence, to be fraudulent and void as to creditors, of all his stock in trade to the above-named plaintiffs in error. On the 6th day of October, 1896, the defendants, Hargadine-McKittrick Dry Goods Company, obtained a judgment against Smith in the county court, and on the same day, after execution returned "no goods," procured a summons in garnishment to be issued and served on Glover and Farney, who, on the 2d day of November, answered, denying the indebtedness to Smith or the possession of any money or property belonging to him. On the 7th day of that month the dry goods company began this action by a petition commonly called a creditor's bill, reciting the proceedings in the

county court and praying to have the conveyance of his goods by Smith set aside as fraudulent as to creditors and a sufficient amount of the goods or of the value or proceeds of them applied to the satisfaction of their judgment. On the 7th day of September the defendant, the Hamilton County Bank, also began an action in the district court against Smith and caused an order of attachment to be issued and to be served, together with a notice in garnishment, upon the fraudulent vendees. This action proceeded to judgment upon December 7, and three days afterwards the garnishees made answer to the same effect as that made by them in the other case in the county court. Upon both answers the garnishees were discharged. To this action the Hamilton County Bank was made a party, but Smith was not. The former, in due season, filed an answer and cross-petition, setting forth the proceedings in its action against Smith and in other respects substantially like the petition of the plaintiffs. To these pleadings, separately, the plaintiffs in error filed demurrers upon three grounds, of which the first and third only are insisted upon in argument, namely, that there is a defect of parties defendant, and that the petitions do not state facts sufficient to constitute a cause of action against them. On December 5, after garnishment proceedings in the county court had been concluded and while those in the district court were pending, but after the beginning of this action, Smith made a general assignment for the benefit of his creditors. Both demurrers were overruled, and the plaintiffs in error filed answers, which, for the purpose of this opinion, may be regarded as general denials, with the addition of specially pleading as separate defenses, the proceedings in garnishment and their discharge therein and the making of the assignment for the benefit of creditors. To these two special defenses the court sustained demurrers. Plaintiffs in error then made a written demand for a trial by jury, which was denied, and the cause proceeded by the usual course to a decree finding all the issues joined in favor of the plaintiff and cross-petitioner, and adjudging

a first lien on the property in controversy in favor of the plaintiffs in error for moneys alleged in their answer and proved to have been disbursed by them in payment of taxes, and a second lien in behalf of the plaintiff and cross petitioner and providing for the satisfaction of the same out of the proceeds of the stock of goods which had been sold and disposed of by the defendants in the action during its pendency.

If the demurrers to the petition and cross-petition were properly overruled, the exception to the denial of the motion for a trial by jury was not well taken. When a petition is evidently framed for the purpose of setting out an equitable cause of action, a general demurrer thereto is equivalent to a demurrer for want of equity under the former practice, and presents the question whether the plaintiff has an adequate remedy at law. *Gullickson v. Madsen,* 87 Wis., 19, 57 N. W. Rep., 965, and cases cited. The vendor in a conveyance alleged and proved to have been fraudulently made, and to be for that reason void as against creditors, is always a proper, but not in all cases a necessary, party to an action by the latter to set the instrument or transaction aside. If he has reserved or retained no title or interest in or lien upon the property, but has parted with it, both absolutely and completely, he has no rights to be affected by the result of the litigation and his presence may be dispensed with (*Potter v. Phillips,* 44 Ia., 353, 357; *Campbell v. Jones,* 25 Minn., 155; *Smith v. Grim,* 26 Pa. St., 95); and the case is the same when it is sought to enforce a lien against the property. *McCormick v. Lawton,* 3 Nebr., 449. If, by reason of the garnishment proceedings, or the pendency of the action, or both, the defendants in error had acquired liens upon the property, or the same had been taken into the custody of the law at the time of the making of the assignment for the benefit of creditors, that instrument was wholly inoperative upon it. The investigation is, therefore, narrowed to the inquiries whether, by the means mentioned, the defendants in error acquired liens upon the property or

placed it *in custodia legis,* and if so, whether their rights are enforceable to this action in equity. To the first two of these questions this court has already given an answer plainly deducible from the statute. The statute enacts, "An order of attachment binds the property attached from the time of service and the garnishee shall stand liable to the plaintiff in attachment * * * from the time he is served with the written notice," etc. Code of Civil Procedure, sec. 212. Now, it is provided by preceding sections that the order of attachment shall be served upon the garnishee, together with the notice, and the return of the officer shall show the names of the garnishee and the time of service upon each. All the accessible property levied upon is taken into the actual possession of the officer and is, of course, bound from the date of the levy, so that express legislation to that effect is unnecessary, and the word used in section 212 is not "levy," but "service," having evident reference to the same term in the preceding sections relative to the process of garnishment. But to bind specific property for the payment of money or the doing of any other act, is the very definition of a lien. This court accordingly held in *Reed v. Fletcher,* 24 Nebr., 435, not only that the plaintiff in attachment undoubtedly acquires an equitable lien by the garnishment proceedings upon the effects in the hands of the garnishee, but that by such proceedings the property is taken into the custody of the law so that it can not hereafter, pending the proceedings, be actually seized upon mesne or final process against the debtor. To the same effect is *Northfield Knife Co. v. Shapleigh,* 24 Nebr., 635, in which case execution creditors were enjoined from levying their writs upon property in the hands of the garnishee and it was held that if the latter should abandon the property, the court would appoint a receiver to administer the trust. The doctrine of these cases is reaffirmed in *Grand Island Banking Co. v. Costello,* 45 Nebr., 119, and the matter ought now to be considered as finally set at rest. Counsel for plaintiffs contends, adversely to his argument in support

of the demurrer for defect of parties, that only such effects are reached by garnishment as the debtor himself might, in its absence, have asserted a right or title to; and that as it is shown by the circumstances of this case, that the debtor parted absolutely and completely with all his right, title and interest in the property, there was nothing in the hands of the garnishee, upon which the proceedings in garnishment could lay hold and that the garnishee, after his answer, having been discharged by order of the court, the proceedings had then come to an end. If this was true, then, as is said in *Northfield Knife Co. v. Shapleigh, supra,* "proceedings in garnishment would be an expensive farce, which would give the attaching creditor no rights under the attachment." The lien is created, not by the answer of the garnishee, and the order of the court thereon, but by the process and service upon the garnishee, and is affected by no interlocutory order of the court so long as in one case the attachment remains in force, or in the other the judgment remains unpaid; provided, of course, proceedings for its enforcement shall be begun within the statutory period of limitations. There is no force in the objection that property parted with by the debtor in fraud of his creditors is not charged with the lien. As to the creditors, it is still his property, and, as was held by the court in *Smith v. Sands,* 17 Nebr., 498, the fraudulent vendee takes and holds the property in trust for the creditors. All that, in such case, the garnishment does is to convert what was before a trust for all the creditors, generally, into specific trusts in behalf of the persons suing out the process. The above cited decisions of this court seem also to have sufficiently settled the question of practice. The statute enacts that the lien may be enforced by an action. An action has been aptly defined to be "any proceeding in a court of justice for the enforcement or protection of a right or the redress or prevention of a wrong." The statute does not provide what shall be the particular nature of the action; and the fact that the lien is created by statute, indicates nothing in that regard. The nature of the action

is, as in other cases, to be determined by the character and circumstances of the litigation. Where an ordinary suit at law will afford an adequate remedy, it should, doubtless, be employed; but when, as in the case at bar, there is a fraudulent conveyance to be set aside and conflicting liens to ascertain and adjust, and the fraudulent vendee is disposing of the goods and converting them to his own use, so that an accounting is requisite, the forms and machinery of a common law action are manifestly unsuited to the situation, and incapable of affording adequate relief, and there is no reason why resort may not be had to equity.

For the foregoing reasons 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.

UNIVERSITY OF MICHIGAN, APPELLANT, V. ANNA MCGUCKIN, ADMINISTRATRIX, APPELLEE.*

FILED JULY 10, 1901. No. 10,080.

Commissioner's opinion, Department No. 3.

1. **Marriage Is a Civil Contract.** In this state marriage is a civil contract, and whenever the minds of parties, capable of entering into such a contract with each other, meet in a common consent thereto, at the same time, there is a valid marriage.

2. **Facts Will Not Be Reviewed in Absence of Bill of Exceptions.** In the absence of a bill of exceptions the findings of the trial court on a question of fact will not be reviewed.

3. **Answer Sufficient.** Answer examined, and *held* to contain a sufficient averment of marriage between the defendants, when assailed for the first time on appeal.

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

*Rehearing allowed.

Wright & Thomas and *Wright & Stout,* for appellant:

This action was brought to foreclose a mortgage executed by Daniel L. McGuckin. After the commencement of the action, it was discovered that defendant Anna McGuckin was living with her co-defendant Daniel McGuckin, claiming to be his wife. By leave of court, she was made a party defendant, for the purpose of cutting out any claim of right she might assert in or to the property. She answered, setting up that she was and is the wife of Daniel McGuckin. The court held, as a conclusion of law, that Anna McGuckin was the wife of Daniel L. McGuckin at the date of the execution of the mortgage, and that the property in question was the homestead of Anna McGuckin.

The fact of copulation after a promise *per verba de futuro,* is simply evidence presumptive of a promise *de præsenti.* The fact of living together, is not itself marriage. It is simply presumptive evidence that a promise was made. The court can not, under these findings of fact, indulge in any presumption. The simple question left for the court to decide is whether a promise *per verba de futuro cum copula,** spoken and performed when the parties were incapable of entering into the marriage relation, constitutes a marriage. As to what constitutes a common law marriage: *Duncan v. Duncan,* 10 Ohio St., 181, 183; *Barnum v. Barnum,* 42 Md., 251, 297; *Stoltz v. Doering,* 112 Ill., 234; *Crymble v. Crymble,* 50 Ill. App., 544; *Cartwright v. McGown,* 121 Ill., 388; *Cheney v. Arnold,* 15 N. Y., 345; *Holmes v. Holmes,* 1 Abbott (C. C.), 525, 538; *Cram v. Burnham,* 5 Me., 213; *Carter v. Parker,* 28 Me., 509; *Collins v. Collins,* 80 N. Y., 1, 11; *Goldbeck v. Goldbeck,* 18 N. J. Eq., 42; *Robertson v. State,* 42 Ala., 509; *Clark v. Cassidy,* 64 Ga., 662, 666; *Estate of Beverson,* 47 Cal., 621; *Van Tuyl v. Van Tuyl,* 57 Barb. [N. Y.], 235; *Ahlberg v. Ahlberg,* 24 N. Y. S., 919; *State v. Worthingham,* 23 Minn., 528.

*By words concerning [the] future with copulation.

A homestead may be abandoned by wife while husband is still living. *Dickman v. Birkhauser,* 16 Nebr., 686.

I. R. Andrews and *J. J. Breen, contra.*

ALBERT, C.

This action was brought by Elizabeth H. Bates against Daniel L. McGuckin and Anna McGuckin to foreclose a mortgage, executed by the first-named defendant to the plaintiff. Anna McGuckin resisted the foreclosure on the ground that at the time of the execution of the mortgage, and at all times subsequent thereto, she was the wife of her co-defendant, and that the mortgaged premises was their family homestead; that the mortgage, not having been signed and acknowledged by her, was void. The reply was a general denial. A trial of the issues joined resulted in a finding and decree in favor of the defendant, to reverse which the case is brought to this court on appeal. For reasons not necessary to state in detail the case is now prosecuted under its present title.

The first question presented is whether the findings of the trial court are sufficient to sustain the decree. The appellant challenges the sufficiency of the finding on two grounds, which will be considered in their order.

It is first urged that the findings do not establish a marriage between Anna McGuckin and her co-defendant. The finding on this point is as follows:

"4. The court further finds that the said Anna McGuckin entered the home of Daniel L. McGuckin in the month of April, 1880, as housekeeper for Daniel L. McGuckin; that she was then the wife of James Lavelle; that at the solicitation and expense of Daniel L. McGuckin, she commenced an action for divorce against said James Lavelle, in Burt county, Nebraska, and that a divorce was granted her on May 4, 1880, in the district court of Burt county, Nebraska; that at the time of the filing of her petition in Burt county, Nebraska, she was living in Burt county, Nebraska, and that her parents with whom she had

made her home since separating from said James Lavelle, were residing in said Burt county, Nebraska.

"5. That in April, 1880, Daniel L. McGuckin was a married man and that he obtained his divorce from his wife in August, 1880, and that said Anna McGuckin did not know of the fact that Daniel L. McGuckin was married until May 4, 1880; that at a time prior to the obtaining of her divorce, to-wit, on May 4, 1880, said Daniel L. McGuckin and Anna McGuckin promised to marry as soon as she should get her divorce, and that they commenced cohabiting together at that time and continued to so cohabit until April, 1893; that the said Daniel L. McGuckin again promised to marry the said Anna McGuckin after she got her divorce and before he obtained his divorce, and promised that he would so marry her as soon as he could procure a divorce from his wife; that pending his action for divorce they cohabited as husband and wife and held each other out to the world as husband and wife, and that no marriage ceremony was ever performed, and that she continued to live with and cohabit with the said Daniel L. McGuckin until the spring of 1893; that they announced themselves as husband and wife to her relatives and so conducted themselves wherever they went; that he introduced her as his wife in society and in the church, and spoke of her as his wife in stores where they traded; addressed her as Mrs. McGuckin in the presence of company, paid her bills and supported her as his wife; that Daniel L. McGuckin gave her an engagement ring and a wedding ring; that she gave birth to five children, whose paternity Mr. McGuckin has always acknowledged, and who were duly baptized in the Catholic church as children of legally married parents; four of said children are still living; that the promises above made were the only promises ever made, and that no new promise was made after the obtaining of the divorce by Daniel L. McGuckin, nor was there any apparent change in their manner of living, or holding themselves out as husband and wife."

In our opinion, the foregoing is a finding of a marriage

between the parties. Marriage, in this state, is purely a civil contract, and whenever the minds of parties, capable of entering into a marriage contract with each other, meet in a common consent thereto at the same time, there is a valid marriage. *Bailey v. State,* 36 Nebr., 808. No particular form of words is required to express such common consent. The announcement of the parties to her relatives that they, the defendants, were husband and wife, in itself shows a meeting of their minds at the same time in common consent to bear that relation each to the other. That the relations between the parties, before divorce from their respective spouses, was meretricious, is immaterial, so long as their minds did meet, as before stated, at a time when they were both free to enter into a contract of marriage. *State v. Zichfeld,* 62 Am. St. Rep. [Nev.], 800; *Poole v. People,* 65 Am. St. Rep. [Colo.], 245.

It is next urged that the defendant, Anna McGuckin, had waived or abandoned her right to claim a homestead as against the appellant. The question involved is purely one of fact, and as such was submitted to the court, and the court found against the appellant. The evidence is not before us, and it will be presumed that the findings of the court are sufficiently sustained by the evidence.

It is next urged that the answer of Anna McGuckin does not allege that she was the wife of her co-defendant at the time the mortgage was executed. This fact might have been pleaded with greater certainty, but, in our opinion, it sufficiently appears when called in question for the first time on appeal.

The decree of the district court should be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the decree of the district court is

AFFIRMED.

NOTE.—Marriage as a contract, *Goodrich v. Cushman,* 34 Nebr., 460; solemnization, *Haggin v. Haggin,* 35 Nebr., 375. As to license. *Idem.* —REPORTER.

C. H. MCCORMICK & BROTHER V. JAMES W. CAREY.

FILED JULY 10, 1901. No. 10,107.

Commissioner's opinion, Department No. 3.

1. **In Proceeding to Revive Judgment, Plea of Payment Admits Validity.** In a proceeding to revive a dormant judgment the defendant, by plea of payment, admits the validity of the judgment sought to be revived.

2. **Party Entitled to Jury.** On issue joined on such plea it is error for the court to deny a request of a party to the proceeding for a trial by jury.

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

Harvey D. Travis, Henry H. Wilson and *Ricketts & Ricketts,* for plaintiffs in error.

Lyron Clark, A. L. Timblin and *C. A. Rawls, contra.*

ALBERT, C.

Two proceedings were instituted by plaintiffs in error in the county court of Cass county for the revivor of two judgments against the defendant in error. They were carried on appeal to the district court and there consolidated. The defense, when reduced to its simplest terms, is, first, that the court rendering the judgments had no jurisdiction over the defendant for want of service of process; second, that it had no jurisdiction to render the particular judgments, for the reason that C. H. McCormick & Bros. were named as plaintiffs in the petitions, and in the summons and in the judgments C. H. McCormick & Bro. were named as plaintiffs; third, that the judgments had been paid. Issue was duly joined, and the plaintiff demanded a trial by jury, which was denied by the court. Thereupon a trial was had to the court, which resulted in the following findings:

"1. That the petition in neither case supports the records of judgment in the county court.

"2. There was no legal service of summons made upon James W. Carey at his usual place of residence, at the time of the alleged service thereof, as set forth in the record in either case at bar.

"3. The competent evidence in the record is not sufficient to overcome presumptions of payment on either or both judgments from lapse of time.

"4. The burden of proof is upon the plaintiffs to show non-payment after the conditional order of revivor was issued in each case.

"5. The court finds generally upon all the issues in favor of the defendant James W. Carey."

Judgment in favor of the defendant was rendered on the findings, and the plaintiffs prosecute error to this court.

The errors assigned may all be grouped under two general heads, namely: The findings are not sustained by sufficient evidence and are contrary to law, and the denial of plaintiff's request for a trial by jury. By his plea of payment the defendant admits the validity of the judgments. Hence the first two findings of the court are outside the issues, and require no further notice. The remaining findings relate exclusively to the question of payment, and, from an examination of the record, we are not prepared to say that they are not sustained by sufficient evidence. There remains, therefore, but one question to be considered, and that is, whether the plaintiffs were entitled to a trial by jury.

The constitution provides that the right of trial by jury shall remain inviolate. Art. 1, sec. 6. This section preserves the right as it existed at the time of the adoption of the present constitution, neither enlarging nor curtailing it. *Sharmer v. McIntosh,* 43 Nebr., 509; *Omaha Fire Ins. Co. v. Thompson,* 50 Nebr., 580. Our first constitution contained a like provision, so that the right of trial by jury, secured by the constitution, is the right as it existed at common law. Hence the question presented is,

whether at common law the issues joined on a plea of payment in proceedings of this character were triable to a jury. Our proceeding to revive a dormant judgment is substantially the same as under the ancient writ of *scire facias*. At common law, the issues, in a proceeding of this character, were made up as in other civil actions. Of the modes of trial at common law it will be necessary to notice but two, for the others were never in use in this state. A trial by record was the proper mode when the existence of the record was directly put in issue by the plea of *nul tiel record,* and, for obvious reasons, such trial was to the court without a jury. Stephen, Pleading, sec. 96. The author just cited, at section 86 of the same work, says: "Every mode of trial except that by jury is of rare admissibility; being not only confined to a few questions of a certain nature, but in general also, if not universally, to such questions when arising in a certain form of issue. And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method." It is clear that the question of payment is not one of the issues "specially provided for," and that at common law, to the issues in this case, the trial by jury would apply "as the ordinary and only legitimate method." 2 Tidd, Practice, 130 [*746] *et seq.* See, also, *Simpson v. Watson,* 15 Mo. App., 425; *Hartman v. Alden,* 34 N. J. Law, 518. In our opinion, the trial court erred in denying plaintiffs' request for a trial by jury, and we recommend that the judgment be reversed and the cause remanded for a new trial according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial according to law.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1901.

PRESENT:

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

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

DEPARTMENT NO. 2.
HON. SAMUEL H. SEDGWICK,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

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

} COMMISSIONERS.

EUGENE MOORE, AUDITOR, V. OMAHA LIFE ASSOCIATION, APPELLEE, IMPLEADED WITH F. W. KETTENBACH, ADMINISTRATOR, APPELLANT.

FILED SEPTEMBER 18, 1901. NO. 9,442.

1. **Sufficient Conflicting Evidence.** A finding based upon sufficient evidence, though conflicting, will not be reversed on review.

2. **Judgment Condition Precedent to Creditor's Bill.** Before one having a general claim against another can maintain a creditor's bill to enforce the same, he must first have reduced it to judgment. *Fairbanks v. Welshans*, 55 Nebr., 362, followed.

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

Macfarland & Altschuler, for appellant.

Byron G. Burbank and *W. S. Hamilton, contra.*

NORVAL, C. J.

William F. Kettenbach, in 1891, took out a policy of insurance upon his life in the Pythian Life Association of Omaha. Afterwards this association ceased to do business, and transferred its policies and business to the Omaha Life Association of Omaha, the latter assuming all liabilities of said Pythian Association. After this transfer and assumption of debt, and in 1893 or 1894, the Omaha Life Association of Omaha deposited with the plaintiff in this case, Eugene Moore, then auditor of public accounts of this state, a certificate of deposit in the sum of $5,000. Afterwards certain sewer bonds were substituted for the certificates of deposit. After this, in 1895, the Omaha Life Association of Omaha ceased to do business, and transferred all its assets to the Omaha Life Association of Minneapolis, Minnesota, which latter assumed the liabilities of the former association. A controversy having arisen as to the ownership of, and right to, these bonds, Moore commenced this suit for the purpose of having such ownership and right to possession determined, making the two Omaha life associations, and others, parties defendants, and setting forth facts sufficient to give the court jurisdiction to determine the question of ownership. Frank W. Kettenbach, administrator of said William F. Kettenbach, intervened in the action, and in his petition in intervention alleged, among other things, the issuance of said policy to said deceased Kettenbach, the deposit of the bonds and certificate of deposit, the death of the assured; that action had been begun in this state by the administrator upon said policy against the Omaha Life Association of Omaha,

in which the administrator recovered only a judgment for costs and premiums paid, but which judgment on review by this court was subsequently reversed; that said action was still pending and undetermined; that there was due said administrator from said Omaha Life Association of Omaha the sum of $5,000, with interest; that said association and also said Pythian Association were insolvent and without assets, and that said bonds are the only property out of which he can realize the amount due him; that said bonds were so deposited for the purpose of securing the holders of policies; that said fact was advertised by said association, and relied upon by Kettenbach when he took out said policy. The petitioner then prayed that he might be made a party defendant, that the other defendants be enjoined from demanding or taking steps to obtain possession of said bonds and securities, that said Moore be ordered and directed to keep said securities in his possession until said action on said policy is finally decided, and that on final determination thereof the auditor be directed to turn such assets over to the petitioner, or cause the same to be sold and the avails applied to the settlement of his judgment; and for general relief. The other pleadings need not be adverted to, other than to say that an issue was joined on the petition in intervention, and trial duly had. On trial it was stipulated that the above case of *Kettenbach v. Omaha Life Association of Omaha* was still pending in the supreme court of Nebraska; that the Kettenbach claim had not been reduced to judgment, and that the right to recover is based upon the policy of insurance before mentioned. The court below, on sufficient evidence, found that the bonds in controversy were the sole property of defendant, The Omaha Life Association of Minneapolis, Minnesota; that the cross-petitioner's claim is in no manner based upon said bonds, nor was any liability incurred on account thereof; that said cross-petitioner in no manner relied upon said bonds in making his contract with the Pythian Life Association, and there is no equity in said cross-petitioner's bill; that the same should be dismissed,

and the injunction theretofore granted dissolved. Judgment was rendered accordingly, from which Kettenbach appeals to this court.

The judgment must be affirmed. First, there was sufficient evidence of record to sustain the findings on which the judgment is based. That being true, the judgment can not be reversed upon the evidence. Further, the petition in intervention stated no cause for equitable relief. There was neither allegation, or attempt at proof, that at the time petition in intervention was filed, said intervener had recovered a judgment against said Omaha Life Association, except the allegation that one, evidently unsatisfactory to him, had been obtained, from which he prosecuted error to this court, and had succeeded in having the same reversed. The stipulation of the parties above quoted establishes the fact that at the time of trial no judgment had been obtained. Hence, said Kettenbach is in the position of one who has a claim against another, not reduced to judgment, attempting to enforce a creditor's bill. This court held in *Fairbanks v. Welshans,* 55 Nebr., 362, that a creditor's bill can not be maintained until a judgment shall have first been obtained, and numerous decisions of this court and others upholding and illustrating this doctrine are therein reviewed. For the reason that at the time the petition in intervention was filed the claim of Kettenbach had not been reduced to judgment, his petition was without equity. Hence, the lower court was right in dismissing it, and rendering judgment against the intervener. This being true, it is unnecessary to enter at large upon a discussion of other points argued, none of which, however, are, in the opinion of this court, well taken.

The judgment of the lower court is therefore

AFFIRMED.

SULLIVAN, J., absent, not voting.

WHITFIELD SANFORD, APPELLEE, V. ALFRED S. LITCHENBERGER ET AL., APPELLANTS.

FILED SEPTEMBER 18, 1901. No. 9,631.

1. **Defective Petition:** UNCERTAIN AVERMENTS. A petition is not fatally defective merely because its averments could have been made more certain.

2. **Objection to Defective Pleading Must Be Raised in Trial Court.** Objection that a pleading is indefinite in its allegations should be raised in the trial court by a motion to make more definite and certain.

3. **Double Interest Stipulation in Note Enforceable.** Where a note stipulates for a lawful rate of interest from date, and a higher and lawful rate of interest after maturity, both are contract rates and are enforceable. *Havemeyer v. Paul*, 45 Nebr., 373.

4. **Insurance Stipulation in Mortgage.** Where a mortgage provides that the mortgagor shall keep the buildings insured for the benefit of the mortgagee, the latter is entitled to be reimbursed for insurance premiums paid by him.

5. **Possession of Note Evidence of Ownership.** Possession of a negotiable promissory note is *prima facie* evidence of ownership.

APPEAL from the district court for York county. Heard below before SEDGWICK, J. *Affirmed.*

M. Meeker, for appellants.

M. B. Reese, contra.

NORVAL, C. J.

This is an appeal from a decree foreclosing two real estate mortgages covering the same land given by the defendants, Alfred S. Litchenberger and Julia E. Litchenberger, to one James W. Stratton.

The first contention in this court is that the first count of the petition does not state a cause of action, because it does not contain an allegation as to which defendant plaintiff claimed was in debt on the cause of action. This criticism upon the pleading lacks merit. The first count is

upon a note and mortgage for $1,500. The note and interest coupons attached thereto are set out *in hæc verba* in the pleading, and are signed by the defendant Alfred S. Litchenberger alone. It is averred that he executed the notes and coupons and that "defendant has not paid the sum secured by said mortgage * * * and there is now due from the defendant to the plaintiff upon said notes and mortgage the said sum of $1,860, with interest," etc. This was sufficient after decree, notwithstanding there was more than one defendant in the cause, to disclose that Alfred S. Litchenberger was the party whom plaintiff claimed was indebted to him on the first cause of action. The pleading was sufficiently specific in that respect, and if it were not, the appropriate course would have been to have moved in the court below for an order on the plaintiff to make his pleading more definite and certain. No such motion was interposed, and the objection now comes too late.

The principal note set forth in the first count of the petition was as follows:

"YORK, NEBRASKA, April 7, 1891.

"On the 7th day of April, 1896, I promise to pay to James W. Stratton, or order, fifteen hundred dollars with interest from this date until paid at the rate of eight per cent. per annum, payable annually, as per coupons hereto attached. Value received. Principal and interest payable at York, Nebraska. Should any of said interest not be paid when due, it shall bear interest at the rate of ten per cent. per annum, payable annually from time same becomes due, and upon failure to pay any of said interest within thirty days after due, the holder may elect to consider the whole note due, and it may be collected at once. This note to draw ten per cent. after maturity.

"ALFRED S. LITCHENBERGER."

In the decree interest was allowed on the foregoing note at the rate of ten per cent. after the maturity of the obligation, of which action of the trial court complaint is now made. The fair and reasonable interpretation of the note

is that it should draw interest until maturity at eight per cent. and ten per cent. interest thereafter. Interest was so computed and allowed in the decree which is in accordance with the rule announced in *Havemeyer v. Paul,* 45 Nebr., 373.

Alfred S. Litchenberger had taken out a policy of insurance on the mortgaged premises, loss payable to mortgagee. A note was given for the premium, which Litchenberger failed to pay at maturity, and plaintiff paid the same, and the amount thereof was allowed him in the decree. Defendants urge that in this the trial court erred because the petition discloses that plaintiff did not pay the premium note until after the foreclosure suit was brought, and no supplemental petition was filed setting up such payment. The suit was instituted on March 19, 1897, and the petition avers that the premium note was paid by plaintiff on March 30, 1897. This last date was doubtless erroneously stated in the pleading, since the note was paid before, and not subsequent to, the commencement of the suit. The allowance of the amount of this premium note was proper. The mortgage stipulated that the mortgagor should keep the buildings on the mortgaged premises insured for the benefit of the mortgagee, and as the failure to pay the premium note was ground for cancellation of the policy, plaintiff had the undoubted right to pay the amount thereof to protect the insurance. Under the mortgage he could have taken out a new policy and the costs thereof would have been a lien upon the property. He paid the amount due on the note instead of taking out a new policy to perpetuate the insurance, and the amount thus paid is proper charge against the land. *White v. Atlas Lumber Co.,* 49 Nebr., 82.

It is insisted that there is no competent evidence that plaintiff was the owner of the notes secured by the mortgages in suit. The notes purported to be indorsed by Mr. Stratton, the payee. J. M. Bell testified that the signatures of Stratton on the back of the notes were genuine. However, plaintiff had possession of the notes in question

and procured and introduced them at trial, which was sufficient evidence of his ownership, in the absence of a contrary showing. *McDonald v. Aufdengarten,* 41 Nebr., 40.

We have examined the evidence contained in the bill of exceptions and find that the amount awarded plaintiff by the decree is not excessive, and fully supports the findings of the trial court. The decree is right, and is accordingly

AFFIRMED.

SULLIVAN, J., absent, not voting.

HARRIET L. HAWVER, APPELLEE, V. PARKWAY REAL ESTATE COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 18, 1901. No. 9,655.

1. **Conflicting Evidence.** A finding of fact based upon conflicting evidence will not be disturbed on review, unless clearly erroneous.

Judicial Sale: REVIEW. A ground for setting aside a judicial sale is unavailing on review, unless the same was presented to the court below.

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

John W. Cooper, for appellants.

W. M. Cowherd, Alfred Pizey and *Paul Pizey, contra.*

NORVAL, C. J.

This appeal is prosecuted from an order of the district court confirming the sale of real estate made under a decree foreclosing a mortgage.

The appraisement and sale are assailed on the ground that the property was appraised at such a low sum as to amount to a fraud. Evidence in the nature of affidavits was taken on this point, which has been preserved in a bill

of exceptions. This evidence, as might be expected, was exceedingly conflicting. That introduced on one side fully sustains the appraisement as made, while that produced by the defendants tends to show that the premises were appraised at a sum not to exceed one-half their fair market value. Conflicting evidence will not be reviewed on appeal.

It is finally insisted that the sale should be vacated for the reason the sheriff offered for sale real estate which was not embraced in, nor covered by, the decree. A sufficient answer to this contention is that the record before us does not show that the sheriff did this. Besides, the objection was not raised in the court below. *Creighton University v. Riley,* 50 Nebr., 341. The order is

AFFIRMED.

SULLIVAN, J., absent, not voting.

C. W. BARNES ET AL., ADMINISTRATORS, V. RED WILLOW COUNTY.

FILED SEPTEMBER 18, 1901. No. 9,962.

1. **County Treasurer:** EXCESS OF FEES: SALARY OF DEPUTY AND ASSISTANTS. A county treasurer is not liable to the county for any fees earned and collected by him unless such fees in any one year exceed the compensation allowed the officer by law, together with the amount paid out by him as salary of deputy and assistants.

2. ———: ———: ———: UNEXPIRED TERM. When a county treasurer dies and a successor is appointed, who serves for the unexpired portion of the year, the amount of fees to be retained by both can not exceed in the aggregate the sum fixed by statute as compensation for one year, plus the amount expended for a deputy and clerk hire.

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

Halleck F. Rose and *J. E. Kelley,* for plaintiff in error.

Harlow W. Keyes, contra.

NORVAL, C. J.

Albert H. Barnes, at the general election held in November, 1893, was elected county treasurer of Red Willow county for the term of two years commencing on January 4, 1894. He duly qualified, entered upon and discharged the duties of said office from said last named date until March 24, 1894, when he died, and his successor was appointed. Barnes earned as fees on moneys collected by him while in office $915.14. He was allowed a deputy at a salary of $700 per annum. Out of said fees he paid his deputy as compensation for his services $175 and retained the balance, $740.14. Letters of administration were granted upon the estate of said Barnes, and Red Willow county filed a claim against said estate for the sum of $240.14, on account of moneys retained by Barnes as fees in excess of the amount allowed by law. That claim was disallowed by the county court, an appeal was prosecuted by the county to the district court, where the county filed a petition to which a general demurrer was interposed. The demurrer was overruled and judgment was rendered in favor of the county for the amount of the claim. The petition contains no averment of the amount of fees the office of county treasurer earned by Barnes and his successor for the year 1894 nor any statements of facts showing that the fees collected by both aggregated more than $2,000 for the year 1894. For the lack of these averments it is argued that the petition is fatally defective and fails to state a cause of action in favor of the county.

Section 20, chapter 28, Compiled Statutes, 1893, follows: "Each county treasurer shall receive for his services the following fees: On all moneys collected by him for each fiscal year, under three thousand dollars, ten per cent. For all sums over three thousand dollars and under five thousand dollars, four per cent. On all sums over five thousand dollars, two per cent. On all sums collected, percentage shall be allowed but once; and in computing the amount collected, for the purpose of charging percent-

age, all sums, from whatever fund derived, shall be included together, except the school fund. For going to the seat of government to settle with the state treasurer, and returning therefrom, a traveling fee of ten cents per mile, to be paid out of the state treasury. The treasurer shall be paid in the same pro rata from respective funds collected by him, whether the same be in money, state or county warrants. On school moneys by him collected, he shall receive a commission of but one per cent., and in all cases where persons outside of the state apply to the treasurer by letter to pay taxes, the treasurer is authorized to charge a fee of one dollar for each tax receipt by him sent to such person."

The provisions of the foregoing section are clear and free from any ambiguity. They fix the fees or compensation of the county treasurer. If the section stood alone upon the statute book, there could be no room to doubt that a county treasurer would be entitled to retain and keep as his own all fees by him earned. But said section 20 is to be construed in the light of section 42 of said chapter 28. It provides "that every * * * county treasurer * * * whose fees shall in the aggregate exceed the sum of * * * two thousand ($2,000) dollars * * * per annum, shall pay such excess into the treasury of the county in which they hold their respective offices. * * * And provided further, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies, not exceeding the sum of seven hundred ($700) dollars per year for each of such deputies or assistants, except in counties having over seventy thousand (70,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected," etc.

The section just quoted is too plain to require judicial interpretation. It allows a county treasurer of a county containing the population of Red Willow county to retain as his own all fees collected in any one year to the amount of $2,000, and in addition a sum sufficient to pay the salaries of his deputies and clerks as provided by statute, and only the fees in excess thereof is he required to turn into the county treasury, and such excess belongs to the county. If the fees earned by the officers do not aggregate per annum the sum of $2,000, then no part thereof is required to be paid to the county. Argument can not make this plainer. The petition shows that the county board of Red Willow county allowed the county treasurer for the year 1894, one deputy with a salary of $700 per annum. So that Mr. Barnes and his successor in office were entitled to retain as a compensation for their services $2,000, and the additional sum of $700 as salary of deputy. There is no allegation in the petition that the fees earned by Mr. Barnes, together with those earned by his successor, exceeded the sum of $2,000, much less the sum of $2,700. As it is not disclosed by the petition that the fees of Mr. Barnes, added to those earned by his successor for the unexpired portion of the year 1894, did not exceed the sum of $2,700, no right is created by statute in favor of Red Willow county on account of the fees collected and retained by Mr. Barnes. For the reasons stated the petition fails to state a cause of action. The judgment is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

VILLAGE OF OSMOND V. JAMES R. SMATHERS.

FILED SEPTEMBER 18, 1901. No. 10,051.

1. **Petitioner for Detachment of Lands from City or Village Must Be Legal Voter.** Section 101, article 1, chapter 14, Compiled Statutes, relating to the detachment of territory from a city or village by petition, is available only to legal voters of the territory sought to be disconnected.

2. **Owners of Included Agricultural Lands May Maintain Action.** The owner of agricultural lands included within the boundaries of a city or village, although not a voter therein, may maintain a suit to have such lands detached from the municipality.

ERROR from the district court for Pierce county. Heard below before ROBINSON, J. *Affirmed*

C. B. Willey, for plaintiff in error.

Berryman & Stewart, contra.

NORVAL, C. J.

On the petition of James R. Smathers, the district court for Pierce county entered a decree detaching certain real estate of plaintiff from the village of Osmond. The latter has brought the record here for review.

Plaintiff grounds his right to bring this suit and for relief under the provisions of section 101, article 1, chapter 14, Compiled Statutes, which provides: "Whenever a majority of the legal voters of any territory within any city or village, and being upon the border, and within the boundary thereof, shall petition the district court of the county in which such city or village is situated, praying to be disconnected therefrom, such petition shall be filed with the clerk of the court at least ten days prior to the first day of the term at which it is proposed to be heard, and like proceedings shall be had thereon as is required in section ninety-nine, as amended in this act, for the annexation of territory to cities and villages, so far as the same are applicable," etc.

Counsel for the city insists, *inter alia:* First, that said section applies alone to cities and villages containing more than 1,000 and less than 25,000 inhabitants, and has no application to a municipal corporation of the population of Osmond, which has 400 inhabitants. Second, said section 101 is unconstitutional for the reason, it is claimed, it attempts to confer legislative powers upon the district court. Third, said section 101 is available alone to legal voters of the territory sought to be detached. The last contention only is it deemed necessary to consider at this time. It will be observed that section 101, article 1, chapter 14, Compiled Statutes, quoted above, authorizes a majority of the legal voters of any territory within the corporate limits of a city or village to petition the district court for the disconnection of such territory from such city or village, and that the section makes no provision for any one else filing such a petition. Therefore the right to petition for the detachment of territory is conferred by this section upon the majority of the legal voters of the territory to be disconnected. *State v. Dimond*, 44 Nebr., 154. The plaintiff, James R. Smathers, has not brought himself within the provisions of said section 101, since it is not alleged that he is a legal voter of the territory sought to be detached from the village of Osmond. It is merely averred in the petition that Smathers is the owner in fee, resides upon and is in the exclusive possession of the real estate in question. All this may be true and yet plaintiff be not a legal voter, which is an essential prerequisite to the right to petition for the detachment of territory under the provisions of said section 101. However, it does not necessarily follow from what has been said that plaintiff's suit must fail him. Said section 101 is not a limitation upon the right to institute proceedings to have territory taken out of the corporate limits of a city or village. That section merely conferred the right to a petition for the detachment of territory upon a majority of the legal voters within the boundaries thereof, and it would seem that such voters need not necessarily be owners of real estate. It

was not the intention of the legislature in passing said section, nor could it lawfully do so, to take away the right of the owner of real estate included in the boundaries of a city or village, to invoke the powers of the court to determine whether such real estate is properly included within the corporate limits of such municipality. This principle was held and applied in *State v. Dimond, supra.* Plaintiff, being the exclusive owner and in possession of the tract of land in question, had a right to bring this suit. The record before us shows that when the village of Osmond was incorporated it contained a population of about 150 and included in its boundaries 2,240 acres of land, the larger portion thereof being used and adapted to agricultural purposes only, and at the present time the village contains only about 400 inhabitants and 1,100 acres of land, only a very small portion of the real estate having been platted or laid out into lots and blocks. Plaintiff's land lies about one-fourth of a mile distant from the platted portion of the village, and is cut off therefrom by a creek. No part of his real estate has ever been platted or laid out into lots, outlots or any other subdivision, is rural in character, is used solely for purposes of agriculture, is low and unsuitable for any kind of village purposes. It is included within the corporate limits of said village exclusively for the purpose of enabling the corporate authorities to levy and collect municipal taxes thereon. It is unjust and inequitable to include said lands within the boundaries of the village.

One other argument advanced by the village will be noticed. That is, that the plaintiff is estopped from having his land detached because he signed the petition for the incorporation of the village. A sufficient answer to this is that he was not the owner of the land when the petition was signed and the village was incorporated.

The decree is

AFFIRMED.

SULLIVAN, J., absent, not voting.

VILLAGE OF OSMOND V. HANCY L. MATTESON.

FILED SEPTEMBER 18, 1901. No. 10,052.

1. **Petitioner for Detachment of Lands from City or Village, Must Be Legal Voter.** The provisions of section 101, article 1, chapter 14, Compiled Statutes, for the detachment of territory from a city or village, are available only to legal voters of the territory sought to be disconnected. *Village of Osmond v. Smathers*, 62 Nebr., 509, decided herewith, followed.
2. **Owner of Included Agricultural Lands May Maintain Action.** The owner of agricultural lands included within the boundaries of a city or village, although not a voter therein, may maintain a suit to have such lands detached from the municipality. *Supra.*

ERROR from the district court for Pierce county. Tried below before ROBINSON, J. *Affirmed.*

C. B. Willey, for plaintiff in error.

Berryman & Stewart, contra.

NORVAL, C. J.

The questions involved in this case are identical with those in *Village of Osmond v. Smathers*, 62 Nebr., 509, decided herewith, and for the reasons stated in the opinion filed in that case the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

CHARLES RUSSELL V. STATE OF NEBRASKA.

FILED SEPTEMBER 18, 1901. No. 11,936.

1. **Waiver.** Rulings not argued are deemed waived.
2. **Application for Continuance Must Be Included in Transcript.** An assignment of error for the overruling of an application for a continuance is unavailing, where such application is not included in the transcript.

3. **Continuance: ABSENT WITNESS: AFFIDAVIT: ADMISSION BY STATE.** It is not error to overrule an application of a defendant in a criminal case for a continuance on the ground that a witness is absent, where the state admits the witness, if present, would testify as stated in the affidavit in support of the motion, and that the statement of the affidavit might be used in evidence on the trial.

4. **Juryman Must Have Qualifications of Elector.** To constitute one a competent juryman he must have resided in the state six months, in the county forty days and in the precinct, township or ward ten days and be twenty-one years of age or more.

5. **Emancipated Minor May Acquire Domicile.** Ordinarily, an infant is incapable of changing his domicile. An emancipated minor may acquire a domicile or residence of his own.

6. **Objection to Venireman Must Be Raised in Trial Court.** An objection that a venireman is not a qualified juryman is unavailing, unless specifically raised in the trial court.

7. **Only Unqualified Opinion Disqualifies a Juror.** An opinion formed by a juror does not affect his competency, or afford ground for challenge for cause, unless the opinion is unqualified as to the merits of the cause and such as will interfere with rendering a fair and impartial verdict upon the evidence under the instructions. *Basye v. State*, 45 Nebr., 261.

8. **Prosecutor May Outline Testimony.** In a prosecution for murder it is competent for the county attorney before the introduction of testimony to outline to the jury the evidence which the state expects to produce to sustain a conviction.

9. **Opinion of Witness in Case Stated, Incompetent.** It is incompetent for a witness testifying to a comparison made between one of the feet of a horse which the prisoner was known to have ridden on the day of the homicide and tracks of a horse found near the place where the crime was committed and leading in the direction of the defendant's home, to give his opinion or belief as to whether the tracks were made by such horse.

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

Albert W. Crites and *W. H. Fanning,* for plaintiff in error:

On the 18th day of May, 1900, Alois F. Staudenmaier was found dead on the prairie some three miles from his own home and something over six miles from the home of

the plaintiff in error. There were a number of bullet holes in the body, and there is little doubt that he came to his death by murderous violence. He was last seen alive sometime after six o'clock in the morning of that day. He started out on horseback at that time to look after his stock, and it would have taken him 30 or 40 minutes, on the pony he was riding, to have reached the place where his body was found. Considerable rain fell at about eleven o'clock in the forenoon, and the clothing on the body was wet through. It is fair to presume that he was killed between seven o'clock and eleven o'clock in the forenoon of that day. The plaintiff in error was convicted of his murder. Witnesses for the state claim to have followed a peculiarly marked horse-track from a point near the body, for more than three miles, over rugged hills and down steep and precipitous dales to a point near where it is admitted the accused rode along on horseback at about eight o'clock on the morning of that day. The state's witnesses differ as to the point near the body where this track was first taken up. All agree, however, that this tracking was not done until the next day and the following Tuesday. The murder was committed on Friday. It is claimed that the track followed had peculiarities similar to the track of the horse the accused was known to have ridden, at and after eight o'clock in the morning of that day. His whereabouts up to eight o'clock is accounted for. At nine o'clock he was nine miles from where the body was found. No sufficient motive is shown for the commission of the crime.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

NORVAL, C. J.

In the district court of Sioux county Charles Russell was prosecuted for the murder of one Alois L. Staudenmaier. From a verdict of guilty, and from a sentence to life imprisonment entered thereon, the accused has prose-

cuted this proceeding, assigning 185 errors. Only those especially argued will be considered, the others being deemed waived.

The court below denied an application made by defendant before trial for a continuance of the cause, which ruling is the first one assailed. A short answer to this assignment of error is that the motion or application for a continuance is not contained in the record brought here, therefore this assignment is unavailing. *Lean v. Andrews,* 38 Nebr., 656; *Jandt v. Deranlieu,* 43 Nebr., 422; *Ball v. Nelson,* 45 Nebr., 205.

But the assignment should be overruled on a ground less technical. It may be inferred from the transcript that the application for a postponement of the trial was based upon the absence of witnesses deemed material for the defense. Pending the hearing of the motion counsel for the state made the following concession and offer which were entered upon the court journal: "The state here admits that the witnesses named in the application for a continuance, if present, would testify to the facts which, it is stated in the application, they would testify to, and the state consents that the application in so far as it sets forth the facts to which these witnesses will testify may be read at the trial, except the testimony of such of the witnesses as may be present at the trial, the state expecting that two of these witnesses will be present." The defendant objected to the offer and admission on the ground that the prosecution was for murder in the first degree and the concession ought to be of the absolute truth of the facts stated in the application, being the facts to which it stated the witnesses would testify. The court below ruled the concession sufficient, and denied the continuance. This decision is in line with the rule announced by this court in two felony cases to the effect that a motion made by a defendant in a criminal case for a continuance on the ground of the absence of a witness may be overruled when the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State,* 50 Nebr.,

351, 357; *Catron v. State,* 52 Nebr., 389. The question here raised was fully considered in the cases just cited, and we are entirely satisfied with the conclusion therein reached. A different rule can not be established in a prosecution for murder than obtains in other felony cases. The constitution guarantees that one prosecuted for a crime shall be confronted with the witnesses against him, but the fundamental law does not make it necessary that the defendant's witnesses shall be present in the court. One charged with murder is no more entitled to the presence in court of his witnesses than one prosecuted for grand larceny, and in such case we have decided that the prisoner has no such right.

The defendant challenged a juryman Albert Estler on the ground that he had not been a resident of the state a sufficient length of time to entitle him to serve as a juror. It is disclosed beyond dispute that Estler became twenty-one years of age on August 21st, 1900, a month preceding the trial, that he formerly lived and made his home with his parents in the state of New York, that he came to Nebraska about eight months before the trial and has resided here ever since, working by the month. By section 657 of the Code of Civil Procedure male persons over the age of twenty-one years and having the qualifications of electors are made competent jurymen. To constitute one a qualified voter he must be of the age of twenty-one years or upwards and reside in the state six months, in the county forty days, and in the precinct, township or ward ten days. Compiled Statutes, ch. 26, sec. 3. The defendant argues that the residence of an infant is that of his parents or guardian, and that as Estler was an infant when he came to this state he was incapable of changing his domicile until he reached his majority, which was less than six months prior to his being called as a juror. The general rule as to the power of an infant to change his own residence is doubtless in harmony with the contention of defendant. But that rule, like many others, has its exceptions. A minor who has been emancipated by his parents

is capable of acquiring a legal domicile or residence of his own. 10 Am. & Eng. Ency. Law (2d ed.), 31, note and cases there cited. The record in this case shows that Estler, before coming to Nebraska, had been for some considerable length of time working away from the home of his parents, and with his wages bought his own clothes, and that he came to this state to make his home here, with the consent of his parents—in fact that they emancipated their son, and therefore he was capable of acquiring a residence in this state. Having resided in Nebraska more than six months prior to his being called as a juror and being more than twenty-one years old at the time, he was a qualified voter.

Something is said in the briefs relative to Estler having formed an opinion as to the guilt or innocence of the accused, hence was not a competent juryman. As he was not challenged for cause on that ground the question is not before us for review.

Errors are assigned for the overruling of several challenges of the prisoner for cause of veniremen George Hill, N. L. Tipton, John Stratton, Frank Stratton and Dan Jordan, on the ground that they had severally formed an opinion as to the guilt or innocence of defendant. A careful perusal of the voir-dire examination of these jurors discloses that every one of them was a competent juror within the rule announced in *Basye v. State,* 45 Nebr., 261, although he had heard about the case and read newspaper accounts concerning the tragedy. Not one of these persons entertained a settled, fixed, unqualified opinion relative to the guilt or innocence of the accused.

Complaint is made of the alleged misconduct of the county attorney in making his opening statement to the jury prior to the introduction of any evidence. The bill of exceptions contains the following concerning the matter:

"By Mr. Crites:

"M. J. O'Connell, Esq., county attorney, in making the opening statement to the jury made use of these words:

'That H. H. Russell the father of the defendant stated on an occasion last fall that if Charles Russell did not kill Staudenmaier he would not get a cent of his property.' To this statement the defendant objects on the ground that it is misconduct of counsel, improper at this time and improper in evidence at any time in the trial of this case.

"By Mr. Harrington:

"The state claiming that the portion of the record just made by counsel for the defendant is unfair to the county attorney and requests that the county attorney may now be permitted to repeat facts to the jury, showing as he has already stated that these statements alleged to be made by H. H. Russell were made in a conversation with the defendant at the home of H. H. Russell to the defendant.

"By Mr. Crites:

"The defendant still objects to this statement as it purports to be amended on the ground that this misconduct of the county attorney in making such a statement to the jury, that it is improper in the standing statement and inadmissible to be proven as evidence at any stage in this case.

"Objection is overruled.

"Exception by defendant.

"By Mr. Harrington:

"Whereupon the county attorney reiterates his statement to the jury for the purpose of making the record fair and complete.

"By Mr. O'Connell:

"Some time last fall Fred Mason was at the home of Charles Russell; there were present Charles Russell, his father and Fred Mason; Staudenmaier passed by the place; the father of the defendant said to Charles Russell, 'If you do not kill that man you will never get any of my property,' or 'I will never will you any of my property,' or something to that effect.

"By Mr. Crites:

"To this statement the defendant objects.

"By Mr. O'Connell:

"Charles Russell replied something to this effect, 'Never mind, old man, I will get him yet.'

"By Mr. Crites:

"To this statement and to every part of it the defendant objects on the ground that the same is misconduct of counsel, improper to be made in the opening statement and improper to be presented at any stage in this case.

"Overruled. Exception."

There was nothing improper in the statement made by the prosecution. He merely outlined to the jury an important and material fact in the case. If the defendant and his father prior to the homicide made the expressions imputed to them, as the evidence in the case shows they made such statements, they were important and material to the state, since they tended to establish premeditation and malice.

By a number of the witnesses a horse was tracked from near where the body of the deceased was found in the direction and near the home of the accused. The defendant was riding on horseback the forenoon of the day of the homicide. One hoof of the horse had a peculiar shape and made an unusual imprint upon the ground. The horse which was tracked from near the body of deceased also made a similar track. Several of the witnesses called by the state which were non-experts were permitted to testify, over objection of defendant, that the tracks of the horse leading from the place where the homicide was committed were made by the horse which the defendant was riding the morning of the tragedy, and one witness, over like objection, was permitted to testify that he believed that the tracks in question were made by said horse. This evidence was clearly inadmissible, and prejudicial to the prisoner. In *Clough v. State*, 7 Nebr., 320, a conviction for murder, it was ruled that it was not competent for a witness testifying to a comparison made between one of the prisoner's boots and a bloody foot-print found

near the place where the homicide was committed, to give his opinion as to whether that boot made the track. So in the case at bar it was wholly incompetent for a witness to testify that the track of a horse leading from the place where the body of deceased was found was made by the horse which defendant was known to have ridden, much less that the witness believed that the tracks were so made. That was invading the province of the jury. For the admission of this testimony the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

NOTE.—In a trial for murder there was testimony tending to show that the person who fired the shot that killed the deceased wore a certain pair of rubber boots, which it was conceded did not belong to the prisoner. The prisoner went upon the stand and testified that he could not get these boots upon his feet, and at the request of his counsel made apparently extraordinary efforts to put them on in the presence of the jury, but without effect. In rebuttal the state called a shoemaker, and had him measure the boots and the prisoner's feet, whereupon he testified that a foot of that size could wear those boots; *held* no error. *State v. Nordstrom*, 7 Wash., 506, 510. As to an instruction in regard to motive. *Ibid.*—REPORTER.

STATE OF NEBRASKA, EX REL. ELLI A. BEACH, V. JAMES S. FIELDS.

FILED SEPTEMBER 18, 1901. No. 12,001.

An Appeal Where None Lies Is Null, and Mandamus Will Lie to Enforce Appellee's Right. Where a defendant in an action of forcible entry and detainer had appealed from a judgment rendered against him therein, for restitution of the premises in which no appeal lies, the entire proceedings are null and void, and mandamus may be invoked to require the issuance of a writ of restitution.

ORIGINAL application for a peremptory writ of mandamus to compel the respondent to issue a writ of resti-

tution on a judgment recovered in an action of forcible entry and detainer. *Writ allowed.*

Jackson & Williams, for relator.

E. D. Kilbourn and *W. V. Allen, contra.*

NORVAL, C. J.

This is an application by Elli A. Beach for a peremptory mandamus to compel the respondent, the county judge of Antelope county, to issue a writ of restitution on a judgment recovered by relator in an action of forcible entry and detainer. The facts briefly stated are these: Relator commenced an action of forcible entry and detention before the respondent, as county judge of Antelope county, against one James Brown, to recover possession of certain real estate. Subsequently, in April, 1899, relator recovered judgment of restitution of the premises, and Brown appealed to the district court, but prosecuted no proceeding in error. Respondent, on demand, refused to issue a writ of restitution, and this proceeding was thereupon brought.

The case is free from difficulty. The statute authorizing an appeal in that kind of a case was unconstitutional and the attempted appeal was abortive and conferred no jurisdiction of the cause upon the district court. *Armstrong v. Mayer,* 60 Nebr., 423. The judgment of the county court was not superseded by the giving of the appeal bond. *Supra.* Relator was entitled to a writ of restitution, and mandamus is the appropriate remedy to require respondent to issue the same. High, Extraordinary Legal Remedies, sec. 242.

WRIT ALLOWED.

SULLIVAN, J., absent, not voting.

BRENNAN-LOVE COMPANY V. JAMES H. MCINTOSH.

FILED SEPTEMBER 18, 1901. No. 9,791.

1. **Evidence.** Evidence examined, and *held* sufficient to support the verdict of the jury.
2. **Verdict.** Verdict *held* to be not contrary to the instructions of the court.
3. **Question: OBJECTION: TENDER.** When to a question in direct examination an objection is interposed and sustained, there must be an offer to prove the facts sought to be elicited thereby, and a ruling of the trial court had thereon, in order to present to this court for its consideration the ruling complained of.

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

Duffie, Gaines, Kelby & Storey, for plaintiff in error.

James H. McIntosh, for himself, and *Charles A. Goss,* with him.

HOLCOMB, J.

The plaintiff began a civil action and recovered judgment in the trial court. The defendant brings the case here for review by proceedings in error. The suit was instituted to recover the sum of $519.25 for services alleged to have been performed and money expended for and on behalf of the defendant in and about the examination of and perfecting the title to certain real estate belonging to one Charles J. Karbach, who procured a loan thereon in the sum of $150,000 from the New York Life Insurance Company through the defendant acting as a broker or loan agent in negotiating and procuring such loan. The alleged contract was a verbal one and the value of services rendered is undisputed. The answer denied any liability on the part of the defendant, denied that it had made the contract as alleged or that any service had been performed or money expended for or on its behalf. The real grounds of the defense interposed were that, while

the services were performed as alleged, which were conceded to be of the value claimed by the plaintiff, and were rendered at defendant's request, the defendant, however, it is contended, was at the time acting as the agent of Karbach, the borrower, and employed the plaintiff as agent, and for its principal, and not on its own account, and that Karbach, and not the defendant, was liable to the plaintiff for compensation for the services rendered by reason of such employment. The plaintiff is by profession an attorney and counselor at law, residing in Omaha. From the evidence it is made to appear that he had been designated by the insurance company making the loan to examine and pass upon titles to real estate and perform other incidental professional services in relation to contemplated loans to be made by the company, to the end that a valid first lien would be acquired on the real estate mortgaged as security for such loans as might be finally consummated.

In a letter of instructions to the plaintiff, as the attorney of the company for the purposes aforesaid, it is stated: "In this and in all similar cases in which you may act for us, please to bear in mind that all your costs and charges are to be paid by the borrower, whether the loan goes through or not." The defendant places considerable stress on this clause as supporting its position that the borrower, Karbach, and not the defendant, was responsible for the value of plaintiff's services which are made the basis of the present action. The letter clearly advised the attorney that he must not look to the company for his compensation. It would not, however, preclude the plaintiff from entering into any contract he might think advisable as to whom he should look for compensation. The statement that charges and costs are to be paid by the borrower was for the purpose of negativing any responsibility on the part of the company, and left the attorney free to provide for his pay in any manner that he might adopt which was found agreeable and advisable.

It is also shown that in a contract between the defendant and the borrower regarding the negotiation of the loan the borrower was to pay for examination of the title and other related services of the kind and nature that the plaintiff performed for which the defendant is sued to recover the value thereof. It is equally apparent from the record that the plaintiff was aware that the defendant was acting as a broker or loan agent in obtaining the loan for the borrower, Karbach.

The court instructed the jury, at the defendant's request, that, if they found from the evidence that the defendant acted as a broker for the borrower, Karbach, in procuring him the loan and such agency was known to the plaintiff, then the plaintiff must look to the principal, Karbach, for pay for his services, and not to the defendant, unless it was further found that the defendant expressly agreed to pay for said services. As presented to the jury the instructions, as a whole, required them to ascertain from the evidence as a question of fact whether in making the contract, which it is conceded was made with the plaintiff for the services he rendered in and about the examination and perfecting of the title to the real estate offered by the borrower as security, the defendant acted in its own behalf as a principal in the transaction or whether it acted only as the agent of the borrower and for that reason assumed no personable responsibility.

An intelligent understanding of the legal principles applicable in determining the respective rights of the parties requires of us, in addition to what has been said, to speak briefly of the relations existing between the parties at and about the time of the alleged contract by virtue of which the plaintiff prosecutes the present action. The evidence shows that, prior to the time the plaintiff was requested to perform the services for which he sues to recover the value thereof, he had rendered similar service to the defendant in relation to loans made to other parties through the defendant acting as a loan broker, for which

services the plaintiff had presented his bill to the defendant and received from it his pay therefor; that in the performance of such services, the plaintiff was acting under a contract made with the defendant acting in its own behalf, and not as the agent of the borrower.

In each of the two prior transactions had between the plaintiff and the defendant in which the defendant compensated the plaintiff for his services complaint was made to him that his charges were too high. This becomes pertinent in the light of what follows. On March 28 the defendant was advised by telegraph that the insurance company making the loan had accepted the application, and at once obtained from Karbach a written contract authorizing it to secure the loan on terms stated in the contract as to commissions and other expenses to be borne by the borrower in consummating the loan. On the next day, the following conversation occurred between the plaintiff and one of the members of the defendant company, as testified to by the plaintiff, and which is undisputed:

Q. When did you have your first dealing with the defendant in respect to the matters charged in the petition?

A. In August, 1895—to matters charged in the petition?

Q. Yes.

A. I beg your pardon—In March, 1896.

Q. Where was your first talk with the defendant, or any one representing the defendant, in that respect?

A. At the intersection of 16th and Douglas streets was my talk with Mr. Brennan, on the 29th of March, 1896. I think I had not had any talk with him before that.

Q. What relation did Mr. Brennan at that time sustain to the defendant?

A. I understood him to be its president.

Q. What was said on that occasion at that place?

A. I was on my way to the post-office; it was a little after 12 o'clock on Sunday the 29th day of March; Mr. Brennan was coming from the direction that I was going,

and he stopped me and said that it looked as if he was going to get the loan through with the New York Life for Charles J. Karbach on the Karbach property, the Karbach building at the corner of 15th and Douglas, and the Karbach hotel. Now, he says, if this goes through, I want to know what you are going to charge us. If you are going to charge us the way you have been doing I am afraid we can't do business together. Well, I said to him that I did not know what I would charge him; that I would charge him whatever my services were reasonably worth; and that is all I could tell him. Well, he says, there won't be much work in it. The Northwestern Mutual Life has a mortgage on the property, and the title has been thoroughly examined, and there won't be much work in it. Well, I said if there would not, then my fee would not be so big; but I did not know what I would charge; and I said to him that that was the only fair way for a lawyer to do business; any other way, either the client cheated him, or he cheated the client. I said I can't tell what the work will be.

After testifying with particularity as to the prior relations existing between the plaintiff and the defendant with reference to other loans, in which it appears that the plaintiff was employed by the defendant acting in its own behalf and not as the agent of the borrower, and that the defendant was well acquainted with the relations existing between the plaintiff and the loan company and knew the purport of the letters of instructions and terms upon which the plaintiff was acting as the company's agent for the purpose of examining titles, etc., the witness testifies to the receipt of papers from the company making the loan with the information that the application for the loan had been accepted; that he notified defendant of that fact by letter, and that a day or two after writing the letter, "Mr. Brennan brought the abstracts of title to my office, and told me to go ahead with the matter; and I did." There is much testimony showing what transpired subsequently to plaintiff's employment, and that all the

dealings and transactions, of which there were many, with reference to the necessary steps to be taken in clearing the title and perfecting the loan on the property were had between the plaintiff and defendant, which are confirmatory of the contention of the plaintiff that he was employed by and rendering service to the defendant acting in its own behalf. From all the evidence, the natural and logical deductions to be made are that the defendant as a loan broker contracted with the borrower to negotiate for him a loan of the amount stated at a stipulated rate of interest on his real property, for which a certain commission was to be allowed as compensation and certain expenses incident to perfecting the loan to be borne by the borrower. In effectuating its contract, the defendant contracted with the plaintiff for his services in passing on the title and work of a kindred character, and for which it thereby became liable for the reasonable value thereof; that the defendant was not acting for and as the agent of the borrower but in its own behalf in executing the contract which it had entered into with the borrower. We are not in doubt as to the evidence being sufficient to support the conclusion reached by the jury on this issue. What is the contract of the parties? Under the evidence, it is shown that the defendant approached and sought his services and to obtain an understanding as to the amount he would charge the defendant, not the borrower, for such services and which were required by the loan company to be performed by the plaintiff and none other, and at the same time making complaint of charges made regarding similar services performed in relation to other loans; also intimating that unless satisfactory terms could be arranged, the defendant would not do business with the plaintiff but would negotiate the contemplated loan with another party as lender. The plaintiff declined to state a certain sum as compensation but stated he would charge what the services were reasonably worth to be determined after they were rendered. The defendant later on brought plaintiff the abstracts of title and told

him to go ahead and do this work. This certainly is all that is necessary to constitute a valid verbal contract for services for which the reasonable value thereof is to be paid by the party having the benefit of such service. One proposes, the other accepts, and the services are rendered in performance of the contract thus entered into. It is contended that the verdict is contrary to the ninth instruction given at the request of the defendant, wherein the jury were instructed that their verdict should be for the defendant unless it is found from the evidence that the plaintiff gave exclusive credit to the defendant for his services and so informed the defendant. And also by the second and fourth instructions, requested by defendant, wherein the jury were instructed that their verdict should be for the defendant unless they found that the defendant expressly agreed to pay for said services. The instructions were obviously as favorable to the defendant as it could reasonably ask.

By the pleadings, the plaintiff sued on the alleged contract with the defendant for the reasonable value of the services performed thereunder. The defendant denied the contract. The burden of proof was on the plaintiff to prove the contract as alleged. The instruction, when considered with the others given on the court's own motion, told the jury that in order to hold the defendants personally liable it must appear from the evidence that the plaintiff was dealing with it as a principal and looked to it for his compensation, and so advised it, and that an express contract must have been proven. The evidence justifies the verdict under the instructions referred to when fairly considered. It seems reasonably clear that the defendant entered into the contract with knowledge that the plaintiff was performing for it the required services and looked to it for his compensation. He so stated when it was attempted to have him fix his charges at a specified sum. He said to a member of the firm, "I will charge you what the services are reasonably worth." If the contract is proven as alleged, as we think it was, it can not be said

that the verdict is contrary to the instructions which required the jury to find an express contract to have been entered into between the parties to the action. The plaintiff was suing on an express and not an implied contract. The instructions said nothing more than that the plaintiff must prove the contract alleged. That is, that the contract was with the defendant acting on its own behalf and not as the agent of another.

It is argued that the court erred in sustaining an objection to certain testimony offered in surrebuttal. Mr. Brennan, a member of the defendant company, was asked on cross-examination if he had in his testimony in the county court in the same case testified to a certain statement just testified to by him in his direct examination, and he answered that he had so testified in the county court. The plaintiff in rebuttal was permitted to call a witness who testified that, in his testimony in the county court, the witness Brennan had not testified to the statement about which he was interrogated on cross-examination and stated that he had. After the plaintiff had introduced his evidence in rebuttal, the defendant called a witness in surrebuttal evidently for the purpose of corroborating the testimony of the witness Brennan as to the disputed statement claimed to have been made by him in the county court with reference to the conversation had between him and the plaintiff on the Sunday heretofore referred to. An objection to the question was interposed and sustained. The objection was well taken, in any view of the case, because the question was not confined to the particular statement in dispute and regarding which the witness Brennan had been contradicted. An offer was then made to prove by the witness that Brennan had testified in the county court to the same statement testified to by him in the district court and regarding which he had been contradicted by the plaintiff in rebuttal. The offer did not correspond to the question to which the objection was sustained, and no ruling appears to have been made by the court on the offer.

The witness was then asked directly if Mr. Brennan had not, in his testimony in the county court, made the statement regarding which there was a dispute in the testimony. An objection was interposed as incompetent, improper, irrelevant and immaterial and not proper surrebuttal, which was sustained. No offer of proof was made and no ruling obtained on the former offer. There being no ruling on the prior offer, and no renewed offer after the question had been objected to and the objection sustained, the record presents no ruling of the court which may properly be reviewed. After the witness had been asked a proper question, or at least the only question that, in any view of the subject, can be regarded as proper, and the objection sustained, there should have been an offer of proof of the fact sought to be elicited thereby and a ruling obtained on the offer. In no view of the case, as the record is presented to us, has there been a ruling on an offer to prove the facts sought to be established by the question objected to. This is essential, in order to have the alleged error considered in this court. Whether or not there is shown any abuse of discretion in sustaining the objection to this proposed testimony in surrebuttal, even if the record properly presented the question for review, may be open to doubt.

There appearing no prejudicial error in the record, the judgment of the district court should be, and therefore is,

AFFIRMED.

SULLIVAN, J., absent, not voting.

EDWARD THOMPSON COMPANY V. ARTHUR E. BALDWIN.

FILED SEPTEMBER 18, 1901. No. 9,978.

1. **Evidence: PLEA OF PAYMENT.** Evidence *held* insufficient to support the plea of payment.

2. **Alteration of Descriptive Clause in Contract, Not Material Change.** In a contract for the conditional sale of books, the deferred

payments being evidenced by the promissory notes of the vendee, it was claimed a material alteration had been made by the interlineation of the words "interest at six per cent. on notes remaining over a year." *Held*, Such words to be only descriptive of the notes referred to and in the nature of a memorandum reference, and that such words did not constitute a material alteration of the contract of sale, the notes referred to being the instruments which determined the rate of interest they bore.

3. **Alteration of Certain of a Series of Notes Does Not Vitiate Remainder of Notes or Contract of Sale.** Where a series of notes were given in payment of books sold conditionally, and proof was tendered showing that a part of the notes had been materially altered, *held* that such alteration did not vitiate the contract of conditional sale or the unpaid notes regarding which no alteration was claimed.

4. **Under Facts Stated, Vendor May Terminate Contract and Recover Property.** Where the property had been delivered to the vendee under a contract of conditional sale and a part of the notes given for the purchase price were past due and unpaid, against which no valid defense existed, *held*, under the terms of the contract, the vendor might lawfully regain possession of the property and terminate the contract.

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

Richard S. Horton, for plaintiff in error.

John H. Grossmann and *John D. Ware, contra.*

HOLCOMB, J.

In the trial court the jury were instructed peremptorily to return a verdict in favor of the defendant, which was accordingly done. On the verdict thus returned, after overruling a motion for a new trial, judgment was rendered against the plaintiff from which it prosecutes error proceedings from the court below to obtain a review of the trial therein had. The plaintiff began an action in replevin for the recovery of the possession of twenty-three volumes of the American and English Encyclopedia of Law then held by the defendant under a contract for the sale of the property on condition. By the contract of sale

the title to the property was not to pass to the defendant until the books were paid for, and in the event of his failure to pay any of the installments according to the stipulations in the contract, the plaintiff was authorized to take into its possession the property sold conditionally and terminate the contract. The defendant filed a general denial. He asked judgment for a return of the property on the grounds of payment and an alleged material alteration of the contract of sale. The principal and substantial ground upon which the defendant seeks to avoid responsibility under his contract, as we take it from the record, is the alleged alteration of the instrument. The plea of payment is puerile and unworthy of serious consideration. It is disclosed that, at the time defendant received the books under his contract, he paid $12 in cash and executed and delivered his nine promissory notes of $14 each, making a total of $138, the contract price. A receipt was given for the cash and notes and it is contended that this in connection with defendant's testimony that he "paid all" constitutes evidence justifying the conclusion that full payment had been made. The evidence does not warrant the conclusion and this defense must be brushed aside without further notice. Under the contract of sale the defendant obligated himself to pay $12 cash on delivery of the books and to execute his nine notes payable to plaintiff's order without interest for $14 each, the first payable in two months and one falling due every two months thereafter, the last one falling due in eighteen months from date. There was also an order to send defendant the succeeding volumes of the work as rapidly as published until the complete number of volumes had been delivered. It is stated: "I agree to pay you for such succeeding volumes the sum of $6 per volume upon delivery." Then is interlined the following: "Interest at six per cent. on notes remaining over a year." The last sentence quoted, it is claimed by defendant, was inserted in the contract after its execution without his consent and constitutes a material alteration of the instru-

ment. It is also testified by the defendant that the notes given in pursuance of the contract maturing in fourteen, sixteen, and eighteen months respectively from date had been altered after execution and delivery without the consent of the defendant by the insertion of the following: "6% int." At the time of the commencement of the replevin action, the note maturing in ten months had been only partially paid and the one maturing in twelve months was wholly due and unpaid. There is no claim that either of these notes had in anywise been altered after their execution and delivery.

Conceding that the sentence quoted, and to which we have heretofore referred, was inserted in the contract of sale without defendant's consent and after delivery, it is not, we think, such an alteration as will avoid the contract. It is but a reference of a descriptive character as to certain notes accompanying the contract which were to evidence the unpaid balance of the purchase price. The legal status of the parties, so far as this action is concerned, was not changed thereby nor did it in any way materially affect the instrument evidencing the contract of conditional sale. The notes themselves must determine the respective legal rights of the parties in respect of the terms as to interest on the deferred payments of the purchase price. The sentence only referred to these notes in the nature of a memorandum as to the stipulations they should or did contain as to interest. Whether the notes or any of them in fact drew interest recourse must be had to these several instruments to determine the question, and the payer's liability for interest is determined by the wording of the notes irrespective of the alleged alteration of the sale contract. The contract as consummated between the parties was that the title to the books should remain in the seller until paid for, and if the notes given for the deferred payments were not paid within thirty days after any one or more of them became due, the seller might retake possession of the property and that with the cash payment of $12 to be paid on the delivery of the books the

remainder of the purchase price should be evidenced by notes of the buyer due at the times heretofore stated. The contract and notes having been executed, the defendant was obliged to satisfy the notes in order to defeat the plaintiff's right to retake possession of the property the title to which was retained in it.

Now, at the time of the commencement of the replevin action, it is beyond peradventure of doubt that two of the notes, against which nothing can be said as to their validity, remained unpaid although past due for a period much longer than required under the terms of the contract. This fact, when established, made plaintiff's cause of action complete and entitled it to a judgment awarding it the right of the property and the possession according to the terms of the contract. But it is contended that, there being evidence of a material alteration of the notes maturing more than twelve months after date, this not only avoids the notes altered but also the entire contract of which they formed a part and that plaintiff can not therefore recover. We do not so regard it. It is true that the alteration as to these notes was material and would prevent any recovery on any contract resting for enforcement on their non-payment. The material alteration of a part only of a series of notes forming a part of an entire contract can have the legal effect of vitiating such contract only to the extent that it must rest on the altered instruments for enforcement. Had the defendant satisfied the notes whose validity is unquestioned, then perhaps the plaintiff would have no legal demand against him and there would be no default in any of the terms of the legal contract existing between them or any part thereof. But having a valid and legal demand for the part of the consideration represented by the unpaid notes regarding which there is no claim of alteration, the plaintiff is in as favorable position to enforce its contract as though the whole sum remained unpaid and against which there existed no valid defense. The defendant had never completed his contract for the purchase of the books. He had, at most,

only the possessory right to them during the time given for the payment of the purchase price, and upon failure to make the stipulated payment of an installment at the time specified, the plaintiff was empowered to regain possession of the property and terminate the contract. The legal title remained in the vendor and could be defeated only by compliance with the conditions to be performed subsequent to the time of the conditional sale on the part of the vendee. This he failed to do; and at the time of the commencement of the replevin action he was in default of payments evidenced by his promissory notes, the validity of which can not be successfully challenged. Whether, notwithstanding the alleged alteration of a part of the notes given for the purchase price, the vendor might recover on the original consideration or whether the alteration was of such fraudulent character as to cancel the debt represented by the altered notes, it is not necessary here to consider. The petition stated a good cause of action, and is fully supported by the undisputed evidence. The contract imposed a moral and legal obligation on the defendant which he should not be permitted to escape by either of the defenses interposed.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

ELLEN BERRY, APPELLANT, V. CALVIN BERK ET AL., APPELLEES.

FILED SEPTEMBER 18, 1901. No. 10,069.

1. **Evidence: FINDING: JUDGMENT.** Evidence examined, and *held* sufficient to support the findings and judgment of the trial court.
2. **A Mortgage for a Bona-Fide Debt to A Is Not Fraudulent Because It Covers a Debt to B Assumed by A.** When a mortgage on real

estate is given in good faith to secure an actual and bona-fide indebtedness due from the mortgagor to the mortgagee, the mortgage is not rendered fraudulent *per se* as to other creditors of the mortgagor because there is included in the transaction a debt due another creditor which the mortgagee verbally or in writing agrees to pay from the proceeds of the mortgaged property.

3. **Good Faith Is the Question.** The true inquiry is whether the mortgage was given in good faith to secure an actual and bona-fide indebtedness owing by the mortgagor.

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

Morning & Berge, for appellant.

Fritz Westermann and *Stevens & Cochran, contra.*

HOLCOMB, J.

The appellant, plaintiff below, brought an action in the nature of a creditor's bill for the purpose of setting aside an alleged fraudulent mortgage by the debtor in favor of the defendant Vanburg, on certain real estate therein described and to subject the same to sale for the purpose of satisfaction of a judgment in plaintiff's favor and against the mortgagor and judgment debtor.

The questions involved in the controversy are primarily questions of fact and the conclusions reached by the trial court can not be rightfully disturbed unless clearly wrong and unsupported by sufficient competent evidence. During the pendency of plaintiff's action, in which the judgment was obtained which forms the basis of the present action, the debtor executed a mortgage in favor of the defendant Vanburg to secure the payment of the sum of $600 due in five years from date and evidenced by the promissory note of the mortgagor.

The evidence is altogether satisfactory on the point that, at the time, there existed a bona-fide indebtedness in favor of Vanburg from the mortgagor for about $290 for money paid by him on an obligation on which he was lia-

ble as surety of the mortgagor, the principal debtor, and that as to this amount the mortgage was taken in good faith to secure the payment of the debt thus created at the time stated. As to the remainder of the consideration, it is testified that the mortgagor was indebted to one Offer, a brother-in-law, in the sum of about $400, and the note and mortgage was given to Vanburg to secure his individual indebtedness as aforesaid and such part of the Offer indebtedness as could be realized from a sale of the premises over and above the amount required to satisfy the debt, interest and costs in favor of Vanburg. While there is some controversy as to the existence of the debt alleged to be owing Offer, the brother-in-law of the mortgagor, and whether the mortgage was given in good faith to secure the same in so far as it would, after the satisfaction of the indebtedness due the mortgagee, we are not prepared to say that the finding of the trial court in favor of the good faith of the parties to the transaction is not supported by sufficient evidence.

The judgment, in our opinion, should not be disturbed on the ground that the findings of the trial court are not supported by the evidence. It is urged that as a matter of law the mortgage should be held to be fraudulent and void as against the plaintiff because of the secret trust in favor of Offer and the agreement by the parties to pay him the proceeds of the sale of the property over and above an amount sufficient to pay the indebtedness in favor of Vanburg. Jones on Mortgages [5th ed.], sec. 627, states the law as follows: "If given to secure existing liabilities, a mortgage is not void as to creditors because it does not specify the amount secured; or that it includes debts due to other persons which the mortgagee has verbally promised to pay." Says the supreme court of New York in *Carpenter v. Muren,* 42 Barb., 300-3: "Including in the mortgage debts due or alleged to be due to others, the mortgagee at the same time giving her parol undertaking, will not of itself make the mortgage fraudulent *per se.* In connection with other circumstances, this fact

might be some evidence of a fraudulent intention, but nothing more." See, also, 14 Am. & Eng. Ency. of Law [2d ed.], p. 236; *Hine v. Bowe,* 114 N. Y., 350; *Chipman v. Stern,* 89 Ala., 207; *Randolph v. Allen,* 73 Fed. Rep., 23; *Adams v. Ryan,* 61 Ia., 733. The consideration of prime importance is whether the mortgage was given in good faith to secure an actual and bona-fide indebtedness, and it occurs to us there can in sound reason be no legal objection to including in the mortgage the indebtedness, if bona fide, of another creditor than the mortgagee whose indebtedness is also secured. By yoking himself to the brother-in-law of the mortgagor, the mortgagee subjected himself to the rules applicable to transactions between relatives which have the effect of hindering, delaying, or defrauding creditors, and casts on him a greater burden in sustaining the bona fides of the transaction than he otherwise would have had to bear; but in this case, as found by the trial court, the entire transaction was free from fraud and had in good faith, and with the findings and judgment we observe no legal grounds for interference.

The judgment is therefore

AFFIRMED.

SULLIVAN, J., absent, not voting.

JAMES A. MARTIN V. KEARNEY COUNTY AND THE CITY OF MINDEN.

FILED SEPTEMBER 18, 1901. No. 10,089.

1. **Waiver of Errors Not Argued in Brief.** Alleged errors not argued in brief of counsel for plaintiff in error may be deemed to have been waived.

2. **Refunding of Illegal Municipal Taxes Can Not Be Required.** Cities of the second class of less than 5,000 population empowered by law to levy taxes for municipal purposes can not be required to refund money received for illegal taxes imposed by such city, from a purchaser of real estate at a sale made thereof by the county treasurer for delinquent taxes, in the absence

of statutory authority providing for the refunding of such taxes. Following *McCague v. City of Omaha*, 58 Nebr., 37.

3. **Purchaser Subject to Rule of Voluntary Payment.** The purchaser of real estate at delinquent tax sale is a volunteer and subject ordinarily to the rules applicable to voluntary payment of taxes.

4. **Rule of Caveat Emptor Applies to Purchaser.** The rule of *caveat emptor* applies to the purchaser of real estate at tax sales. *McCague v. City of Omaha, supra.*

5. **Purchaser Charged with Notice of Record of Levy.** A purchaser of real estate at delinquent tax sale is charged with notice of the public records showing the manner in which taxes for municipal purposes charged against the real estate purchased were levied by the city authorities empowered by law to levy such taxes.

6. **County Not Liable for Irregular Action of City Council.** Irregular action by a city council in making a levy of taxes for municipal purposes resulting in the levy being declared illegal and void is not a "mistake or wrongful act of the county treasurer or other officer," within the meaning of section 131, article 1, chapter 77, Compiled Statutes, for which the county can be held liable to refund to a purchaser at delinquent tax sale the illegal taxes so attempted to be levied.

7. **Party Must Bring Himself Within Terms of Statute.** A party, to recover, under the provisions of a statute, illegal taxes paid, must bring himself within its terms.

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

J. B. Scott and *J. L. McPheely*, for plaintiff in error.

Hague & Anderberry and *E. C. Dailey, contra.*

HOLCOMB, J.

The plaintiff in error, plaintiff below, became the purchaser of certain real estate situated in Minden, Kearney county, which was sold for delinquent taxes assessed against said property. After the expiration of the time for redemption from tax sale, he began proceedings in equity for the foreclosure of the lien in his favor by virtue of the tax sale certificates

and the subsequent taxes paid thereunder. Upon trial in the district court on the issues raised by the pleadings, it was determined that of the taxes for which plaintiff claimed a lien on the real estate purchased, those levied by the city of Minden for certain municipal purposes were void and of no validity as a lien on the land because of irregularities and failure to comply with the provisions of the law authorizing the levy attempted to be made by the city authorities. From the judgment rendered in the equity action to foreclose the tax lien no appeal was taken, and the adjudication thereupon became final. The plaintiff, after the rendition of the decree in the foreclosure suit wherein the city taxes mentioned were adjudged to be void, presented his duly verified claim to the board of county commissioners of Kearney county for the amount of the taxes thus declared to be void which had been paid by him at the time of the purchase of the land at delinquent tax sale, together with the interest thereon which he would have received had the tax levy been valid. The claim was rejected and an appeal taken to the district court, where issues were joined and a trial had to the court, which resulted in a finding and judgment in favor of the county, from which judgment the plaintiff prosecutes error proceeding in this court. In the district court the city of Minden was also made a party defendant, the judgment rendered being in its favor also as well as in favor of the county.

The city of Minden is a city of the second class of less than 5,000 population. The alleged irregularity avoiding the tax involved in this litigation consisted in the city council undertaking to levy a tax for certain municipal purposes by a resolution adopted by that body instead of duly enacting an ordinance providing for the levy as provided by law. It seems to have been the contention of the plaintiff that by bringing in the city as a party defendant he would be entitled, on the facts stated, to recovery of judgment for the amount of the void tax and interest either against the county or the city; that one or the other

should be adjudged liable to reimburse him for the amount of the void tax paid with interest. In the argument in the brief of plaintiff in this court no claim is made as to any right of recovery against the city, and any question as to the city's liability may, therefore, under the rule of this court, be deemed to have been waived. *Gulick v. Webb,* 41 Nebr., 706.

That the city can not be held, we think, is settled by former decisions of this court on a like question. In *McCague v. City of Omaha,* 58 Nebr., 37, it was announced as a rule of law in this state that "in absence of statutory authority a city of the metropolitan class can not be required to refund money received from a purchaser of real estate at a sale made thereof by the county treasurer for illegal special assessments or taxes imposed by the city." Following *Pennock v. Douglas County,* 39 Nebr., 293, and *Merrill v. City of Omaha,* 39 Nebr., 304. On principle, the rule applies with equal force and for the same reasons to cities of the class or grade as the defendant city in the case at bar, and a recovery against it by the plaintiff could not be had without violating and overturning the rule already announced when applied to cities of the metropolitan class. The foregoing remarks as to the possible liability of the defendant city we regard as effectually disposing of the case so far as it is concerned.

This brings us to a consideration of the case as affecting the liability of the county under the issues raised by the pleadings and as presented by the arguments of counsel in their briefs. It is contended that because the taxes levied by the city council for certain municipal purposes were found to have been irregularly levied and void for that reason, the plaintiff, having paid the taxes when he purchased the land against which levied, may recover the same back notwithstanding they were paid voluntarily, and that the rule of *caveat emptor* does not apply. Some authorities are cited which it is contended support the proposition thus advanced. While the decisions of the courts of the different states are not entirely harmonious

on the question, we regard the matter as conclusively settled in this state by the prior utterances of this court regarding the same and similar questions. That the purchaser of real estate at delinquent tax sale is a volunteer and subject ordinarily to the rules applicable to voluntary payments of taxes generally is quite obvious from the nature of the transaction into which he enters and it would seem the proposition hardly permits of discussion or argument. In the case of *Pennock v. Douglas County, supra,* where the subject of the right to recover taxes paid by a purchaser at delinquent tax sale which were illegally assessed is exhaustively discussed, it is said: "We are urged by counsel for appellant to hold the city of Omaha liable in this case upon moral grounds, but we cannot do so. The city did not ask appellant to purchase at its tax sales. He was a volunteer, with all that that term implies." Not only was the tax purchaser a volunteer, but, under the established doctrine of this jurisdiction, he purchased the property for delinquent taxes at his own risk as to the title he acquired thereby. He had no warrant or guaranty of the regularity of the proceedings or legality of the taxes paid from the taxing authorities of the county which issued to him a tax certificate as evidence of his purchase. This instrument has been construed as releasing and quitclaiming to the purchaser only the county's interest in and right to a lien on the real estate sold. The rule of *caveat emptor* is held to apply and the purchaser secures title to the property purchased at his own risk. In the case last referred to, on this subject this court has heretofore expressed itself in unmistakable terms; it is there said: "He [the purchaser] bought without warrant or covenant of any kind and bid what he considered the venture worth; and under these circumstances and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title"; citing Rawle, Covenants for Title, sec. 321, and cases there cited. In *McCague v. City*

of Omaha, 58 Nebr., 37, it is held in the third paragraph of the syllabus that "the rule of *caveat emptor* applies to purchasers of real estate at tax sales." Says NORVAL, J., in writing the opinion: "He was not required to either pay the special taxes against the lots in question, nor to purchase the property at tax sale. He voluntarily purchased the lots for the amount of the illegal taxes imposed thereon, and he has no one but himself to blame for the loss. He cannot recover the amount back. (*Dixon County v. Beardshear,* 38 Neb. 389.) The rule of *caveat emptor* applies to him. (*Pennock v. Douglas County, supra; Merrill v. City of Omaha,* 39 Neb. 304; *Adams v. Osgood,* 42 Neb. 450.)"

It is argued, however, that the present case, under the facts stated, on principle falls more nearly within the rule applied in the case of *Wilson v. Butler County,* 26 Nebr., 676, and should be distinguished from the line of decisions above referred to. The decision in the *Butler County Case* had for its support the provision of section 131 of the revenue laws, ch. 77, art. 1, Compiled Statutes, 1899, wherein it is provided that "When by mistake or wrongful act of the treasurer or other officer land has been sold on which no tax was due at the time, * * * the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer and their bondsmen will be liable to the county to the amount of their official bond." In that case it is held that "Where a county treasurer sells lands for taxes which were not liable to taxation, and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him, with interest thereon." It is also held that "A tax purchaser may presume that the property was taxable, and is not required to make a further examination of that fact as a condition of maintaining an action against the county for the purchase money, and interest." It appears from the

opinion that the land which had been taxed and sold to the purchaser for delinquent taxes was at the time government land and not taxable; that the taxing authorities had no lawful right to levy thereon any assessments whatever for revenue purposes and that by their "wrongful act" the land had been entered on the tax records as being subject to taxation and assessments levied against it in the same manner as real estate subject to taxation. The facts brought the case altogether within the provisions of the statute quoted and resulted unquestionably in establishing the liability of the county for the moneys sought to be recovered. It is the statutory authority and not the application of legal principles recognized by the common law that justified and required in the proper enforcement of the statute the judgment rendered in that case. But observes MAXWELL, J., in delivering the opinion of the court: "The case is entirely different from that of a taxpayer who voluntarily pays a questionable tax without objection. In such case there can be no recovery because the party waives the objection by deliberately paying the amount claimed. He may have an object in this. The questionable tax may be of general benefit, * * * or it may be that the tax in itself is just, although subject to attack from a legal standpoint. In either case, the taxpayer who voluntarily pays the amount charged against his property, thereby in effect admits its validity, and ordinarily cannot recover it back."

Were we to undertake to define, in the abstract, with any degree of certainty, the force, scope and extent of the statutory provision referred to with reference to the right of recovery from the county for illegal taxes paid by reason of the "mistake or wrongful act" of the treasurer or other officer, etc., we would probably find the question surrounded by many difficulties. It is, we think, the part of both wisdom and prudence to address ourselves directly to the question presented for consideration in the case at bar, and ascertain whether the statutory provisions contemplates in such a case reimbursement by the county

to the tax purchaser. For reasons which appear to us quite satisfactory, the plaintiff can not be regarded as being entitled to invoke the aid of this statute in recovering the amount of taxes paid by him at the delinquent tax sale, which it was afterwards adjudged gave no valid lien on the real estate purchased. The action of the city council of the city of Minden resulting in the abortive attempt to levy the taxes held to be illegal was not, in our judgment, a "mistake or wrongful act of the county treasurer or other officer" within the meaning of the statute. That is, the action taken by the city authorities in the manner performed which invalidated the levy was not a mistake or wrongful act within the meaning of the statute. The action of the city council was not a mistake or wrongful act for which they and their bondsmen are held liable to the tax purchaser. It is to be observed, in the construction of this statute, that we are to keep in mind all its parts, and that for a mistake or wrongful act within the meaning of the statute an action may be maintained on the officer's official bond by the tax purchaser or the county to recover the illegal taxes and interest resulting from the act complained of. This contemplates a violation of official duty such as will constitute actionable wrong doing by a public officer. *Lonsdale v. Carroll County,* 75 N. W. Rep. [Ia.], 332; *Iowa & Dakota Land Co. v. Barnes County,* 72 N. W. Rep. [N. Dak.], 1019.

It will not, we apprehend, be seriously contended that the city council can by application of sound legal principles be held responsible on their official bond because of the illegality of the taxes levied by them under the proceedings held void for irregularity for the reasons stated. This would be placing a responsibility on officers authorized to levy taxes that would cause but few, if any, to care to perform that duty. The city council was acting upon a matter on which the legislature had empowered it to act. There was an error of judgment on the part of the members of that body as to the exact steps necessary to be taken to accomplish the desired object. They were pro-

ceeding to do that which they were authorized to do, but in such irregular way as to have their action adjudged not in conformity with the requirements of law and illegal. They failed to follow the provisions of law as to the method of procedure which they adopted in making a levy of municipal taxes for the purpose stated. Their method of procedure was a matter of public record. The plaintiff was cognizant of the proceedings taken, or at least was in as favorable position to obtain the information as the taxing authorities of the county. He was, under the uniform holdings of the courts, charged with notice of the public records evidencing the manner in which the taxes were levied and was not warranted in relying solely on the tax records of the treasurer's office in determining whether the city taxes therein appearing were lawfully assessed and validly levied. It was his duty to examine the proper records and therefrom be advised as to the validity of the tax he was paying, by the purchase of the real estate offered for sale for delinquent taxes. Says COBB, Ch. J., in *Merriam v. Otoe County,* 15 Nebr., 408, 413: "Parties dealing with a county, or other municipal corporation, are under a peculiar obligation to act with fairness and in good faith, as such corporation can only act through its records and other instrumentalities given it by law. Such persons are bound to take notice of such records, not only of what they show, but also, if such be the case, of their failure to show, matters material to the business in hand. It was then the duty of the plaintiff, before buying the lands in question at private tax sale, to examine the record and see for what taxes they were being sold. If he neglected this duty, or knowingly co-operated with the county treasurer in a sale and purchase of the land for a tax unauthorized by law, he cannot call upon the county to save him harmless from the effect of such imprudence"; and further on, in relation to the same subject, it is stated: "Unlike those which we have been considering the 'wrongful act of the treasurer' in selling the land for taxes without first making an effort to collect them by the seizure

and sale of personal property, as well as the existence of such personal property out of which the same could have been collected, was not matter of record, of which the purchaser was bound to take notice, or of which he could be said to be estopped to assert, by participating in the purchase and sale." In the case of *Gould v. Board of Commissioners* on rehearing, 79 N. W. Rep. [Minn.], 530, it is said by the supreme court of Minnesota: "In this case the property was subject to taxation. The illegality or irregularity complained of consisted exclusively of the action of the state board of equalization in raising the assessed value of one class of real estate in the town without making the same increase on another class. This illegality or irregularity appeared from the public records. Plaintiff had the means of discovering this, and he was just as much bound to inform himself of the fact as were the public authorities. Every man is supposed to know the law. If plaintiff was ignorant of the facts of which he now complains when he paid the tax, it was because he failed to avail himself of the means of information which were open to him."

In the present case the city authorities had no duties to perform in determining what real estate was subject to municipal taxes. This was performed by other officers and under different provision of law. It was within the power of the city council only, in the manner provided by law, to levy certain taxes for municipal purposes on all the taxable property within the corporation. They did this in such an irregular manner that the levy was declared null and void. The levy was certified to the proper county officers, and in the performance of a ministerial duty imposed on them the taxes levied were entered on the tax record against all the property lying in the corporate limits of the city making the levy. The taxes were collected and turned over to the city authorities entitled thereto. There was no mistake or wrongful act on the part of the county treasurer or other county officers. The land sold was subject to taxes. It was subject to all valid taxes legally levied against it and it can not, we think, be said that the

irregular action taken by the city council culminating in the void levy was a mistake or wrongful act of the treasurer or other officer "by reason of which land has been sold on which no tax was due at the time." The county acted only for the purpose of collecting the levy made by the city and turning over the funds to the municipality. Further than this, it and its officers had no interest in the matter and no greater responsibility should have been or was by the legislature intended to attach to them than necessary to a proper discharge of their duty incident to such collection. The taxes held illegal were not levied by or for the benefit of the county and we observe no sound reason for holding the county to any further or greater responsibility. On the question of the proper construction of similar statutes see also *Lindsey v. Boone County,* 60 N. W. Rep. [Ia.], 173; *Tyler v. Cass County,* 48 N. W. Rep. [N. Dak.], 232. Counsel for plaintiff in error in their brief say: "We do not contend that Kearney county would be justified in drawing money from its county general fund to reimburse the plaintiff in error, but we do contend that Kearney county could have reimbursed the plaintiff in error out of money in its hands belonging to the water and general fund of the city of Minden." If this contention is sound then the city of Minden is liable under the law and may be compelled in a direct proceeding to make reimbursement for the illegal taxes collected by the county treasurer and received by it. The county certainly could not take from the city's funds the money necessary to reimburse the plaintiff in error except on the theory that the city was primarily liable and legally obligated to the tax purchaser for taxes thus paid.

But from what has been said in the first part of this opinion, the city, without statutory authority therefor, can not be held legally bound to refund taxes illegally levied and voluntarily paid. It is obvious from a casual reading of the statute which we have been considering that the only reimbursement therein contemplated to the county in the event it is required to pay to the tax pur-

chaser taxes resulting from the "mistake or wrongful act of the county treasurer or other officer" is by having recourse to the official bond of the officer responsible for such mistake or wrongful act. No other mode is pointed out by the statute providing for reimbursement to the county for the repayment of such taxes, and it is quite apparent that to say the city can not be held primarily for the illegal taxes it has received, and yet the county may reimburse itself out of the city funds in the possession of the county treasurer, is both inconsistent and illogical. We do not think the proposition is sound and must therefore reject it. The rule is, says Cooley on Taxation, 813, that when a party relies upon a statute for the recovery of illegal taxes paid, he must be careful to bring himself within the provisions of the statute. The plaintiff under the facts in the case at bar and the provisions quoted has not shown himself entitled to recover from the county the taxes collected for city purposes claimed to have been illegally levied, and the judgment of the district court should, therefore, be affirmed, which is accordingly done.

AFFIRMED.

SULLIVAN, J., absent, not voting.

PETER C. NELSON V. NEBRASKA LOAN & TRUST COMPANY.

FILED SEPTEMBER 18, 1901. No. 10,101.

1. **Facts Set Forth Constitute General Appearance.** A party who appears in a case, asks to be and is made a party defendant for the purpose of objecting to a confirmation of sale in foreclosure proceedings, and objects to the confirmation because he was the owner of the property sold and was not served with summons, and because another defendant, being a resident of the state, was served only with notice by publication, thereby makes a general appearance for all purposes of the case.

2. **Constructive Service No Ground for Setting Aside Sale.** It is no sufficient ground to set aside a sale of real estate made in fore-

closure proceedings that a party not necessary nor indispensable to the action was only constructively served with summons when he was a resident of the state.

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

Henry M. Kidder, for plaintiff in error.

Jacob Baily and *Augustus R. Humphrey, contra.*

HOLCOMB, J.

From an order overruling a special appearance and objections to the jurisdiction of the court over him, and confirming a sale of real estate made by the sheriff in foreclosure proceedings, Peter C. Nelson as plaintiff in error prosecutes error in this court. The plaintiff in error was not made a party defendant in the foreclosure action. By a special appearance he came into court and objected to its jurisdiction over him because he was the owner of the land and in possession thereof by tenant and there had been no service of process upon him. The special appearance was overruled. The record then shows: "And this cause coming on further to be heard upon the application of Peter C. Nelson, to be made party defendant, and the court being fully advised in the premises, it is ordered and decreed by said court that the said Peter C. Nelson, be and the same is hereby made a party defendant, and that said defendant is to show cause, if any he has why the sale heretofore made by the sheriff in this cause should not be confirmed." The plaintiff in error then appeared in the case and filed objections to the confirmation of the sale and urged the court to set aside and cancel the decree for the reason that the defendant Hans J. Nelson was, and had been during the pendency of the action, a resident of the state, was not personally served with summons and the attempted service by publication did not confer jurisdiction on the court to act in the cause; and also because the defendant Peter C. Nelson was the owner of the title to

the land and had been in possession by tenant and by agent, and that no process was ever issued or served on the defendant nor had the plaintiff secured service by publication, and that all proceedings theretofore had had been without jurisdiction.

It is quite obvious from the foregoing that, whatever may have been the situation as to want of jurisdiction over the person of the plaintiff in error prior to the time he obtained leave to be made a party defendant and enter objections to the confirmation of sale, he thereby made a general appearance and the court acquired jurisdiction over him for all purposes of the case. He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him; has made a general appearance and waived all objections as to the manner in which he was brought into court. The appearance made was a general one, and comes entirely within the rule stated in *Welch v. Ayres*, 43 Nebr., 326. See, also, *Aultman & Taylor Co. v. Steinan*, 8 Nebr., 109, 113; *Burnham v. Doolittle*, 14 Nebr., 214; *White v. Merriam*, 16 Nebr., 96, 98; *Bucklin v. Strickler*, 32 Nebr., 602; *Leake v. Gallogly*, 34 Nebr., 857; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Nebr., 29. The other objection to the confirmation, viz., that there had been no proper service of process on the defendant, Hans J. Nelson, is not well taken. The action was one in which the jurisdictional steps required in obtaining service by publication had been complied with. Whether the defendant, Hans J. Nelson, might not have specially appeared and showed that he was and had been a resident of the state upon whom personal service might have been obtained and had the constructive service quashed is not before us and need not be discussed. Under the theory of the plaintiff in error and on the ground stated in the motion, this defendant, having disposed of the property on which the mortgage was being foreclosed, was not a necessary or indispensable party to the action and it became immaterial whether or not the court acquired jurisdiction over his

person. Certainly the plaintiff in error was in nowise prejudiced, conceding that proper service of summons had not been made, since whether he was in the case or not, could only be for the purpose of adjudicating his liability for a personal judgment, and this was a matter entirely at the option of the plaintiff in the action if, as the plaintiff in error says, he had disposed of his interest in the mortgaged property after the execution of the mortgage and before the commencement of the suit in foreclosure. The plaintiff in error, on the grounds stated in his motion, is not in a position to complain because personal service was not had on his co-defendant, nor is the want of such service sufficient reason for setting aside the sale made by the sheriff.

The order appealed from being free from error, it follows that the same should be affirmed, which is accordingly done.

AFFIRMED.

SULLIVAN, J., absent, not voting.

THEODOCIA LEWIS V. CHAUNCEY M. NORTH.

FILED SEPTEMBER 18, 1901. No. 10,134.

1. **Submission of Equitable Issues to Jury Not Prejudicial Error.** It is not prejudical error to submit to a jury, for its finding generally, questions of fact on purely equitable issues raised by the pleadings in the case.

2. **Submission Discretionary With Court.** A district court sitting as a court of equity may, in its discretion, submit to a jury any disputed question of fact.

3. **Specific Performance: STATUTE OF FRAUDS.** In order to justify a decree of specific performance of a verbal agreement for the sale of real estate, the acts of part performance relied on to escape operation of the statute of frauds must be clearly, definitely and satisfactorily shown, and it must also appear that such acts were done with reference to, and in pursuance of, the contract.

4. **Statute of Frauds Will Be Defeated Only by Possession Arising Upon Contract.** Continued possession by a tenant is not such

a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to, and result from, the contract and not the lease. *Bigler v. Baker*, 40 Nebr., 325, 326.

5. **Occupancy as Owner.** The above rule *held* to apply when the alleged vendee was occupying the land as a former owner.

6. **Evidence Insufficient.** Evidence examined, and *held* to be insufficient to support the finding of the jury and the decree of the trial court rendered thereon.

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

R. C. Glanville, for plaintiff in error.

W. H. Thompson and *W. H. Platt, contra.*

HOLCOMB, J.

A verdict was returned and judgment rendered in favor of the defendant. Plaintiff brings the case here on error. The plaintiff bases her right of action on three promissory notes executed by the defendant in her favor and aggregating with interest at the time of the institution of the suit about $2,000. In the answer the giving of the notes sued on is admitted, and for a defense it is alleged that they were executed as a part of the purchase price of certain lots purchased by the defendant of the plaintiff situated in Colorado and upon which there had been paid the sum of $1,800; that the defendant went to Colorado after the purchase of the property and about the time the note first due matured, "and then and there had a settlement with the said plaintiff in which the said plaintiff agreed for and on consideration of the surrender of the said property and the forfeiture of the said eighteen hundred dollars heretofore paid, that the said plaintiff would cancel the said notes sued on and send them to the defendant and that the defendant upon the receipt of the said notes, on his return to Nebraska, he would redeed the said property to plaintiff and thereupon and there and then surrender

the said property to the said plaintiff fully relying on the said agreement of settlement and that the plaintiff took possession of the said property and has retained it ever since. That this said contract of settlement was verbal and consummated by the defendant's turning over the property to plaintiff, that this defendant has always been ready and is now ready to comply with his part of the said contract and agreement in every particular and now prays," etc. The reply denied specifically the alleged contract of settlement, the agreement to redeed the land, and cancel the notes, and the delivery or taking possession of the real estate under the contract and pleaded the statute of frauds as rendering void the alleged contract pleaded by the defendant in his answer. It is urged by the plaintiff that the answer does not state a defense to the cause of action pleaded in the petition; that the facts pleaded in the answer are insufficient to take the verbal agreement pleaded without the reach of the statute of frauds.

Without taking the time to discuss or determine this question, we pass directly to that which appears to us as the controlling proposition, for which purpose we assume the answer presents a valid defense, and that is, do the facts as disclosed by the record, support the plea of the defendant to the effect that a contract or agreement was entered into for a reconveyance of the land in consideration of the cancellation of the notes then outstanding representing the deferred payments of the purchase price, and was there such a part performance under and in pursuance of the verbal agreement as to avoid the effect of the statute of frauds and justify a court in decreeing specific performance of the contract?

The defense interposed was purely equitable and invoked the aid of a court of equity for the enforcement of the contract alleged in the answer when established by the evidence. The submission of the questions of fact raised by the issues to a jury for a general verdict does not, we think, amount to prejudicial error calling for a reversal of the judgment on that account. In the trial of an equitable

action any or all questions of fact may, in the discretion of the trial court, be submitted to a jury for their determination. Says the author of the opinion in *Alter v. Bank of Stockham,* 53 Nebr., 223, 230: "A chancellor was always invested with the discretion to submit to a jury issues of fact, and the Code has not deprived the courts, when sitting as courts of equity, of that discretion, and the district courts of the state, while sitting as courts of equity, are vested with the discretion to submit to a jury any disputed question of fact." See also 11 Am. & Eng. Ency. Pl. & Pr., p. 607 *et seq.,* under the title "Issues to the jury in equity cases."

The question of prime importance in the case at bar is whether the evidence shows such part performance of the verbal contract pleaded as to escape the provisions of section 3 of the statute of frauds which declares contracts for the sale of real estate or any interest therein, except leases for one year or less, to be void unless in writing and subscribed by the party to be charged thereby. It is indisputably shown by the evidence that the defendant purchased the real estate mentioned, paying therefor $1,800 in cash and executing the notes in controversy for the remainder, and thereupon the property was conveyed to him by warranty deed. This transaction occurred in the spring of 1893. By the terms of the agreement for the sale of the property, and it is so specified in the deed of conveyance, the plaintiff was to give possession of the premises October 1, 1893. The first note matured October 1. Prior to its maturity and during the latter part of September, and while the plaintiff was yet in possession of the premises under the agreement made at the time of the purchase, the defendant left his home in Nebraska and went to the plaintiff at her place of residence for the purpose of paying or making some arrangement for the payment of the note then about to fall due. While on this trip the defendant testifies that the contract of settlement was entered into and possession of the premises thereunder surrendered to the plaintiff. All the negotiations, both as to the pur-

chase of the property and the alleged resale thereof to the grantor, appear to have been had with the husband of the plaintiff. While it is urged by counsel for plaintiff that the evidence is insufficient to support a finding of agency on the part of the husband, we are unable to so view the record, and hold to the opinion that the evidence is ample to show that the husband was duly authorized by the wife to act for her in the premises.

Regarding the contract for a resale of the property to the grantor in consideration of the cancellation of the notes outstanding given as a part of the purchase price in the original transaction, the defendant is the only witness who testifies on the subject and his testimony is as follows: "We had several conversations about the property, in regard to him taking it back. And as I told him that I couldn't make the payments and I wanted to turn the property over to him, and he said that it would be a great loss for me as I had paid $1,800, and he didn't like to see me lose that much, and he said he could trade the property off and get me something out of it and I told him if he could, all right. He could trade the property off and if he wanted to give me anything, it was all right. That day, or a day or two before I left there, on toward evening of the last day, I think, of September, him and I was down town and come back to the place right across from this place, in front of the house—we stood there—and right then and there we agreed"—the witness was here interrupted by an objection.

Q. State what was done.

A. I turned the property over to him and he agreed to make out a deed and send it to me with those notes and that was to release me of all claim in the property. I was losing $1,800 and deeding him back the property—and the last words he said to me, he said: "I will send you the papers and you can sign and return the deed to me."

Q. State how it was that you turned the property over to him.

A. He was living in the property at that time and his

time was expired and I told him he could take possession and still live there and I turned it over to him and I received nothing further from that day.

This is all the evidence as to an act of part performance under the alleged verbal contract, and it seems to us that it, admitting all that is said to be true, falls far short of acts necessary and required in the performance or part performance of a verbal contract for the sale of real estate which will relieve the contract of the blighting effect of the statute referred to. Counsel for the defendant in their brief contend that the evidence shows that the plaintiff remained in the possession of the property long after her time had expired under the original agreement and that such possession is sufficient to constitute a part performance and take the contract without the statute of frauds. An examination of the record does not bear out this contention. One witness whose evidence was submitted in the form of depositions testified that the plaintiff and her husband were in the possession of the premises after the alleged contract the same as they were before, but this part of the witness's deposition was not offered nor received in evidence. Even though it were, it proves nothing. It is not stated how long the parties were in possession after the time which they were to retain possession when the premises were sold to defendant, nor is there any act testified to at all inconsistent with, or showing a different attitude or relation toward the defendant than existing under the original agreement under which they were lawfully in possession and if after the time mentioned they would be regarded only as holding over their time. The defendant testifies to no act done by either of the parties in the performance or part performance of the contract alleged. There is not a scintilla of evidence showing any change (by acts and not words) in the attitude or relation of the parties by or toward each other as a result or consequence of the verbal agreement he testifies to.

The rule is fundamental that acts of parties in consummating an agreement not in writing, for the sale of real

estate, in order to relieve it of the effect of the statute, must be clearly and satisfactorily shown and such acts must also appear to have been done with reference to and in pursuance of the contract. We have here nothing but the testimony of the defendant in the nature of an opinion or conclusion. He testifies to no act performed by the plaintiff's agent. He says that he surrendered possession, and yet it is indisputably established that the plaintiff was at the time in possession. There was no change, no giving up of possession by the one and a subsequent retaking. There was no act symbolical even of a surrender of possession by the owner to the alleged purchaser or her agent. In fact there was nothing done, conceding all that is testified to by the defendant, except that done by word of mouth. No act of the plaintiff pointing in the remotest degree to a part performance of a contract for the purchase of the property is disclosed by the evidence. The object of the statute is to prevent frauds and perjuries, and yet, if this alleged verbal contract may be specifically enforced, reliance entirely must be had on the oral statements of the defendant unsupported by any evidence of any act done or steps taken by the purchaser upon which a court would be warranted in concluding that she had taken action with reference to and for the purpose of carrying out the verbal agreement testified to. The statute would be of little, if any, value if the contract pleaded, supported by no other evidence than we find in the record, requires or warrants a decree of specific performance.

In *Emmel v. Hayes*, 14 S. W. Rep. [Mo.], 209, it is stated by the judge writing the opinion: "The uniform statement of the text-writers, and the reported rulings of adjudged cases, is that mere continuance of possession does not constitute part performance. There must be a radical change in the attitude of the contracting parties towards each other; a change consisting of acts done; a notorious change, which itself indicates that some contract has been made between the parties; and then parol evidence is admissible to show the details of the agree-

ment." Browne, Statute of Frauds [5th ed.], sec. 476, states the rule as to possession being a part performance of the contract as follows: "The possession must appear to have been delivered or assumed in pursuance of the contract alleged. Thus, it is abundantly settled that one who is already in possession of land as tenant verbally contracts with the owner for a new term; his merely continuing in possession after making the alleged contract is not an act of possession within the meaning of the rule, so as to justify a decree for a lease according to the contract."

In *Poland v. O'Connor,* 1 Nebr., 50, it is held, first, that "A parol agreement for the sale and conveyance of land, must be established by clear and most satisfactory proof; or the court will not specifically enforce it"; and second, "to take such a case out of the statute, the possession of the vendee must be by acts clear, certain, and definite in their object, and having reference to the contract." See, also, *Hunt v. Lipp,* 30 Nebr., 469. In the fifth paragraph of the syllabus in *Bigler v. Baker,* 40 Nebr., 325, it is held: "Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract and not the lease."

In *Christy v. Barnhart,* 14 Pa. St., 260, it is said: "It is not to be disputed, at this time of day, that to withdraw a parol sale of lands from the blighting effects of the statute of frauds, there must be an open and absolute possession taken in pursuance of the contract, with a view to the performance of it. It is consequently a settled rule that a parol sale to a tenant in possession is within the statute, though his possession be afterwards continued, because there is no change of possession, in execution of the contract."

In *Swales v. Jackson,* 26 N. E. Rep. [Ind.], 62, it is stated in the syllabus: "Where the vendees were occupying the land, either as tenants or as former owners, there is no such taking of possession under the contract as will

avoid the statute of frauds." Berkshire, J., after citing a number of authorities as to the required evidence to take an oral contract out of the statute, observes: "In *Cutsinger v. Ballard, supra* [115 Ind., 93], this court said: 'Courts of equity have adopted the foregoing as the rule of evidence in cases for specific performance of oral contracts, and if, at the end, the evidence leaves it a matter of conjecture whether there was a contract, or if its terms are left uncertain, or if the possession or acts of part performance are not clearly referable to the contract, a decree of specific performance ought to be withheld.'"

The following are also directly in point: *Johnston v. Glancy,* 28 Am. Dec. [Ind.], 45; *Koch v. Nat. Union Building Ass'n,* 137 Ill., 497; *Kaufman v. Cook,* 114 Ill., 11; *Armstrong v. Kattenhorn,* 11 Ohio, 265. See also Waterman, Specific Performance of Contracts, secs. 263, 265, 272, 274; 2 Story, Equity Jurisprudence, secs. 752, 753, 760, 764.

The evidence of the defendant not only stands alone and uncorroborated by any attending circumstances shown in evidence, but is flatly contradicted by the testimony of the plaintiff and her husband, and is also greatly discredited by the statements of the defendant himself made in letters written by him subsequently to the alleged contract of settlement. In a letter to the plaintiff's husband, dated November 10, 1893, relative to plaintiff's action in selling the property by virtue of a trust deed executed by the defendant to secure the deferred payment of the purchase price, defendant states: "As you told me the last talk I had with you that you would take the property back if you could not trade the property." There was evidently, at the time this letter was written, no well defined conception in the mind of the defendant that he had prior to that time, as afterward testified to by him, contracted unconditionally the property to the plaintiff who had in pursuance of such contract entered into the possession, and for the consummation of the contract there remained nothing to be done but reconvey the premises upon the receipt

of the notes duly canceled. And on November 17 the defendant in a letter to the attorney for the plaintiff states: "I received a letter from those parties in Denver saying they would let the matter stand for twenty days. I am going out there during that time and will attend to that matter." These expressions are clearly inconsistent with his testimony given at the trial and utterly repugnant to the idea that the property at the time the letters were written had been sold to the plaintiff and part performance of the contract accomplished.

While the rule is that, on questions of fact, when the evidence is conflicting, a finding of the jury or court will not be disturbed when there is sufficient evidence to support the conclusion reached, we are firmly of the opinion in the present case that, construing the evidence most favorably to the defendant, it is wholly insufficient to relieve the verbal contract pleaded from the operation of the statute of frauds, and for that reason the judgment must be reversed and the cause remanded for further proceedings in accordance with law and equity.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

GEORGE G. GREEN V. MRS. TIERNEY, FORMERLY MRS. S. ROYDS.

FILED SEPTEMBER 18, 1901. No. 10,200.

1. **Errors Not Called to Attention of Trial Court Can Not Be Reviewed.** An alleged error occurring during the trial of a case which has not been called to the attention of the trial court in the motion for a new trial can not be reviewed in this court on proceedings in error.

2. **Error Can Not Be Predicated on Inconsistent Defenses, Where One of Them is Eliminated.** When different defenses are pleaded, one of which is inconsistent with the other, and by an instruction one of the inconsistent defenses is eliminated

from the case, the plaintiff can not predicate error because of the inconsistent pleading.

3. **Question**: TENDER: REVIEW. When there has been no offer of proof of the facts sought to be elicited by a question asked in direct examination objected to and objection sustained, the ruling of the court in sustaining the objection is not properly presented for review.

4. **Instructions**: EXCEPTION EN MASSE. When instructions are excepted to *en masse*, if any one is found free from error, the exception can not be sustained.

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

Henry M. Kidder, for plaintiff in error.

J. A. Armour and *Thomas Darnall, contra.*

HOLCOMB, J.

This action originated before a justice of the peace and was brought by plaintiff in error to recover $29.02 for a bill of goods consisting of patent medicines alleged to have been sold and delivered to the defendant. The answer in the district court pleaded a failure of the plaintiff to comply with the terms of the contract for the sale of the medicines, a rescission of the contract, damages for its breach, and a counter-claim for the sum of $2.48 freight paid on the shipment of the goods. The item of alleged damages was eliminated by the instructions of the trial court and need not be further noticed. A verdict was returned by the jury upon which judgment was rendered. A motion for a new trial being overruled, the plaintiff prosecutes error. The motion for a new trial was based substantially on the following grounds: 1. The verdict is contrary to the evidence. 2. Is contrary to law. 3. Is the result of prejudice. 4. The court erred in giving its instructions on its own motion relative to the right of defendant to rescind. 5. The court erred in the admission and rejection of evidence. 6. Errors of law occurring at and during the trial.

It is argued in the brief that there was a departure from the issues raised before the justice of the peace by the answer filed in the district court and that the trial court erred in not striking from the answer certain parts of it on plaintiff's motion. This question was not, we think, presented in the motion for a new trial with sufficient certainty and we can not therefore review the alleged error. The assignment "errors of law occurring at the trial" is insufficient to call the attention of the court to its ruling during the trial on the motion to strike out a portion of the defendant's answer.

It is next urged that a claim for damages is inconsistent with a plea of a rescission of the contract. But, as heretofore stated, this defense was eliminated from the answer by an instruction of the court and no prejudice has resulted to the plaintiff thereby.

It is next urged that the court erred in rejecting certain evidence offered by the plaintiff. As there was no offer to prove the facts sought to be elicited by the question which was objected to, and the objection sustained, the ruling of the trial court is not properly presented here for review. *Denise v. City of Omaha*, 49 Nebr., 750; *German Ins. Co. v. Hyman*, 34 Nebr., 704, 709; *Smith v. Hitchcock*, 38 Nebr., 104, 110; *Murry v. Hennessey*, 48 Nebr., 608, 613.

Finally, an objection is made to one instruction given by the court on its own motion which it is argued is erroneous. By recurrence to the motion for a new trial, we find the instructions were excepted to *en masse* and we therefore are called upon only to examine the record sufficiently to ascertain whether any one of the instructions given was free from error, and finding such to be the case it follows that the assignment of error under consideration should be overruled.

The judgment of the district court should be and accordingly is

AFFIRMED.

SULLIVAN, J., absent, not voting.

ELSIE D. TROUP ET AL., APPELLEES, V. P. W. HORBACH ET AL., APPELLANTS.

FILED SEPTEMBER 18, 1901. No. 10,208.

1. **Confirmation of Sale:** APPEAL: SUPERSEDEAS AND REVERSAL: THE TITLE OF PURCHASER FAILS: LEVY MAY BE QUASHED AND SALE VACATED. Defendants appeal from a final order confirming a sale of real estate made to the execution plaintiffs under an execution issued on a judgment rendered in an equity action, the final order being superseded during the pendency of the appeal. The judgment on which the execution was issued having in the meantime been reversed, *held*, that thereby the title of the purchaser to the property failed, and that an order might properly be entered in this court quashing the levy and vacating the sale.

2. **Appeal Brings Up Cause for Trial De Novo.** An appeal is not a remedy to correct errors of law only, but brings the case to the appellate court for a trial *de novo*. *Wilcox v. Saunders*, 4 Nebr., 569.

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

John D. Howe and *Edward R. Duffie*, for appellants.

G. M. Johnston and *J. E. Cobbey, contra.*

HOLCOMB, J.

Appellants Horbach and Horbach by appeal come to this court from a final order entered in the district court for Douglas county confirming a sale of real estate made by the sheriff under an execution and a subsequent *venditioni exponas* issued on a judgment obtained in the district court of Gage county in an action in equity by several creditors of a corporation against the appellants and others as stockholders by reason of their liability under section 4, article 11 of the constitution, under the sub-title "Miscellaneous Corporations." The appellees make no appearance. The judgment rendered in the equity action, although an appeal was taken to this court, was unsuper-

seded and the plaintiffs have undertaken its enforcement by the issuance of the execution on the return of which the final order in this proceeding was founded.

The real estate levied upon was sold to one of the attorneys for the plaintiffs acting in behalf of and as trustee for all the judgment creditors who had obtained judgments in the original action. The return of the sheriff shows that: "The plaintiff having purchased the above described property, I did not receive any money in consideration of the above sale." The order of confirmation was superseded by the execution of an undertaking as required by the trial court, and no further steps have been taken to perfect the sale made by the sheriff or execute to the purchaser a deed for the property sold under the execution.

It is argued that the execution and vendi are illegal and void because of the form in which issued, and that the motion of appellants to quash the levy made by the sheriff and the objections made to the confirmation of the sale for the reasons stated should have been sustained by the trial court and should now by this court be held well taken. Since the order of confirmation was entered by the trial court, the judgment on which the execution was issued has been by this court reversed. *Troup v. Horbach,* 53 Nebr., 795. This leaves nothing for the execution to rest upon, and we are of the opinion that the appeal may properly be disposed of on this ground alone and without engaging in a discussion of the legality of the writs of execution and vendi which was the question presented and argued to the trial court. The effect of the reversal is, we think, to annul the execution. *Ballard v. Whitlock,* 18 Grat. [Va.], 235; *Hamlin v. Coleman,* 74 Ga., 831. The sale of the property under the execution was to the plaintiffs and has not yet been perfected. The sale is not completed until the execution and delivery of a sheriff's deed. This has been stayed by the execution of a supersedeas bond. Upon the reversal of the judgment, the title to the property, conceding it to have passed to the purchaser, the land having been sold to the plaintiffs, fails, and it is

their legal duty to make restitution to the execution defendant of the same property purchased by them at the sale under the execution. 3 Freeman, Executions, sec. 347.

The appeal taken in this action brings the case here, not only for the correction of errors of the trial court, but for a trial *de novo,* and it is within the authority of this court to enter such a judgment or order as may be justified by the record. *Wilcox v. Saunders,* 4 Nebr., 569; *Porter v. Sherman County Banking Co.,* 40 Nebr., 274.

For the reasons given, the order of confirmation is vacated and the levy of the execution quashed and the sale of the property thereunder set aside and annulled.

JUDGMENT ACCORDINGLY.

SULLIVAN, J., absent, not voting.

JOSEPH WILLIAMS ET AL., APPELLANTS, V. JOSEPH MILES ET AL., APPELLEES.

FILED SEPTEMBER 18, 1901. No. 11,630.

1. **Settlement of Bill of Exceptions by Clerk Under Double Stipulation of Counsel, Construed as Compliance With Statute.** Where a proposed bill of exceptions is submitted to opposing attorneys for examination and suggestions of amendments, who, after examination, return the bill indorsed thereon, "we consent this bill of exceptions be allowed and signed," and afterwards enter into a stipulation that the clerk of the district court may settle and allow the bill of exceptions in the case, in which stipulation it is agreed that no amendments will be suggested by the parties seeking to have the proposed bill allowed, *held,* that the two stipulations, when construed together, are equivalent to an agreement that the bill of exceptions proposed was true and correct, and that the clerk was authorized to sign and allow the same under the provisions of section 311 of the Code of Civil Procedure.

2. **Remedial Statute Liberally Construed.** The statute relating to bills of exceptions being remedial in its nature will be liberally construed. *Morchead v. Adams,* 18 Nebr., 569.

APPEAL from the district court for Richardson county. Heard below before THOMPSON, J. Heard on motion to quash bill of exceptions. *Motion overruled.*

Reavis & Reavis, J. H. Broady and *John L. Webster,* for appellants.

Francis Martin, Edwin Falloon and *Clarence Gillespie, contra.*

Edwin Falloon: The statute by which the clerk is allowed to settle and sign a bill of exceptions must be strictly construed. *Scott v. Overall,* 50 Nebr., 144.

The court is referred to the following cases where stipulations have been held insufficient: *School District v. Cooper,* 44 Nebr., 714; *Martin v. Fillmore,* 44 Nebr., 719.

HOLCOMB, J.

This action is brought to this court by appeal from the district court of Richardson county.

A motion is presented to quash the bill of exceptions filed in the case which was settled and allowed by the clerk of the trial court for three reasons: (1) "The clerk of the district court had no authority to settle and sign said bill as appellees had not agreed that said bill is correct"; (2) "that said bill is not settled and signed by the trial judge"; (3) "that while there is a stipulation now attached to said bill permitting the clerk to sign and allow it, said stipulation was not so attached when signed by attorneys for appellees, nor does said stipulation show that the parties to this action had agreed upon said bill."

It is argued on behalf of counsel presenting the motion that the stipulation is insufficient to authorize the clerk to sign and allow the bill because it does not appear that the parties to the action had stipulated that the bill of exceptions allowed by the clerk was agreed upon as correct; that while there was a stipulation that the clerk might settle and allow the bill, the parties interested had not agreed upon the bill allowed and therefore the clerk was

without authority to act, and that the motion to quash should be sustained under the rule announced in *Scott v. Spencer,* 42 Nebr., 632, wherein it is held: "To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that * * * the parties to the litigation, or their counsel, must agree upon the bill of exceptions and attach thereto their written stipulation to that effect"; and that: "The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so."

Section 311 of the Code of Civil Procedure, relating to the allowance of bills of exceptions, among other things provides: "In cases where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do; and shall thereupon be filed with the papers in the case, and have the same force and effect as though signed by the court." From the record before us it is disclosed that on August 18, 1900, the attorneys for the appellees received the proposed bill of exceptions for examination and suggestions of amendments and the following indorsement appears on the proposed bill signed by the attorneys for the appellees as of date August 28: "We consent this bill of exceptions be allowed and signed." In the bill of exceptions is also the following stipulation by counsel for the respective parties in interest: "It is agreed by the parties hereto, that the clerk of the district court, be and he is hereby authorized to settle and sign the bill of exceptions, as Judge John R. Thompson who tried the case is absent from the first judicial district, and that such settlement and signing by the clerk be done by the 11th day of September 1900. It is agreed that no amendments will be suggested on the part of all plaintiffs represented by I. J. Ringolsky, Jno. L. Webster, and Reavis & Reavis." It was upon this authority that the clerk acted. If from the

stipulations quoted it can be said that the parties have agreed upon the bill and that the clerk should sign and allow it, then the requirements of the statute with reference to his authority to sign and allow the bill have been met and the case does not come within the rule invoked.

In *Morehead v. Adams,* 18 Nebr., 569, it is held: "The statute relating to bills of exceptions being remedial in its nature will be liberally construed." The appellees, who are the movers in the attempt to quash the bill of exceptions, have expressly stipulated on the bill itself that they consent to it as the bill of exceptions and that it may be allowed and signed. In addition to this was the stipulation for the clerk to sign and allow the bill, with the agreement of the attorneys for the appellants that no amendments will be suggested on their part.

Construing the stipulations together, as should be done, as they are only different steps taken in the one action for the purpose of securing the allowance of the bill, it occurs to us that the only logical inference warranted therefrom is that the bill is agreed upon by both parties in writing as being correct and that the clerk might sign and allow it as such under the authority referred to. One party consenting to the bill and its allowance, and the other that no amendment would be suggested, was certainly a meeting of the minds on the proposition that the bill was correct and agreed to, and it remained only to have it allowed and signed either by the trial judge or, by the agreement of the parties, as was done, by the clerk. The case is brought within the rule stated in *Behrends v. Beyschlag,* 50 Nebr., 304, wherein it is held that a stipulation in these words: "It is hereby agreed that the clerk of the district court sign this bill of exceptions, instead of the judge who presided at the trial of this case," is sufficient to authorize the party therein designated to sign and settle the bill of exceptions; that the words "this bill of exceptions" in such stipulation were equivalent to an agreement that the document to which the stipulation was attached was a true bill of exceptions.

For the reasons stated, the motion should be overruled, which is accordingly done.

MOTION OVERRULED.

SULLIVAN, J., absent, not voting.

JOHN BARTON, SHERIFF, ET AL. V. HENRY B. SHULL, CORONER, ET AL.

FILED SEPTEMBER 18, 1901. No. 11,901.

1. **Law of the Case.** Questions raised and decided on former review of the same action *held* to be and followed as the law of the case.

2. **Jury Must Follow Court's Instructions, Right or Wrong.** It is the duty of the jury in all cases to follow the instructions given them by the court, whether correct or not; and if they fail to do so, the verdict will be deemed to be contrary to law and should be set aside and a new trial ordered.

3. **When Exceptions Are Taken to Sureties, Sheriff Must Require Justification or Become Responsible.** When exceptions are taken to the sufficiency of sureties in a replevin undertaking within the time provided by statute, and the sheriff or other officer approving the replevin undertaking fails to have the sureties justify as bail on arrest, he, unless such justification is waived, becomes thereby responsible on his official bond for the sufficiency of such sureties, not only when the replevin undertaking is approved, but also at the time the defendant in replevin is in a position to enforce a judgment rendered in his favor in the replevin action or proceed against the sureties on the undertaking executed by them.

4. **Evidence Does Not Support Verdict.** Evidence examined, and *held* not to support the verdict returned by the jury.

5. **Verdict Contrary to Instructions.** The verdict returned by the jury *held* to be contrary to the instructions of the court and should have been set aside.

6. **Levy in Attachment:** REPLEVIN: LEVY BY EXECUTION: SUIT ON BOND: DEFENSE PRO TANTO. Where property levied upon under writs of attachment is taken from an officer by replevin proceedings, and after judgment in the attachment case the same property is levied upon and seized by the officer from whom replevied by virtue of an execution issued on the judgment, regaining possession of the same property under the execution, undiminished in value, constitutes a defense *pro tanto* in an

action on the replevin undertaking or in an action for taking insufficient sureties on the replevin bond, and the fact that the property is subsequently replevied by the plaintiffs in the first replevin action, or their assignees, will not render the defense unavailable.

7. **Granting New Trial No Error.** Action of the trial court in granting a new trial on a former hearing *held* without error.

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

Hastings & Hastings, for plaintiffs in error:

It is the duty of the jury in all cases to follow the instructions given them in charge by the court. *Jewett v. Smart,* 11 Ia., 505 [also Nebr. cases cited in opinion].

Any other ruling would submit parties to the injustice of having their evidence and facts shaped to one view of the law by the trial court and then decided upon another without any opportunity to submit the facts and evidence bearing upon that view. *Matthewson v. Burr,* 6 Nebr., 312; *Cook v. Pickrel,* 20 Nebr., 433; *Missouri P. R. Co. v. Cassity,* 44 Kan., 207, 24 Pac. Rep., 88; *Hardin v. Sheuey,* 40 Nebr., 623, 43 Nebr., 806.

Sureties did not justify as bail on arrest.

The fact that the juror Gavin was related to counsel is, probably, not technical ground for challenge. *Wood v. Wood,* 52 N. H., 422; *Funk v. Ely,* 45 Pa. St., 444.

Tibbets Bros., Morey & Anderson, also for plaintiffs in error.

Fayette I. Foss, A. S. Sands, J. D. Pope and *B. V. Kohout, contra.*

HOLCOMB, J.

The plaintiffs in error, also plaintiffs below, began an action against the defendant, Henry B. Shull, as coroner, and the sureties on his official bond, for having negligently approved an insufficient undertaking in replevin in an ac-

tion begun against John Barton as sheriff. The sheriff, defendant in the replevin action, had attached a certain stock of drugs and other merchandise kept therewith at the instance of the other plaintiffs in this action, who were creditors of a certain firm or copartnership doing business under the firm name and style of Foster & Ayres. The property was attached as belonging to the said copartnership or firm of Foster & Ayres. Thereafter the plaintiffs in the replevin action who were the father and mother, and father-in-law and mother-in-law respectively of the individual members of the said firm of Foster & Ayres, replevied the attached property as belonging to them, the coroner serving the replevin writ on the sheriff, taking the property by virtue thereof and delivering it to the said plaintiffs after taking and approving a bond in replevin to which objections were made and exceptions taken, as to the sufficiency of the sureties, by the sheriff, the defendant in this action.

The cause by proceedings in error has once before been brought to this court for consideration, the opinions disposing of the case being found in *Shull v. Barton*, 56 Nebr., 716, and on rehearing in 58 Nebr., 742. In the two opinions referred to will be found an extended discussion of the case and a decision on several points raised in the trial thereof. We will not undertake again to consider matters therein disposed of. The questions therein determined having once been decided will be followed as the law of the case.

It will be observed that the specific cause of action on which a right of recovery is based is the alleged failure of the coroner to have the sureties on the replevin bond justify as bail on arrest, after the defendant in the replevin action, and within the time provided by statute, had duly objected and excepted to the sufficiency of such sureties, they being, as alleged, of insufficient financial responsibility to respond to the obligations assumed by entering into the replevin undertaking. No attempt was made by the coroner to have the sureties justify, in the manner

pointed out by statute, after objections had been made to their sufficiency, unless the taking by the coroner of an affidavit by each of the two sureties in the most general terms as to the value of the property of each above debts and exemptions and subject to execution can be regarded as an attempt at justification. Certainly it was no such justification as the statute requires, as has heretofore in this case been decided. The court instructed the jury, and we think properly, that under the evidence no legal justification as required by statute had been exacted by the coroner from the sureties after he was notified that they were objected to as insufficient, and that his liability to the plaintiffs in this action must be determined from the standpoint that no justification of the sureties had been required after due notice of exceptions to their sufficiency. On this point the jury were instructed as follows:

"13. It appears from the undisputed evidence that the replevin action alleged by plaintiffs was commenced by Foster & Co., that property was taken and an undertaking with Killer and Sarah Jane Custer taken by defendant Shull, that he was coroner and the other defendants his sureties on his official bond, that objection was made to the sufficiency of the sureties within twenty-four hours by plaintiff, and it does not appear that the sureties have ever justified as required by law; it also appears by undisputed evidence that plaintiff Barton recovered judgment against Foster and Co., as stated, that an execution was issued and returned by H. B. Shull coroner, unsatisfied.

"14. The statute as before stated, having provided that the coroner should be responsible for the sufficiency of the sureties until they justify in the manner stated, and it not appearing that they have ever done so, the only remaining questions are: first, were these sureties insufficient when this action was begun August 19th, 1893? 2nd, If they were at that time insufficient had sheriff Barton received the property back in such a way as to discharge the liability upon the bond?

"15. These two questions, gentlemen, are all that is left for your consideration. With regard to the first, if you believe from the evidence that the amount of the replevin judgment could not have been made by legal process in the state of Nebraska on August 19th, 1893, against Sarah Jane Custer and Henry Killer, then they were insufficient at that time. With regard to the second, if you believe from the evidence that the property was taken back, but immediately taken away by the same parties, or their grantees on another replevin action, and has not been returned nor paid for, nor in any manner recovered to the use of the plaintiffs, or any of them, that constitutes no defense to defendant's liability."

The jury having returned a verdict for the defendants upon which, after a motion for a new trial was overruled, judgment was rendered in their favor, it is assigned, as the principal ground of error calling for a reversal of the judgment, that the verdict is contrary to and unsupported by the evidence and is contrary to the instructions of the court. Without at the present time discussing the correctness of the instructions, the rule is, that it is the duty of the jury in all cases to follow the instructions given them by the court, whether correct or not; and if they fail to do so the verdict will be deemed to be contrary to law and should be set aside and a new trial ordered. The reasons for the rule are obvious; and any other would lead to endless confusion, sanction an utter disregard of the court's opinion of the law applicable to the pleadings and the evidence, and render its instructions entirely impotent except when willed otherwise by the jury. A refusal or failure to follow the instructions of the court is sufficient ground for setting aside a verdict and granting a new trial. *Standiford v. Green*, 54 Nebr., 10; *Esterly Harvesting Machine Co. v. Berg*, 52 Nebr., 147; *Omaha & R. V. R. Co. v. Hall*, 33 Nebr., 229; *Aultman v. Reams*, 9 Nebr., 487.

Assuming, then, that the instructions heretofore quoted correctly presented to the jury the only question to be by

them considered and determined, a brief examination and consideration of the evidence is required of us in ascertaining whether the verdict returned can be sustained under the evidence and the court's instructions. The evidence on the first trial, which we assume was quite similar to that submitted in the subsequent case, was reviewed at some length by Mr. Commissioner RAGAN, who wrote the opinion of the court first handed down, heretofore cited, 56 Nebr., 716, and the conclusion there reached was that, entirely aside from the provisions of the Code requiring the sureties to justify when objected to, as bail on arrest, in order to relieve the approving officer from responsibility, the coroner, in taking and approving the sureties on the replevin undertaking, acted negligently, for which he was responsible in damages to the defendant for all loss sustained by reason of the insufficiency of such sureties; that the sureties were clearly insufficient and the officer acted negligently, for which an action would lie when he approved the replevin bond. Much stronger would be the reason for holding him responsible under the provisions of the statute referred to. On rehearing it was determined that the provisions for justification as bail on arrest were in force and operative and that the officer approving the replevin bond, in order to be relieved from responsibility, must comply with such provisions unless exceptions to the sufficiency of the sureties were waived by the defendant in the replevin action. 58 Nebr., 742. By section 189 of the Code of Civil Procedure it is provided: "The defendant may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the sureties: If he fail to do so, he must be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify upon notice as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties, until the objection to them is waived as above provided or until they justify. The property shall be deliv-

ered to the plaintiff, when the undertaking, required by section one hundred and eighty-six has been given." To justify as bail on arrest, it is provided that, upon written notice to the defendant or his attorney, the sureties may justify before a judge or clerk of the court in which the action is brought, a probate judge, or justice of the peace, at a specified time and place mentioned, and may be examined on oath or affirmation touching his or their sufficiency in such manner as the officer may think proper. If the officer finds the surety sufficient, he shall indorse his allowance on the undertaking and cause the same to be filed with the clerk. Says the statute, "The sheriff or other officer shall be responsible for the sufficiency of the sureties, until the objection to them is waived as above provided or until they justify."

Clearly, then, if we give force and effect to the plain provisions of the statute, as we are in duty bound to do, the defendant and the sureties on his official bond are liable to the defendant in replevin for the damages he sustained by taking from him the property he was adjudged to be entitled to under his attachment writs, if at the time he may have proceeded against the sureties on the replevin undertaking he found them insufficient and incapable of responding to the terms of the obligation, having no property whereby by legal process he might obtain satisfaction from them of the judgment in his favor in the replevin action for a return of the property or of its value to the extent of his special interest therein in case a return could not be had. By the coroner's failure to have the sureties justify as provided by law when objection to their sufficiency was made, he became responsible on his official bond for the sufficiency of the sureties to respond to a judgment for a return of the property or of its value, including damages and costs. Shinn, Replevin, secs. 394, 395, 906, 907; Cobbey, Replevin, sec. 694; Wells, Replevin, sec. 289. Of the two sureties accepted by the coroner on the replevin undertaking, one was a clerk in a store which was closed by the attachment proceedings, and the other, a

single woman, was employed in the family of the plaintiffs in replevin, her wages being fixed at no particular or stated sum. From the evidence we think it clearly appears, as was stated by Commissioner RAGAN in the first opinion, that the sureties, at the time of their acceptance as such, were not of such financial responsibility as to render them qualified as sufficient sureties on the obligation they signed, and the officer was negligent in approving the bond thus tendered without further inquiry and investigation as to their ownership of property subject to execution and forced sale and the nature and location of the same, if called upon to respond to the obligation by the defendant in replevin according to the terms of the undertaking. The evidence is overwhelming and conclusive to the effect that at the time the defendant in replevin had obtained his judgment in that action and was in a position to move against the sureties on the undertaking, for the purpose of obtaining satisfaction of the judgment, he was wholly and entirely unable to collect anything from the sureties on the obligation they had assumed, and that no property of any kind or nature belonging to them could be found in the jurisdiction of the court with which to satisfy such judgment. The surety Henry Killer at the time he signed the undertaking, as appears from the evidence, had no visible property in his own name subject to execution and forced sale. His father, it appears, had died shortly previous and he claimed eighty acres of real estate in an adjoining county, belonging to his father's estate under the terms of a last will and testament. This will, it appears, was for some reason held to be invalid and the young man, as he testified, sold his interest in the real estate, shortly after signing the bond, to his mother for $1,000. He also claims to have collected from his father's estate $300 for wages due him for work done before the father's death. All this money, if received, appears to have been dissipated in traveling, and it is shown that in the spring of 1893, and a few months only prior to the beginning of this action, he returned no property for assessment and

shortly left the state. Others competent to speak on the subject also testified that he was not possessed of any property and was substantially without means or property out of which a judgment could be satisfied. The official records where he resided failed to disclose any property subject to assessment, nor did the real estate records show any real property belonging to him. It is obvious that, as a surety on a replevin undertaking, he was practically worthless. In an affidavit made before the coroner, at the time of his acceptance as a surety, he swore that he owned real estate in Saline county, where he then lived, not exempt from execution and aside from incumbrances of the value of $947.28. Save such interest as he was possessed of in his deceased father's real estate in Jefferson county, the evidence discloses that he owned no real estate whatever at the time of making the affidavit or since. The other surety, Sarah Jane Custer, made affidavit that she owned real estate in Saline county not exempt from execution and aside from incumbrances of the value of $2,500. The evidence as to her financial responsibility appears no better than her cosurety. She had at the time been living in the family of the plaintiff in error for several years, first for wages at a stipulated sum, and later on without any agreement as to wages and apparently as one of the members of the family. She appears to be a person of very limited means and with no visible property until about the time of the transaction under consideration. Shortly prior to the time she signed the replevin bond, the plaintiff in replevin and a son-in-law, the defendant in the attachment proceedings, conveyed to her certain town lots on which they resided in DeWitt, Saline county, which by competent judges is valued at about $900. The property was encumbered for $450. Shortly afterward the property was conveyed by her to one Vanderpool, who claims to have purchased L. M. Foster's interest in the stock of merchandise replevied from the plaintiff in this action. There is also testimony tending to prove that L. M. Foster borrowed of her several years before $800, and that as se-

curity she had a mortgage on a stock of drugs owned by him which he afterwards, as he says, turned over to her in satisfaction of the debt. It also appears that after the property had been attached by the sheriff a mortgage was executed thereon in favor of the surety in the replevin bond, Sarah Jane Custer, for $2,500. These circumstances can hardly be regarded as other than a shifting of the property between the members of the same family for the purpose of defrauding honest and bona-fide creditors, and is entitled to but slight consideration in fixing the financial responsibility of the parties connected therewith. Soon after the execution of the replevin undertaking this surety disposed of all property held in her name and with the Fosters left the county and state. At the commencement of the present action nothing whatever was left within the jurisdiction of the court belonging to her or her cosurety and the replevin bond was utterly worthless. The property taken on the replevin writ was valued at the sum of $3,447.24. The sureties taken when the bond was approved were at that time manifestly insufficient. At the time the defendant in replevin had recovered his judgment and was ready to proceed to enforce it or to have recourse on the replevin undertaking the sureties had no property, were without the jurisdiction of the court, and the judgment creditors in the replevin action, as to them, was entirely remediless. The responsibility of the approving officer for this state of affairs is by law fixed and made certain, and from the consequences of which he can not escape by attempting to prove that at the time the bond was approved the sureties were sufficient. As we understand the record the defendant practically concedes that the sureties were worthless when this action was begun. Whether correct or not in this regard it is quite obvious that the sureties on the replevin bond were, at the commencement of this action, insufficient and wholly unable to respond in damages or make good their undertaking for return of the property or for its value in case a return could not be had. This conclusion will not be seriously questioned by any who have studied the record now before us.

The defense interposed, wherein it is claimed that the sheriff, after the property was taken from him under the replevin writ, again obtained possession of it in as good condition, and of the same value, under writs of execution in favor of the same parties and other creditors, can not, under the instructions of the trial court, be sustained. It is proved beyond controversy that after the execution writs were levied on the property, admitting it to have been the same that was taken under the replevin writ, and of undiminished value, it was again replevied by the same plaintiff except that of L. M. Foster, who had sold his interest to one Vanderpool, who, as assignee, joined with the other plaintiff in the first replevin action in again replevying the same property, obtaining possession thereof and removing the property from the county. The sheriff under his executions gained nothing for himself or those he represented by seizing the property under the writs of execution issued on the judgments obtained after the institution of the first replevin action. By the trial court's instructions if the plaintiffs in the first replevin action, or their assignee, regained possession of the property after the sheriff had seized it under the executions placed in his hands, the fact that he had once had the possession of the property after it was taken from him by the replevin writ would not operate as a defense in favor of the coroner and relieve him from responsibility for taking insufficient security. If the instructions were followed which the jury were in duty bound to follow on this issue under the undisputed evidence, no other conclusion can be justified than that the sheriff lost the possession of the property by a second replevin action instituted by one of the same parties to the first replevin action and the assignee of the other. No other conclusion can therefore be arrived at than that the verdict is not supported by the evidence and is contrary to the instructions of the court, for which the judgment must be reversed.

We think the jury were misled by the argument of counsel for the defendant in an attempt to maintain the posi-

tion that the sureties had in fact justified, although not in strict conformity with the statute, and that the defendant had waived the required statutory justifications by his actions and statements to the coroner, although neither of these questions were properly before the jury for their consideration. We perhaps would be justified in holding that the conduct of the counsel amounted to prejudicial error in that, in the face of objections by opposing counsel and contrary to the instructions of the court, he persisted in presenting and arguing to the jury as grounds for a verdict in favor of defendant questions not presented by the evidence or pleadings for their consideration. We, however, do not regard it as necessary to determine the question in view of the conclusions already reached. This cause is here for the second time. Although not necessary to be determined in a proper disposition of the present proceeding, we are constrained to express our disapproval of that part of the fifteenth instruction given the jury by the trial court relating to the question of whether the sheriff had received the property back in such a way as to discharge the liability of the coroner for taking insufficient replevin bond. It is there stated in substance that if the sheriff had, subsequent to the first replevin suit, regained possession of the property, but it was immediately taken away by the same parties or their grantees in another replevin action, then the retaking by the sheriff would constitute no defense to the liability of the coroner for taking insufficient security or his failure to have the sureties justify in the manner provided by law. We do this that the action may be speedily and finally disposed of. The replevin undertaking provided that the action should be prosecuted without delay, to pay all damages and costs adjudged against the plaintiff and for a return of the property or in case a return could not be had, to pay its value and lawful interest to the extent of the defendant's special property therein together with damages and costs. When the sheriff took the property on executions in favor of the same parties for whom the attachment writs were levied

to the extent of the property so retaken, this constitutes a defense *pro tanto* in an action against the coroner for taking insufficient security, and satisfied, to the extent of the property so retaken by the executions, the conditions of the replevin undertaking providing for a return of the property to the defendant in case a judgment for a return should be rendered. The fact that the property is subsequently again replevied does not, as it occurs to us, afford any sufficient reason for changing the rule announced in the opinion on the former hearing. The instruction we regard as inconsistent with the views therein expressed.

The defendant, by virtue of his attachment writ, had a special property which he could enforce when he obtained his judgment in the replevin action. Instead of enforcing this right when judgment was obtained in the main case and in the replevin action, an execution is issued and levied on the same property, by which he gains possession of the same property lost in the replevin action. This practically works an abandonment or waiver of the attachment lien for the purpose of enforcing the execution. He obtains possession of the same property and the conditions of the replevin undertaking are presumably good and altogether sufficient to indemnify and save him harmless. The office of the replevin undertaking is to take, in a limited sense, the place of the property replevied and protect the person from whom taken either by a return of the property or the payment of its value with interest. Now, the sheriff, having regained possession of the property first replevied, or such of it as he in fact seized under the executions issued for the benefit of the same attaching creditors, has accomplished all that he can rightfully demand of the sureties on the replevin bond and has no cause of complaint against them so far as a return of such property is concerned, nor can he complain in that respect of the approving officer who approved the undertaking. If the property is again taken from him, then the law furnishes him an adequate remedy on the bond which must be given before he can rightfully be deprived of its possession. He

has the full benefit of the property which the undertaking, alleged to be insufficient and negligently taken, provides shall be returned to him, in the possession of the property itself or the execution of another undertaking for its return to him in case a return is adjudged in his favor. While the multiplicity of suits is not to be commended, but rather condemned, the sheriff is not in a position to take advantage of this abnormal state of affairs. He was not content to rest on the lien obtained by the levy of the attachment writ but seeks also to obtain a lien on part of the same property by the levy of an execution for the purpose of satisfying the same obligation. We are, therefore, of the opinion that, notwithstanding the retaking of the property from the sheriff by the second replevin action, to the extent that he regained possession of the same property in as good condition and of equal value which was taken from him by the replevin writ first levied and for the return of which the insufficient replevin bond was given, that this constitutes a defense *pro tanto* in favor of the coroner in an action on his official bond for approving an insufficient replevin undertaking. It would seem on principle that a return of the same property to the defendant in replevin in as good condition and of equal value as when taken under the writ, either voluntary or by legal process, is a good defense in a suit on the replevin undertaking for a return of the property in case it should be so adjudged, and this view is supported, we think, by the former expressions of this court in the case at bar as well as in other actions when the subject has been under consideration. If our views in this respect are correct and are supported by authority, as we think they are, it appears to us that the fact that the property after being returned was again taken away from the defendant in a new replevin action instituted for that purpose, would not be cause for changing the principle or rendering it inapplicable when invoked by those liable directly or indirectly on the replevin undertaking first executed. If a good defense partially or *in toto* has arisen in favor of the coroner by

reason of a return of the property taken on the writ and for which he is held responsible, the defense would not be rendered unavailing by a subsequent retaking of the same property in a new action begun by the same plaintiffs or their asignees and for the return of which property a new undertaking had been executed in favor of the defendant in replevin. This, we think, is the logical conclusion to be reached from what has already been decided in the present case, and is in harmony with the views expressed in the following authorities: *Otto v. Burch,* 50 Nebr., 894; *Rinker v. Lee,* 29 Nebr., 783; *Harrow v. Ryan,* 31 Ia., 156.

The defendants in error, by way of cross-petition, seek to predicate error on the ruling of the trial court in granting a new trial on plaintiff's motion after hearing had at a former term of court. It appears that a trial was had wherein the pleadings, the evidence, and the instructions were substantially the same as at the last trial and in which a verdict was returned in favor of the defendants. The motion for a new trial was sustained, the verdict set aside, and another trial ordered. The trial court could not have consistently done otherwise, and from the views entertained by us regarding the last trial, as heretofore expressed, it logically follows that no error was committed in granting the new trial of which complaint is now made by the defendants in error.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

PAULINE ANDERS, ADMINISTRATRIX, V. LIFE INSURANCE CLEARING COMPANY.

FILED SEPTEMBER 18, 1901. No. 9,831.

Commissioner's opinion, Department No. 1.

1. **Provision in Insurance Policy Condition Precedent.** A provision in a life insurance policy as follows, "This policy shall not take effect until the first premium thereon shall have been paid to the company, or to some person authorized by the company to receive it, in accordance with the premium receipt accompanying the same, and while the insured is in good health as evidenced by the health certificates properly executed and furnished to the company," is a condition precedent, and before recovery can be had, insured must show compliance therewith or a waiver by the insurer.

2. **Condition Precedent: WAIVER MUST BE PLEADED AND PROVED: GENERAL DENIAL.** A party relying for recovery on a waiver of a condition precedent in a life insurance policy must plead and prove such waiver, or it will be unavailing; and proof thereof can not be received under a general denial.

3. **Directing of Verdict Proper.** Where the proof of plaintiff, admissible under the pleadings, is insufficient to entitle him to recover, an instruction directing the jury to find for the defendant will be upheld.

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

Edward F. Pettis, for plaintiff in error.

Lambertson & Hall, contra.

KIRKPATRICK, C.

This is an action brought in the district court of Lancaster county by Pauline Anders, administratrix of the estate of Adolph Anders, deceased, against the Life Insurance Clearing Association of St. Paul, Minnesota, to recover the sum of $1,000 on a policy of insurance on the life of Adolph Anders, which it was claimed was executed by the Life Insurance Clearing Association about a month

before the death of Anders. Trial was had to a jury in the district court, resulting in the district court instructing the jury to bring in a verdict for the defendant in error, the Life Insurance Clearing Company, on the ground that under the pleadings and evidence, plaintiff in error, plaintiff below, could not recover. To reverse this judgment, plaintiff in error has brought the case to this court. The facts in the case, briefly stated, are as follows: A. Von Pulaski, an insurance broker of Hastings, took the application of Adolph Anders for life insurance in the Union Life Insurance Company of Omaha in September, 1893. The application, together with the physician's certificate, was sent to the Omaha company, which appears to have rejected the application as a doubtful risk. The secretary of the Union Life Insurance Company forwarded the application, together with the physician's certificate, to the Life Insurance Clearing Company of St. Paul, which thereupon made out the policy sued upon in this action, sending it with a premium receipt for the first year's premium and two health certificates, one to be signed by Anders, and the other to be signed by the medical examiner of the Omaha company, to the secretary of the Union Life Insurance Company at Omaha. The policy, with the premium receipt and the health certificates, was sent to the agent of the Omaha company at Hastings, who turned over the policy and certificates to Pulaski, who, in turn, mailed the policy to Anders. The health certificates were not signed, nor was the premium receipt delivered to Anders, but was returned to the Omaha company, which returned it to the clearing company at St. Paul. There is a conflict in the testimony as to the payment of the premium by Anders; Pulaski, the broker, testifying that it was paid to him, and that he sent half of it to the clearing company and kept half as his commission; the clearing company, however, claiming that it never received any sum whatever on the premium. The policy, on October 7, 1893, was delivered to Anders, who died on October 29, 1893. The petition of plaintiff in error in the district court alleged execu-

tion and delivery of the policy sued upon, attaching a copy of the policy to the petition as an exhibit, and alleged generally the payment of the premium, and full compliance with the terms and conditions of the policy on the part of both plaintiff in error and her intestate. The answer of the clearing company consisted of both a general and special denial, and in addition set out the following as a defense: "Defendant further alleges that said policy of insurance described in plaintiff's petition contained this clause and provision: 'This policy shall not take effect until the first premium thereon shall have been paid to the company, or to some person authorized by the company to receive it, in accordance with the premium receipt accompanying the same, and while the insured is in good health, as evidenced by health certificates properly executed and furnished to the company.' Defendant alleges that if said policy of insurance came into the hands of the said Adolph Anders, it was without the knowledge or consent of the said defendant, and the said Adolph Anders did not pay the first premium to the company or to any person authorized by the company to receive it, in accordance with the premium receipt accompanying the same at the time the said policy came into his possession, or at any other time, and did not furnish to the defendant a health certificate showing that he was in good health at the time the policy came into his hands, or at any other time. Wherefore, the said policy, if it came into the possession of the said Adolph Anders, did not take effect, and was null and void, and the plaintiff is not entitled to recover thereon." To this answer of the insurance company plaintiff filed for reply a general denial.

The questions presented for consideration in this case are: First, are the matters set out in that portion of defendant's answer above quoted condition's precedent? and, second, were they waived by the company so as to make it liable on the policy? and, third, if they were waived, should plaintiff in error have been allowed to prove such waiver, not having by any pleading presented the question of

waiver as an issue in the case? We have very carefully examined all the authorities cited by both plaintiff in error and defendant in error, and in addition thereto many other authorities, and have reached the conclusion that the matters specially pleaded in the answer of defendant in error are conditions precedent. In view of the business transacted by defendant in error, the class of risks it accepted, etc., the conditions pleaded seem to be but reasonable. A large portion of the business transacted by defendant in error was that of writing risks rejected by other companies. In the case at bar plaintiff in error's intestate did not make an application to the defendant company, but the application was made to the Union Life Insurance Company of Omaha. After having been rejected by that company, it was by its officers forwarded to the Life Insurance Clearing Company, the defendant in error. Defendant in error accepted the risk, issued the policy, and transmitted it to the officers of the Omaha life insurance company, to be delivered to Adolph Anders upon his complying with the conditions precedent set out in the policy. One of these conditions was the payment of the premium. Another of these conditions was that the two health certificates accompanying the policy, one to be signed by Anders and the other by the physician who examined him, were to be filled out and delivered to the company at the time the policy was turned over to Anders, deceased. Considerable time had elapsed from the making out of the application to the Omaha life insurance company and the medical examination, to the time when the policy was in fact written up by the defendant in error. Defendant in error had a right to know that Anders was in as good health at the time the contract of insurance was to be finally consummated as he was at the date of the application which was the basis of the contract. This was a very important condition, in view of the character of the business of defendant company in writing risks rejected by other companies. It is probably true that Anders, deceased, did not know that the policy was accom-

panied by these two health certificates, yet, from the conditions contained in the policy which was wrongfully delivered to him, he was bound to take notice that the policy did not take effect until the payment of the first premium and the execution of the health certificates mentioned therein.

It will be noticed that the application originally made by Anders, deceased, a certified copy of which was used by the defendant company as a basis for writing the risk, contains a clause in the following language: "I do hereby agree that the foregoing answers and statements, and also those made to the company's medical examiner, are true and full, and are offered as a consideration of the policy contract, which shall not take effect until the first premium shall have been paid, during my life and good health." From this clause in the application signed by Anders, and the conditions of the policy pleaded by defendant in error, we are of the opinion that Anders, deceased, was bound to take notice that the policy did not take effect until he had paid the first premium and had furnished to the company some kind of certificate that he was in good health at the time he made such payment and received the policy. It is true, the evidence tends to show that he did in fact pay the first premium at the time he executed the application to the Omaha life insurance company. No part of this money ever reached the defendant, the Life Insurance Clearing Company. Yet there is no evidence tending to show that the health certificates were executed in accordance with the conditions of the policy, and it seems very clear that defendant in error had no knowledge that the policy had ever been delivered to deceased until it received notice of his death. The conditions precedent pleaded by defendant in error are conditions that might have been waived, and whether evidence of waiver under the pleadings was admissible will require consideration.

Section 128 of the Code of Civil Procedure is as follows: "In pleading the performance of conditions precedent in

a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." Under this provision, the petition of plaintiff in error seems to have been sufficient, as she pleads the performance of all the conditions upon her part or that of her intestate to be performed. But it is clear that she can not recover in the case at bar by showing performance of all the conditions precedent. Under the condition of facts disclosed by the evidence she must recover, if at all, on the ground that defendant in error had waived the conditions precedent pleaded in its answer. It seems to be the rule of this court, firmly established and founded upon right reason, that a person relying upon a waiver of conditions precedent to the validity of a contract of any kind must properly plead such waiver in order to be entitled to introduce evidence tending to establish it. *Livesey v. Omaha Hotel Co.*, 5 Nebr., 50; *Quick v. Sachsse*, 31 Nebr., 312; *Phenix Ins. Co. v. Bachelder*, 32 Nebr., 490. In the case of *Eiseman v. Hawkeye Ins. Co.*, 74 Ia., 11, it was said: "If plaintiff, in an action upon a policy of fire insurance, relies upon a waiver by the company of conditions of the policy as an excuse for his failure to perform them, he must plead such waiver." Again, in the case of *Bernhard v. Washington Life Ins. Co.*, 40 Ia., 442, the court said: "In an action upon a policy of life insurance, the petition alleged the execution of the instrument for a due consideration, and the answer denied the payment of premiums, which, by the terms of the policy, worked a forfeiture. The court instructed the jury that they might inquire whether the company had waived the payment of the premiums: *Held*, that there was no issue raised by the pleadings which justified the instruction."

It is the policy of our Code of Civil Procedure that matters actually in controversy between the litigants shall be narrowed down within the least possible limits, so that the time of the court may not be taken up in the hearing

of evidence upon questions which are not decisive of the case. In the case at bar, plaintiff in error, having alleged full compliance with all the conditions upon her part and upon the part of her intestate to be complied with, can not be permitted on trial of the case to change materially the issues involved by saying that, while her intestate had not complied with the conditions, the defendant in error had waived them, and for that reason she was entitled to recover. While the evidence tending to establish waiver was slight, yet it was sufficient in our opinion to have required its submission to the jury; but the question of waiver not having been pleaded, there was no issue thereon which would properly have been submitted.

It follows, therefore, that the action of the district court in instructing the jury to find in favor of the defendant in error was right, and it is recommended that the judgment of the lower court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

CHARLEY HRABAK ET AL. V. VILLAGE OF DODGE.

FILED SEPTEMBER 18, 1901. No. 10,188.

Commissioner's opinion, Department No. 1.

1. **Money for Liquor License Received by Treasurer Ex Officio.** Money paid to a village treasurer to procure the issuance of a license to sell intoxicating liquors, as required by the ordinances of said village, is received by the treasurer *ex officio*, and his bondsmen are liable for his failure to account therefor.

2. **Village May Maintain Action Though Trustee of School District.** A village can maintain an action against its defaulting treasurer and his bondsmen to recover license moneys collected by

such treasurer, although the village is comprised within the limits of a single school district, to which the money must ultimately be paid.

3. **Where Petition States Cause of Action, and Answer No Defense, Not Error to Direct Verdict for Amount Sued For.** Where a petition states a cause of action, and the answer thereto fails to state a defense, it is not error for the court to instruct the jury to find for the plaintiff in the amount shown by the pleadings and proof to be due.

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

McNish & Oleson, for plaintiffs in error.

A. H. Briggs, contra.

KIRKPATRICK, C.

This is an action brought in the district court for Dodge county by the village of Dodge against Henry Hoetfelker, village treasurer, and Charley Hrabak, Anton Bartosh and Willits Hatton, his bondsmen. Henry Hoetfelker having absconded, no service was had upon him, and the action proceeded against the bondsmen alone. The village of Dodge, defendant in error, in its petition against the defendants, alleged the election and qualification of Henry Hoetfelker as village treasurer, and that he entered upon the discharge of his duties as such treasurer, giving a bond to the village in the sum of $2,000, signed by plaintiffs in error as sureties. It was alleged in the petition that there was paid into the hands of Hoetfelker, as village treasurer, for the benefit of the school funds, $2,000 realized from saloon licenses; that he accounted for or paid over to the treasurer of school district No. 46, which was the school district comprised within the limits of the village of Dodge, $1,000, and that he had converted the remaining $1,000 of license moneys to his own use. As a second cause of action, defendant in error, the village of Dodge, pleaded that the village treasurer collected as taxes the sum of $834.44, accounting for $800.44, leaving a balance of $34 which

he converted to his own use. Plaintiffs in error answered, admitting their liability under the second cause of action, and pleaded a tender in court for the use of the village of the sum of $34. The answer of plaintiffs in error to the first cause of action will require consideration later herein, and need not now be further referred to. Trial was had in the district court, which resulted in favor of the village, and plaintiffs herein prosecute error to this court.

Very many assignments of error are made, both in the motion for a new trial and in the petition in error; but in the brief filed by plaintiffs in error only four grounds for reversal are urged, and none other will be considered. The first two errors argued in briefs of counsel are substantially the same, and will be considered together. In substance they are that the moneys received from licenses to sell intoxicating liquors in the village should have been paid by the applicants for license direct to the county treasurer; that the village treasurer had no right or authority to receive or collect them, and that he did not receive them *virtute officii,* and for that reason plaintiffs in error are not liable on the official bond of the village treasurer for such moneys. The third error pointed out in the briefs is that the court erred in its rulings on the admission and exclusion of evidence. The fourth error complained of is the instruction of the court directing the jury to return a verdict for the village for the amount for which suit was brought.

To properly understand the case, it will be necessary to set out a portion of the answer filed by plaintiffs in error to the first cause of action pleaded in the petition of the village, which is as follows: "Your said answering defendants admit that they signed a bond for one Henry Hoetfelker in the manner and form as set forth in the third paragraph of plaintiff's amended petition. * * * That the said money so as aforesaid received by the said Henry Hoetfelker arising out of and from the granting of licenses to various persons by the authorities

of said village of Dodge for the sale of malt, vinous and spirituous liquors, commonly called 'saloon licenses,' were not received by said Henry Hoetfelker by virtue of his being treasurer of the village of Dodge, but that in law and in fact the said Henry Hoetfelker, as such treasurer of the village of Dodge, had no right, power, or authority to receive and disburse said moneys for and on behalf of the said plaintiff nor of the school district to which said moneys belonged; and that said moneys belonged wholly and solely to the school district in which said licenses were granted, and that neither said plaintiff nor its representatives had any right, title or interest in said moneys or right to the possession thereof, nor to exercise any control over said moneys in any manner whatsoever; and that at this time the said plaintiff has no interest in said moneys, nor is it the owner thereof, nor any part thereof; and that said moneys alleged to have been paid to said Henry Hoetfelker, as stated in the first cause of action in said amended petition, were received by him without any authority whatever as village treasurer so as to bind your said answering defendants upon their said bond of the said Henry Hoetfelker for the faithful performance of his said official duties, and that a failure to disburse any of such moneys that might be received by him would not constitute a breach of the conditions of the bond set forth in said first cause of action in plaintiff's petition, and that your said answering defendants would not be liable thereon by reason thereof; that your said defendants, when they signed and executed the said official bond, so as aforesaid, contracted specially and with reference to the duties and obligations imposed upon the said Henry Hoetfelker by law, and that they never assumed any other or further obligations in the premises than those imposed upon them by reason of said bond and the laws of the state of Nebraska governing with respect to the duties and obligations of the said Henry Hoetfelker therein."

Plaintiffs in error, in answering to the second cause of action set out in the petition of defendant in error, among

other things, say: "That your said defendants, answering with respect to the facts and allegations contained in said amended petition necessary to constitute a cause of action against your said answering defendants, and say that as to the said amount of $34 therein claimed to be due from the said Henry Hoetfelker as said village treasurer to the said plaintiff, that your said answering defendants have never denied their obligation to pay the said amount, but as to this sum they aver and allege the facts to be as follows, to-wit: That on or about the 5th day of November, 1896, they made an unconditional tender of the said $34, in legal money of the United States, to the village treasurer of said village of Dodge, and that said treasurer absolutely refused to accept said moneys; and that on the 10th day of December, 1896, they made another and further unconditional tender of said sum of $34, in legal money of the United States, to the village treasurer of said village of Dodge, and the proper and lawful officer to receive the same, and the same was again refused, whereupon said sum was deposited in the Farmers State Bank of Dodge, Nebraska, to the order of the proper authorities of the said village of Dodge, and that at the same time the Board of Trustees and the treasurer of the said village of Dodge were duly notified of said deposit, and that the said tender of said sum of $34 has been at all times kept good by said defendants, and they have at all times had said money ready to be delivered unto said plaintiff or its authorized representatives; and that in this answer as to the second cause of action stated in said amended petition the said tender is renewed and kept good as it has been at all times since the making of the same, and for this purpose said defendants hereby deposit said moneys with the clerk of said court for the unconditional use and benefit of said plaintiff in satisfaction of the said sum claimed by the plaintiff against these defendants, as stated in said second cause of action of plaintiff."

From the portions of the answers set out it will be seen that plaintiffs in error admit the execution and delivery

of the bond sued upon; they admit that Henry Hoetfelker, village treasurer, collected the taxes and license moneys mentioned in the petition, and admit that he never paid out or accounted to his successor in office for the same; and that he was in default in the amount claimed. These answers presented for the consideration of the trial court the sole question whether or not Hoetfelker, as village treasurer, collected the license moneys in the village of Dodge by virtue of his office. This issue is one purely of law, so that we will not be required to examine the rulings of the trial court upon the admission or exclusion of evidence. If Hoetfelker collected the license moneys by virtue of his office as village treasurer, then neither the answers filed nor the evidence tendered or received presents any defense. If Hoetfelker as village treasurer did not collect the license moneys by virtue of his office as treasurer of the village of Dodge, then the peremptory instruction of the court in favor of the defendant was wrong, and the case will have to be reversed.

It is contended by plaintiffs in error that it was not a part of the duties of Hoetfelker, as village treasurer, to collect and safely keep or pay out the moneys arising from liquor licenses in the village. We are unable to agree to this proposition. Section 64, article 1, chapter 14, of the Compiled Statutes provides what the duties of the village treasurer shall be, and, among other things, says: "The treasurer of each city and village shall be the custodian of all money belonging to the corporation; he shall keep a separate account of each fund or appropriation, and the debits and credits belonging thereto; he shall give every person paying money into the treasury a receipt therefor specifying the date of payment and on what account paid," etc. Section 5, article 8 of the constitution is as follows: "All fines, penalties and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinance of cities,

villages, towns, precincts, or other municipal subdivision less than a county, 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." By the terms of this section it seems very clear that the money realized on licenses in the village of Dodge should properly be paid to the officers of said village. The constitution provides that all fines, penalties and license moneys arising under the rules, by-laws or ordinances of cities, villages, towns, precincts or other municipal subdivisions less than a county shall belong and be paid over to the same respectively. It also provides that the license moneys arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed. It can not be said that the license moneys in the village of Dodge were collected or arose under the general laws of the state. The general laws of the state provide for the county commissioners or supervisors issuing licenses, but expressly withhold from them the authority to issue a license within the limits of a village or incorporated town, or within two miles thereof. There were no statutory provisions by which persons could procure a license to sell intoxicating liquors within the limits of the village of Dodge except by virtue of an ordinance, properly enacted by said village, and the license must be procured from the village board. It is true, many of the provisions of the general law must be followed by the village board and the petitioner before a license can be granted. By general law, a minimum charge of $500 is fixed for the license, below which the village could not go. The statute also requires the filing of a petition with a certain number of signers, and prescribes certain other conditions; yet the ordinances of the village of Dodge were the only authority for granting these licenses. The power of the village board to grant a liquor license, even in the absence of the statute, would carry with it the power to collect the charges for

such license. If the position contended for by plaintiffs in error was correct, it would put the village board in the position of being obliged to inquire of the county treasurer whether the licensee had paid in the license money before a license could issue. After a petitioner filed his petition with the village board and complied with the provisions of the law, the village board would be put to the necessity of ascertaining whether the money had been paid to the county treasurer. The county treasurer, having no connection with the village authorities, would have no means of knowing how much money was required under the village ordinances before the license could be issued. The whole position of plaintiffs in error is wrong. When the petition is filed with the village board for a liquor license, and the statutes of the state and the village ordinances have been complied with, it is only necessary for the village board to inquire of the village treasurer, the proper custodian of the village funds, to ascertain if the money required by the village ordinances has been paid. This is the only reasonable construction of the statute and the constitution under consideration. That portion of section 5, article 8, of the constitution which requires that the license moneys must be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue is in no way inconsistent with this construction. This appropriation could only be made by the proper village officers. Very soon after the adoption of the present constitution, this question received consideration in a carefully prepared opinion by Judge LAKE (*State v. McConnel*, 8 Nebr., 28), in which it is said: "In distinguishing the 'fines, penalties, and license moneys arising under the general laws of the state,' from those 'arising under the rules, by-laws, or ordinances, of cities, villages,' etc., it is evident to us that reference was had, not to the primary source of the power, but to the immediate authority by which the fine or penalty is imposed, or the license granted. By section 345 of the act, 'To license and regulate the sale of liquors,' the

sale of 'malt, spirituous, or vinous liquors, or any intoxicating drink,' without first obtaining a license to do so, is prohibited, and made a highly penal offense. But, as this court has held in the case of *Phillips v. City of Tecumseh,* 5 Nebr., 312, such license can be granted within the limits of an incorporated town or city only by the proper authorities thereof, and under such rules and regulations as they may provide. And by another general act, under which the city of Lincoln was incorporated, authority is given to 'prohibit and suppress tippling shops,' altogether. General Statutes, 144. From this it will be seen that, independently of the action of the corporate authorities of the city of Lincoln, by ordinances duly passed, not a single dollar of the money in controversy could have been imposed or collected. We must hold, therefore, that it falls within the second clause of the section, and belongs to the common school fund of the city, of which the defendant is the lawful custodian."

The question whether the village treasurer collected and held license moneys by virtue of his office has been many times before this court, and in every case, so far as we are aware, it has either been held or assumed that it was the duty of the village treasurer to collect such moneys. The case of *State v. Brodboll,* 28 Nebr., 254, was an application for a mandamus to compel the village treasurer of the village of Lindsey, in Platte county, to apportion the moneys in his hands arising from licenses to the school districts. It appears from the record in that case that the village of Lindsey comprised within its limits a portion of three school districts. This court granted a mandamus, and compelled the village treasurer to apportion the moneys equally among the three districts. The case of *State v. White,* 29 Nebr., 288, is a case in many respects similar to the one last cited. A portion of four school districts was included in the village of South Sioux City. An application for a mandamus was made by school district No. 11 to require the village treasurer to pay the money in his hands arising from licenses to that school

district. This court held that the moneys arising from liquor licenses belonged to the school districts included within the limits of South Sioux City, and that school district No. 11 could properly maintain an action to require the village treasurer to apportion and pay over to that district its share of the license moneys. Many more cases might be cited in which this court has distinctly recognized the duty of the village treasurer to collect and properly apportion moneys received for liquor licenses. In the case at bar the village of Dodge had an ordinance which provided that license moneys must be paid to the village treasurer and his receipt therefor procured before a license could be issued. Under this ordinance, in the absence of either constitutional or statutory provisions, it would have been the duty of the village treasurer to collect this license money, and he did collect the same by virtue of his office.

It follows, therefore, that Henry Hoetfelker, as village treasurer, having collected the license moneys mentioned in the petition of defendant in error, by virtue of his office as village treasurer, and having failed to pay the same to the proper district officer, or turn the same over to his successor in office, plaintiffs in error are liable on their bond for the amount of money which the village treasurer converted to his own use.

Regarding the amount of money due from Henry Hoetfelker as village treasurer for taxes collected and not paid over, amounting to $34, it may be said that the trial court seems to have found from the evidence that the tender made by the plaintiffs in error was a conditional one, and that they could not be relieved from costs.

It follows from what has been said that the action of the trial court in instructing the jury to bring in a verdict for defendant in error for the amount for which suit was brought is correct, and it is, therefore, recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the lower court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

JOHN H. YOST V. WILLIAM SCHLEICHER ET AL.

FILED SEPTEMBER 18, 1901. No. 10,031.

Commissioner's opinion, Department No. 2.

Property in Custodia Legis Can Not Be Replevied. When personal property has been taken by a constable under a writ of replevin, and he is proceeding according to law, and has not yet delivered the property to the plaintiff, nor returned it to the defendant, another action of replevin against the constable to recover possession of the property can not be maintained.

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

Thomas H. Matters, for plaintiff in error.

M. C. King and *E. M. Coffin, contra.*

SEDGWICK, C.

This is an action of replevin tried in the district court of Clay county on appeal from a justice of the peace. The defendant, Schleicher, is a constable, and as such, on the 5th day of February, 1897, took possession of the property involved in this suit upon a writ of replevin in an action before a justice of the peace, in which his co-defendants, Bender & Zimbleman, were plaintiffs and one Philip Yost was defendant. On the following day this action was begun and the property taken from the defendant, Schleicher, under the writ in this cause. It was tried in the district court with a jury and when the taking of the evidence was completed the court instructed the jury to find a verdict for the defendants upon the ground, as stated in the instruction, that "where property is once replevied and taken from the possession of a defendant in that suit no

further replevin of the same property is permissible until that suit is decided."

1. The plaintiff in his brief suggests that "the property in controversy was taken by William Schleicher, one of the defendants in this suit, who was a constable, and as such officer he obtained an undertaking required by law and delivered the property taken under his writ to Bender & Zimbleman." But the constable testified that he had possession of the property under his prior writ when the writ in the present action was served on him, and there are other witnesses who testified to the same thing. It seems that the constable had taken the undertaking of Bender & Zimbleman and was preparing to turn the property over to them. The return on his writ had been written but not yet filed with the justice. The question as to whether the return of the officer could be varied or explained by such evidence was not presented to the trial court. The plaintiff objected to the oral examination of the witnesses on that point on the ground that the evidence was immaterial, but not on any other ground; and, as the plaintiff began this action against the officer, we think that it ought to be considered that the property was in the possession of the officer, not having yet been turned over to the plaintiffs in the prior action, and the question is, whether property in the possession of an officer under a prior writ of replevin can be replevied from him.

2. The instruction of the trial court appears to be predicated upon the proposition that even after the property has been turned over to the plaintiff in the first suit, the plaintiff having given the statutory bond for that purpose, the property can not be taken in another action in replevin by a stranger to the first suit; and it is insisted that this is not the law. However this may be, it is clear that one can not maintain an action of replevin for property while an action is pending in which the same property was replevied from him; nor can he recover by replevin property which is in the custody of the law. Our law requires the constable who takes personal property under a writ

of replevin to have it appraised, and, if the statutory bond is given, to deliver the property to the plaintiff. If the bond is not given the constable must return the property to the defendant. And certainly the law will not allow another person to prevent the constable from performing these duties by taking the property away from him. The constable being an officer of the law and holding the property under a statute which makes a definite disposition of it, there can, of course, be no other conclusion than that the property is in the custody of the law while so held. After the constable has disposed of the property as the law directs, whether it is returned to the defendant, or is delivered to the plaintiff upon his giving bond, a very different question is presented,—a question not involved in this case and not herein determined. It was therefore the duty of the trial court to instruct the jury to find a verdict for the defendant, and whether the court gave a wrong or a right reason for so instructing the jury, is immaterial.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

SULLIVAN, J., absent, not voting.

CHARLES W. OAKES, APPELLEE, V. ARTHUR C. ZIEMER ET AL., APPELLEES, IMPLEADED WITH SARAH GRUNINGER, APPELLANT.

FILED SEPTEMBER 18, 1901. No. 11,543.

Commissioner's opinion, Department No. 2.

1. **Opening Judgment:** SUFFICIENCY OF ORIGINAL PETITION. In an application to open a judgment under the provisions of section 82 of the Code of Civil Procedure, a defendant will not be heard to question the sufficiency of the petition on which such judgment was rendered.

2. **Definition of "Full Answer."** "A full answer," as used in this section, means one not wanting in any essential requirement; a meritorious answer.

3. **Evasive Answer.** *Held*, That in application to reopen a judgment for the foreclosure of a tax lien an answer denying on information and belief the regularity of such lien is evasive and not "a full answer," for the reason that such lien is a matter of public record from which defendant could obtain positive knowledge.

APPEAL from the district court for Lancaster county. Heard below before HOLMES, J. Rehearing of case reported in 61 Nebr., 6. *Former judgment of affirmance adhered to.*

Ricketts & Ricketts, for appellant.

I. H. Hatfield and *S. L. Geisthardt, contra.*

OLDHAM, C.

All the facts essential to a final determination of this cause are set forth in the opinion reported in 61 Nebr., 6. A rehearing has been granted to permit a further argument on the sufficiency of the answer tendered by appellant, and to determine whether such answer entitles her to the relief provided by section 82 of the Code of Civil Procedure.

The contention of the appellant seems to be that any answer which, if filed before judgment, might under the liberal provisions of our Code be amended, is sufficient to entitle a non-resident defendant served by publication to the relief therein provided. This position leads to an examination of the construction to be placed on the words "a full answer" as used in section 82, *supra*. This section of our Code is identical with section 77 of the Code of Kansas, excepting as to the time in which the action is permitted to be instituted. The signification of these words in the Kansas statute has been determined by the supreme court of that state in the case of *Durham v. Moore*, 48 Kan., 135, 136. This opinion was on an application to reopen a judgment and seems to fully support the conclusions reached by this court on the former hearing of this case, both on the question of the insufficiency of the answer and also on the

right of appellant to question the regularity of a judgment sought to be reopened. The court says: "The plaintiff in error attacks the sufficiency of the petition and the findings and order of the court in the first instance. Under an application to open up a judgment, we do not understand that a defendant is in a position to attack the regularity of the proceedings. He asks to have the judgment opened up which had been rendered against him upon service by publication. Now, it would hardly be in consonance with good reason for the defendant to say that the judgment he asked to have opened up was not a judgment, or that no judgment was ever rendered, and all of the proceedings of the court were an absolute nullity. The plaintiff in error calls the record he wishes to have opened up a judgment, and he cannot now be heard to say that it is void. This attack comes too late. It is urged that, because the court below had notice of the application to open up the judgment, the defendant had filed the affidavit required by law and offered to pay the costs, if the court required him to pay them, and had filed an answer, it erred in refusing to open up the judgment. To support the contention of the plaintiff in error, there seems to be one essential finding lacking. The court does not find that he filed a full answer to the petition of the plaintiff. This is one of the necessary requirements of the statute; and we understand 'a full answer' to mean, not wanting in any essential requisite; a meritorious answer. The answer filed fails to show a complete defense to the petition."

In the case of *Union Lumbering Co. v. Supervisors,* 2 N. W. Rep., 281, the supreme court of Wisconsin under a statute requiring a meritorious answer to be exhibited to authorize the setting aside of a judgment by default, held that an answer denying on information and belief the regularity of a tax lien was not sufficient. The court says: "This answer is manifestly evasive and bad, because the public records within the reach of the defendants would enable them to positively and distinctly deny these de-

fects in the tax proceedings if they did not exist. *Mills v. Town of Jefferson,* 20 Wis., 54."

In *Palmer v. Rogers,* 70 Ia., 381, the court in reversing the action of a court below in setting aside a default on an imperfect answer, says: "This court has held, that to comply with the statute, (Code, 2871) requiring the party in default to file an 'affidavit of merits,' the defendant against whom the default was entered must set out and show the facts constituting the defense which he claims to be meritorious, to the end that the court itself may adjudge whether, indeed, it be so."

The rule seems to be well settled that the answer tendered in an application to set aside a judgment, must set forth with certainty and precision a defense to the merits of the cause, and that technical defenses or allegations in general terms will not suffice. This rule is supported by the leading text writers on judgments, and numerous decisions of courts of last resort in addition to those already cited.

The opinion on the former hearing seems to announce the true doctrine of this case, and it is therefore recommended that it be adhered to.

POUND, C., concurs.

SEDGWICK, C., concurring.

I concur in the opinion of my Brother OLDHAM, because the answer filed with the motion to open the judgment was not sufficient. The statute provides that it must be a full answer. That is, it must answer all of the petition. A general denial is a full answer. But a general denial, under our Code, must deny "each material allegation of the petition." This answer (which is quoted in the original opinion in this case) "denies the allegations contained in plaintiff's petition." In Moak's Van Santvoord's Pleadings [3d ed.], p. 530, it is said: "The answer is required to contain a 'general or specific denial of each material allegation,' etc. An answer that 'the defendant denies

the plaintiff's complaint,' or, 'denies the allegations contained in the plaintiff's complaint in manner and form as set forth therein,' would be manifestly insufficient. Effect must be given to the words, 'each material allegation.' And if the general denial or traverse is used, it should be strictly in the form, 'each allegation,' or, 'each and every allegation set forth in the plaintiff's complaint.' This will prevent the abuse of this general form of traverse, in cases where the plaintiff verifies his complaint for the purpose of narrowing down the issue by obtaining from the other side an admission of those material facts about which there can be no dispute. A denial of 'each allegation,' is in term distributive; and if a single allegation in the complaint be true, the defendant will not be able to use this general form of traverse." Judge MAXWELL, in his Code Pleadings, p. 386, says: "It is not sufficient to deny 'the plaintiff's petition,' or the allegations of 'the plaintiff's petition as therein set forth,' because the Code requires a 'denial of each material allegation of the petition controverted by the defendant.'" Under these authorities this language, "denies the allegations contained in plaintiff's petition," does not constitute a general denial, and being accompanied by the statement that this language is used because the plaintiff has not sufficient information to admit the allegations of the petition, and for the purpose of putting the plaintiff upon proof, the answer is clearly evasive, and not the full answer required by the statute. The trial court overruled the motion to open the judgment because the applicant "tenders no issue as against the plaintiff by the showing now on file," which is the true reason for overruling the motion, and the order of the trial court ought to be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the former judgment is adhered to.

AFFIRMED.

SULLIVAN, J., absent, not voting.

EMILY S. MCKELL V. MERCHANTS NATIONAL BANK OF OMAHA.

FILED SEPTEMBER 18, 1901. No. 9,704.

Commissioner's opinion, Department No. 3.

1. **Married Woman's Note:** DEFENSE. In an action against a married woman on a promissory note, wherein she pledges her separate estate for its payment, an answer averring that at the time of its execution she was a married woman and had no separate estate, and owned no property in her own right, states a good defense. *Kocher v. Cornell*, 59 Nebr., 315, followed.
2. **Married Woman's Suretyship.** A contract of suretyship is binding on a married woman, when made with reference to, and upon the faith and credit of, her separate estate, subject to the qualification mentioned in the preceding paragraph.
3. **Married Woman's Liability.** The liability of a married woman, on a contract made within the scope of her statutory capacity to contract is to be determined by the same rules as those applied to persons of full capacity.

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

Howard B. Smith, for plaintiff in error.

George E. Pritchett, contra.

ALBERT, C.

The Merchants National Bank of Omaha brought this action against James C. McKell and Emily S. McKell, on two promissory notes which, in addition to the usual agreements, contained the following: "And I, Emily S. McKell, being a married woman, do execute this note with especial reference to, upon the faith and credit of, and with the intention to charge my individual property for its payment." James C. McKell made default. His co-defendant filed an answer, to which the plaintiff interposed a general demurrer. The demurrer was sustained, and the answering defendant failing to plead over, judgment was rendered in favor of the plaintiff against the

defendants. The defendant, Emily S. McKell, brings the case here on error.

The sole question presented by the record is whether the facts pleaded in the answer are sufficient to constitute a defense. The answer, which for present purposes must be taken as true, admits the execution and delivery of the note, but avers, among other things, that at the time of their execution and delivery she was a married woman, the wife of her co-defendant, and had no property of her own and was possessed of no separate estate in her own right. The identical question involved was presented in *Kocher v. Cornell,* 59 Nebr., 315. In that case, this court employs the following language: "According to the doctrine of the common law, a *feme covert* was incapable of contracting a personal obligation. Her ownership of property was not even recognized. In equity, however, a different rule prevailed. Although she could not, according to the equity doctrine, create a personal liability against herself, her separate estate was liable for the satisfaction of engagements made with reference to it. Her contract was regarded as binding, not upon her, but upon her estate. The property, as was said in *London Chartered Bank v. Lempriere,* 4 L. R. P. C., 572, was considered the real debtor." The language quoted admits of but one construction, and, applied to the case at bar, it is clear the trial court erred in sustaining the demurrer to the answer.

As the case, in our opinion, must be reversed and remanded for further proceedings on the grounds mentioned, it may be proper to notice some of the other allegations of the answer to which our attention has been directed. Among such is one to the effect that the answering defendant signed the notes as surety for her husband and for no other purpose. It is urged that, in order for a married woman to bind her separate estate by contract, the contract must be made, not only with the intent to bind such estate, but with direct reference thereto, and that in no case can she bind such estate on a general contract having no direct reference thereto, nor by a contract of

suretyship for another. The argument of counsel on this proposition is both interesting and instructive, but in our opinion it comes too late. After considering the married woman's act from almost every point of view, this court stands irrevocably committed to the doctrine that a married woman is liable on her contract of suretyship, if made with reference to and upon the faith and credit of her separate estate. *Grand Island Banking Co. v. Wright*, 53 Nebr., 574, and the cases there cited.

The answer contains the further allegations that she executed the notes without consideration; that she did not execute them with reference to, upon the faith and credit of, nor with the intent to charge her separate estate for their payment; that the notes were handed to her by her husband; that she signed them at his request, without reading them, and relying upon his statement, made to her at the time, that her signature was only a matter of form; that she did not know the notes contained the clause whereby it was sought to charge her separate estate; that the consideration moved wholly to her husband, and was used by him in his private business. As to the consideration, we have seen that a married woman is liable on her contracts of suretyship, when made with reference to and upon the faith and credit of her separate estate. Within that limitation, such contract is to be tested by the same rules as other contracts of suretyship. That a consideration moving wholly to the principal is a sufficient consideration for the promise of the surety is elementary. *Briggs v. First Nat. Bank of Beatrice*, 41 Nebr., 17.

The remaining allegations are in the nature of a charge of fraud and imposition practiced upon her to induce her to sign the notes, but they do not amount to such a charge of those matters as to constitute a defense. There is no pretense that she was unable to read, nor that she lacked opportunity to examine the notes and learn their contents. With the notes before him and ample opportunity to read and acquaint himself with their contents, it will not be claimed that a man could escape liability on the ground

that he did not know their contents, and relied upon the statement of his co-maker that his signature was required merely as a matter of form. *M'Kinney v. Herrick,* 23 N. W. Rep. [Ia.], 767. The same rule should apply to married women, when acting within the scope of their statutory capacity to contract.

For the reasons stated in the first paragraph of this opinion, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

PETER ROONEY V. CATHARINE FARRELL ET AL.

FILED OCTOBER 1, 1901. No. 9,454.

Error Proceeding Will Be Dismissed When Judgment Is Not Certified. A petition in error will be dismissed when the final judgment assailed is not authenticated by the certificate of the court below.

ERROR from the district court for Dakota county. Tried below before EVANS, J. *Dismissed.*

Barnes & Tyler, for plaintiff in error.

William P. Warner and *M. C. Jay, contra.*

NORVAL, C. J.

There is attached to this transcript the certificate of the clerk of the district court stating "that the foregoing

is a true and perfect transcript of the petition, answer, reply, instructions given and excepted to in said action, the verdict, motion for a new trial and motion to retax costs in said action, together with the appeal bond, as the same are on file and of record in my office." The transcript is not otherwise authenticated. It will be observed that the certificate of the clerk of the trial court makes no mention of, or in any manner authenticates, the final judgment in the cause. It follows that this court is without jurisdiction. *Littell v. Cross,* 58 Nebr., 594; *Melcher v. Haley,* 58 Nebr., 729. The petition in error is

DISMISSED.

SULLIVAN, J., absent, not voting.

FRANK A. GAGE V. CLARA E. WEST.

FILED OCTOBER 1, 1901. NO. 10,083.

1. **Amendment of Pleading:** JUDICIAL DISCRETION. The granting or refusing of amendment of pleadings is committed to the sound discretion of the trial court.
2. ———: ABUSE OF DISCRETION. It is an abuse of discretion to refuse the amendment of a pleading tendered in the furtherance of justice.

ERROR from the district court for Grant county. Tried below before KENDALL, J. *Reversed.*

William Mitchell, for plaintiff in error.

J. C. Porter and *C. L. Gutterson, contra.*

NORVAL, C. J.

Frank A. Gage commenced an action to replevy certain cattle from Clara E. West, who, in her answer, alleged that she had taken the cattle under a chattel mortgage given by Gage to her to secure a promissory note of his. In reply Gage admitted the execution and delivery of the note and mortgage, but alleged a failure of consideration,

for the reason that the consideration for which they were given was the promise of said Clara to marry him, which promise she had failed to perform, but had married another man. The reply was inartistically drawn, but no attempt to assail it for insufficiency was made until the trial, when objection was made and sustained to the introduction of testimony tending to prove the allegations. Plaintiff asked leave of court to amend the reply, which request was refused, and a verdict was rendered in favor of defendant. From the judgment rendered thereon plaintiff comes here on error.

The court below abused its discretion in refusing to permit plaintiff to amend his reply. It is the settled law of this state that the power to permit or refuse amendments of pleadings is discretionary with the trial court; but this is a legal discretion which may be abused when an amendment is refused which is clearly in furtherance of justice. *Mills v. Miller,* 3 Nebr., 87, 95; *O'Dea v. Washington County,* 3 Nebr., 118, 122; *Berrer v. Moorhead,* 22 Nebr., 687, 692. The amendment offered falls clearly within the principle announced in these and many other cases decided by this court. The judgment is therefore reversed and the case remanded with leave to plaintiff to amend his reply and for further proceedings.

REVERSED.

SULLIVAN, J., absent, not voting.

CLARA ELDRED, APPELLANT, V. HARVEY D. ELDRED, APPELLEE.

FILED OCTOBER 1, 1901. No. 10,178.

1. **Foreign Decree of Divorce Bar to Alimony.** A decree of divorce obtained by a wife upon service by publication, without appearance of defendant, in a foreign state, is a bar to an action for alimony in this state, to be awarded out of his property here.
2. **Decree of Divorce Does Not Absolve Father from Support of Children.** The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children, and will not defeat an action therefor.

APPEAL from the district court for Saline county. Heard below before HASTINGS, J. *Reversed.*

Fayette I. Foss, A. N. Dodson and *Norman Jackson,* for appellant.

B. V. Kohout, contra.

NORVAL, C. J.

Plaintiff and defendant were married in Iowa in 1880, where they resided for about three years, and then moved to Saline county, Nebraska, where they made their home for several years. Finally they moved to Mercer county, Illinois, where they purchased residence property which for a time they made their home. Finally the defendant returned to this state, leaving his wife and children behind, and in June, 1896, the plaintiff applied to the circuit court of Mercer county, Illinois, for a divorce from the defendant and for alimony. Service of process was had upon the defendant by publication, but he did not appear in the cause. Plaintiff was granted a decree of divorce, given the custody of their minor children and the residence was awarded her as alimony. Subsequently plaintiff instituted this suit in the court below for alimony and the education and support of their two minor children. A decree was entered dismissing the cause but without prejudice to a future suit for the support of the minor children. Plaintiff appeals.

The validity of the Illinois decree is not questioned. The court had jurisdiction of the cause, and the decree granting Mrs. Eldred a divorce, being valid there, is likewise valid here. If there had been personal service upon the defendant in the cause, the decree awarding alimony would be conclusive upon the parties, and a new suit for alimony by Mrs. Eldred could not be maintained. But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no

validity save as to the property within the jurisdiction of the court pronouncing it. This suit, then, is not for an allowance out of the property of the defendant for her maintenance, as incidental to some other proceeding or relief. No divorce is sought herein. If the decided weight of authority in this country should be followed, alimony could not be recovered in an independent suit. But this court is committed to the doctrine that courts of equity have jurisdiction to allow alimony to a wife as an independent right where no divorce or legal separation is sought. *Earle v. Earle,* 27 Nebr., 277. This decision would be decisive of the present case had plaintiff not been legally divorced from the defendant, since in the case cited the plaintiff was at the time the legal wife of the defendant, no divorce having been previously granted, nor was one sought in the proceeding for alimony. The marriage relation that existed between the present plaintiff and defendant has been dissolved by a court of plaintiff's own selection. They are no longer husband and wife. The duty and obligation that once existed to support and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony. 2 Am. & Eng. Ency. Law [2d ed.], 98; *Weidman v. Weidman,* 48 N. E. Rep. [Ohio], 506; *Roe v. Roe,* 35 Pac. Rep. [Kan.], 808; *Peltier v. Peltier,* Harr. [Mich.], 19; *Blythe v. Blythe,* 25 Ia., 266; *Shotwell v. Shotwell,* 1 Smed. & M. Ch. [Miss.], 51; *Fischli v. Fischli,* 1 Blackf. [Ind.], 360.

Cochran v. Cochran, 42 Nebr., 612, differs in some respects from the case at bar. There the divorce had been obtained by the husband in *ex parte* proceedings, without the knowledge of the wife and in fraud of her right of maintenance and support; while Clara Eldred herself applied for and obtained the divorce and a decree awarding her all the husband's property situate in Illinois. She made her own choice of forum and is barred by the adjudication as to her own maintenance and support. But

not so as to the support of the children. The defendant's duty to support them was not terminated by the decree of divorce. *Rogers v. Rogers,* 51 Ill. App., 683. The dismissal of the cause so far as it relates to the maintenance of the children, is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

ANNA P. TURNEY, APPELLEE, V. NILS BLOMSTROM ET AL., APPELLANTS.

FILED OCTOBER 1, 1901. No. 10,296.

1. **Nebraska Legal News Is a Newspaper.** Record examined, and *held* that the *Nebraska Legal News* is a newspaper within the meaning of section 497 of the Code of Civil Procedure. *Hanscom v. Meyer,* 60 Nebr., 68, followed.
2. **Definition of Newspaper.** That the principal distinguishing feature of a newspaper, in contemplation of the statute, is that it be a publication appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of recent occurrences,—political, social, moral, religious,—and items of a varied character, both local and foreign, intended for the information of the general reader. *Hanscom v. Meyer, supra.*

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

Stephen B. Pound and *Roscoe Pound,* for appellants.

D. J. Flaherty and *J. R. Gilkeson, contra.*

HOLCOMB, J.

The only question presented for consideration is whether the "Nebraska Legal News," in which the notice of sale was published, is a "newspaper" within the meaning of section 497 of the Code of Civil Procedure. From the record pre-

sented we arrive at the conclusion that the paper mentioned is a weekly publication devoted, while not exclusively, more especially to the news of the courts, the proceedings had therein, and the decisions and opinions emanating therefrom, news of more importance to the legal profession and those interested in the litigation carried on in the courts than to the public at large. There are contained in the copies attached to the record aside from the information of the character alluded to, advertisements of a general character, a limited amount of general reading matter, and some brief mention of current events, more especially of a personal nature and confined to the legal profession. There is somewhat a dearth of what may be called news of current events. The paper is in its sixth volume and twelfth number, and it has long been recognized by the courts as a proper medium for the publication of legal notices to be published in some newspaper under the provisions of the section of the statute mentioned.

The case at bar in all its bearings is quite similar to the one presented to us in the case of *Hanscom v. Meyer*, 60 Nebr., 68, where the subject was discussed at some length and the conclusion was there reached that the publication then under consideration, one very much like the *Nebraska Legal News* in its make-up, scope, purpose and circulation was a newspaper within the meaning of the statute. It would serve no useful purpose to again go over the same ground and reiterate the views therein expressed. We refer to that opinion as more fully expressing our views regarding the subject. Applying the rule therein announced as to what constitutes a newspaper, we are of the opinion that the publication in the case at bar comes within the rule and should be regarded as a newspaper in contemplation of the section referred to. In the absence of legislation more clearly defining the class of newspapers in which legal notices may properly be given, we think that the fact that a publication may be devoted especially to some particular object, calling, or profession or the dis-

semination of information of a special kind and yet possessing the general characteristics of a newspaper in the ordinary acceptation of the term and as defined by the courts and lexicographers, will not deprive it of its general classification as a newspaper, within the meaning of the law. While it may be true, as expressed by counsel for appellant, that the standard by which a newspaper may be defined is a liberal one, we think it must be regarded as proper in the absence of legislative restriction as to what constitutes a legal newspaper. While not wishing to be understood as favoring a more liberal standard, we do not think the court is warranted in reducing and narrowing the standard already established.

From what has been said it follows that the ruling complained of is without error and the order of confirmation should be, and therefore is,

AFFIRMED.

SULLIVAN, J., absent, not voting.

AUGUST UECKER, APPELLEE, V. ALBERT MAGDANZ, APPELLANT.

FILED OCTOBER 1, 1901. No. 10,321.

Appeal in Law Action Does Not Invest This Court With Jurisdiction. An appeal from an order or judgment of the district court in a law action does not invest this court with jurisdiction of the cause. *Hayden v. Hale*, 57 Nebr., 349.

APPEAL from the district court for Pierce county. Heard below before ROBINSON, J. *Dismissed.*

W. W. Quivey, for appellant.

C. B. Willey, contra.

HOLCOMB, J.

There is brought to this court a transcript of the record of the trial court and a bill of exceptions duly settled and

allowed. No petition in error has been filed and the parties are designated as appellee and appellant respectively. From the proceedings taken to bring the cause here and since had, and as more than a year has elapsed since the rendition of the judgment, we can only regard the action as pending in this court on appeal from the court below. The action is one purely of law for the recovery of the value of property alleged to have been converted to his own use by the defendant, who appeals from the judgment rendered against him on the trial had in the district court. We have repeatedly held, in conformity with constitutional and statutory provisions, that the appellate jurisdiction of this court in law actions is by proceedings in error and not by appeal. *Robertson v. Hall,* 2 Nebr., 17; *Hosford v. Stone,* 6 Nebr., 378; *Campbell v. Farmers & Merchants Bank,* 49 Nebr., 143; *Collins v. City of Omaha,* 55 Nebr., 208; *Lowe v. Riley,* 57 Nebr., 252; *Hayden v. Hale,* 57 Nebr., 349.

For these reasons the appeal must be dismissed at the cost of appellant.

DISMISSED.

SULLIVAN, J., absent, not voting.

WILLIAM REINOEHL V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1901. No. 11,992.

1. **Words "With Consent" Unnecessary in Information for Statutory Rape.** 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, it is not necessary to allege that the offense was committed "with the consent" of such female child. *George v. State,* 61 Nebr., 669.

2. **Demurrer Waiver of Motion to Quash or Plea in Abatement.** In a criminal prosecution for a felony, the accused will be taken and deemed to have waived all defects or irregularities which may be excepted or objected to by motion to quash or plea in abatement when he demurs to the information or pleads to the general issue. Criminal Code, sec. 144.

3. **Preliminary Examination May Be Waived.** A preliminary examination is a right accorded, a personal privilege granted, and one which the accused may waive. *Latimer v. State*, 55 Nebr., 609.

4. **Plea of General Issue Waiver of Defects Enumerated.** In a criminal prosecution for a felony, after pleading to the general issue and after a jury has been impaneled and sworn, it is not error to overrule an objection by the defendant to being tried at that term of court on the ground and for the reason that he was, on his preliminary examination, ordered to enter into a recognizance for his appearance at a term subsequent thereto, or because the county attorney had filed an information against him before the term at which he was ordered in the preliminary examination to appear and answer the charge preferred against him.

5. **Evidence of Intention Admissible.** Evidence tending to show the intention of the defendant toward the prosecutrix which is related to and has a material bearing upon the ultimate fact sought to be established by the prosecutrix *held* properly admitted.

6. **Voluntary Confession While Under Arrest Admissible.** Where statements of a defendant in the nature of a confession while under arrest are shown to be voluntary and not made under the influence of hope or fear emanating from those in authority or concerned in the administration of the law, the same may properly be received in evidence.

7. **Instructions.** Rulings of the trial court on instructions to the jury, given and refused, examined, and *held* to be without prejudicial error.

8. **Evidence Sufficient.** Evidence examined, and *held* sufficient to support the verdict of the jury.

ERROR from the district court for Boyd county. Tried below before HARRINGTON, J. *Affirmed.*

W. T. Wills, W. A. Meserve, Robert Ryan and *Frank Irvine,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

HOLCOMB, J.

The defendant below prosecutes in this court error to the district court of Boyd county, wherein he was informed against and convicted of carnally knowing and abusing a female child of the age of about eleven years contrary to

the provisions of section 12 of the Criminal Code, and sentenced to the penitentiary for the term of seventeen years. Several errors are assigned and argued in brief of counsel for defendant, the more important of which will be noted in the order of presentation.

It is contended that the information upon which the defendant was prosecuted is insufficient because it is not alleged that the offense charged was with the consent of the prosecutrix, it not being charged that the act was committed forcibly, and against her will. We had occasion to pass upon the identical question in the case of *George v. State,* 61 Nebr., 669, and there arrived at the conclusion that the allegation was not essential to a good information. After considering the question, and citing a number of authorities, it is observed by the present writer, who prepared the opinion of the court in that case: "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." The views therein expressed appear to us as sound, and consonant with reason and a proper construction of the section of the statute under which the information is drawn.

It is next urged that the conviction can not stand because the defendant was put upon his trial at an adjourned sitting of the district court of the term which had not finally terminated at the time of the preliminary hearing, in view of the order of the examining magistrate whereby he was required to give bond for his appearance on the first day of the "next term" of the district court, and in default of which was committed to the jail of the county. The record discloses that the regular term of the district court immediately preceding the time of the preliminary hearing convened September 3, 1900, and that at the time of the hearing it had been adjourned to November 8, 1900. The defendant was arrested on the charge of which he was

convicted and brought before the county judge of Boyd county on November 7, 1900, and waived a preliminary examination, and was, by the county judge, required to enter into a recognizance for his appearance on the first day of the next term of the district court, and, having failed to give the required undertaking, was committed to the jail of the county. On November 8, there was held a session of the district court pursuant to the prior adjournment of the September term, at which time an information was presented against the defendant to which, after the overruling of a demurrer thereto, the defendant pleaded not guilty and the cause proceeded to trial on the general issue on the fourth day of December following. After the jury was impaneled and sworn, the defendant for the first time raised the objection that he could not be tried then and at that term of court because he was required to appear and answer the charge on the first day of the next term, which had not then been called, and because the county attorney had no authority to present and file an information against him until and during the term at which he was required to appear and answer the charge made against him, which it is claimed was the next regular term convened after the preliminary hearing. Assuming, as contended for by defendant's counsel, that the information was prematurely filed and that the defendant could not be put upon his trial until the next regular term convened after the time of the preliminary hearing, we are constrained to the view that the defect or irregularity, if one existed, was waived by the defendant in pleading to the general issue, and that he can not be heard, in the manner attempted, to deny the right and authority of the court to try the cause at the time the trial occurred. If the objection interposed is tenable,—which we do not here deem it incumbent on us to finally determine,—it certainly should have been raised by a motion to quash or plea in abatement, and, having failed to so raise the question, the defendant will be taken and deemed to have waived it. Sec. 444, Criminal Code.

It seems reasonably clear that the district court had jurisdiction to try the defendant for the crime of which he was accused, and also over his person. If, by order of the magistrate before whom he was taken for preliminary examination, he was not required to appear in the district court to answer the complaint made against him until the next regular term, this was a privilege and right which he could properly waive, and must be held conclusively to have done so if no seasonable objection is interposed to a trial during a sitting of the district court at the adjourned session. He could, did he so desire, waive altogether all the preliminary steps required to be taken before being tried in the district court on an information made and filed by the county attorney. *Coffield v. State,* 44 Nebr., 417; *Latimer v. State,* 55 Nebr., 609; *Dinsmore v. State,* 61 Nebr., 418. Certainly, if he may waive all the steps which it is his privilege to have followed in the nature of a preliminary inquiry, it follows as a logical deduction that he may waive any defect growing out of such preliminary hearing by which he was brought to a trial in the district court. It may be to a defendant's advantage to have a speedy trial in the district court at a special or called session, notwithstanding he may have been recognized to appear at some future time, and yet will it be contended that the court is without power to try him at such special term when he consents thereto, and it is his desire to have such speedy trial? In the case at bar the defendant failed to give the required recognizance for his appearance and was committed to the county jail to await trial. The information against him was thereafter, and during term time, presented and filed in the district court. No objection was raised against it except a demurrer, which we have held is not well taken, and none to the time or manner of filing. No motion is presented to quash the information because prematurely filed, and before the defendant was required to appear and answer the complaint. No application was made for a continuance of the cause, nor objection made or effort put forth to have the trial

postponed until the next term, until after the jury had been impaneled and sworn, when, for the first time, it was objected that the defendant could not be put upon his trial until the next regular term to which it is contended he was ordered to appear and answer the charge preferred against him. We have no hesitancy in saying that under such circumstances, whatever may be the merits of the objection if seasonably interposed, the objection was waived by waiting until the time stated to present it, and no error was committed by the trial court in overruling the same.

It is also argued that the court erred in the admission of certain evidence of the prosecutrix regarding prior associations and certain alleged statements and conversations by the defendant to her some three or four months prior to the time of the alleged crime. The evidence objected to tended to prove that the defendant was desirous of being alone with the prosecutrix, and at such times would speak to her of things indecent and vulgar to a degree not permissible here to repeat, and which were well calculated to familiarize the child with and obtain her acquiescence in the acts of the defendant of which he is accused. The evidence, as it seems to us, must have some probative value for the purpose of showing the intentions of the defendant toward the prosecutrix, and the object to be accomplished, and which was finally consummated by the act complained of. It, if believed, disclosed the method pursued by him, and his relations to the child, which finally led to the accomplishment of his purpose. It evidenced his intentions and ultimate object, though perhaps in a lesser degree, as would be the case if he had declared to another that he would do what it is charged he did in fact do. It is related to, and has a material bearing upon, the ultimate fact sought to be established by the prosecution, and assists, in some degree at least, in arriving at the truth of the principal fact in controversy. Greenleaf, Evidence [16th ed.], secs. 14*o* and 14*q*., and authorities there cited. We perceive no error in the admission of the evidence complained of.

In the oral argument of the case it was suggested that evidence inadmissible in character was admitted relating to other alleged acts of the defendant committed on the prosecutrix of the same kind of which he is charged in the case at bar. An examination of the record discloses that while some questions of the character indicated were asked, on objections thereto the answers were excluded, and that, except by an intimation by the prosecutrix in one of her answers, to which no motion was made to strike out, there is no evidence in the record as to any other act of the defendant of the kind for which he was convicted, and it therefore becomes unnecessary for us to consider the question further.

It is argued that evidence of certain statements of the defendant in the nature of a confession, made after arrest, and while in custody of the sheriff, was erroneously admitted, it not being shown that such statements were voluntarily made by the accused. It appears that after his arrest the defendant asked to see the county judge who was the examining magistrate and against his advice persisted in speaking to him regarding the accusation made against him. Substantially the same statements were repeated to the attorney assisting in the prosecution and under the same circumstances. To the sheriff he made certain statements without inquiry from him or solicitation on his part. These confessions, we think, must be regarded as entirely free and voluntarily made, and were in nowise superinduced by hope or fear by any act or expression of those concerned in the administration of the law, and the admissibility of the evidence comes altogether within the rule stated in *Burlingim v. State*, 61 Nebr., 276, and *Coil v. State*, 62 Nebr., 15.

Several instructions are excepted to, both given and refused, which have been examined, and the rulings thereon found proper.

It is suggested that the evidence is insufficient to support the verdict. To this we can not assent. The testimony it is true is more or less conflicting, but upon every

material point there is positive and direct evidence which, if believed by the jury, was sufficient to establish every material averment of the information. That they did believe such testimony is made manifest by their verdict, and it is not within our province to say that of the conflicting testimony the jury relied on that unworthy of belief and rejected that which should have been believed. The verdict of guilty is supported by sufficient competent evidence and should not be disturbed.

The judgment of the district court should be, and accordingly is,

AFFIRMED.

SULLIVAN, J., absent, not voting.

STANISLAV J. CERNY V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1901. No. 12,079.

1. **Failure to File Information.** Where no information or indictment is filed against a defendant, charged with the commission of a crime, during the term at which he was held to answer, his detention is unlawful and he is entitled to be discharged. *Leisenberg v. State*, 60 Nebr., 628.

2. **Filing at Subsequent Term: PLEA: MOTION IN ARREST.** But if at a subsequent term of the court an information is filed and defendant pleads not guilty, the court has power to try the issue raised; and, after verdict of conviction has been rendered, it is not error to deny a motion in arrest of judgment. *Leisenberg v. State, supra.*

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

John W. Cooper, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

HOLCOMB, J.

An information was filed in the district court for Douglas county against the defendant, plaintiff in error,

charging him with the crime of assault with intent to commit a rape upon the person of one Katie Vavra, a female child under the age of fifteen years. To this information the defendant entered a plea of not guilty. After a trial in which a verdict of guilty as charged was returned by the jury, the defendant filed a motion in arrest of judgment assigning as a reason therefor the following: "Because the said court had no jurisdiction and acquired no jurisdiction to try the defendant upon the alleged information filed in the said action of the State of Nebraska v. Stanislav J. Cerny at the May, 1900, term thereof, for the reason that said alleged information upon which defendant was tried was not filed during the February, 1900, term of said court as required by law, at which term of said court defendant was required by the order of the magistrate before whom the preliminary hearing was had, to appear and answer to the charge alleged in the complaint filed against him." The motion, upon consideration by the district court, was overruled, as was also a motion for a new trial, to which exceptions were duly taken, and the defendant sentenced by the court to imprisonment in the penitentiary at hard labor for the term of thirteen years.

The only question presented for review is the ruling of the trial court on the motion in arrest of judgment. It appears from the record, that the February, A. D. 1900, term of the district court for Douglas county was in session on the first day of May, on which day the term was by order of court adjourned *sine die*. It also appears that on the date mentioned the defendant had his preliminary examination, for the crime charged, before a justice of the peace of that county and, after hearing, was held to answer to the charge in the district court and ordered to enter into recognizance for his appearance thereat forthwith and in default of such recognizance that he be committed to the jail of the county until discharged by due course of law. The transcript of the proceedings had at the preliminary hearing was not filed in the district court until subsequently to the time of the adjournment of the February

term and no information was filed by the county attorney until the following term, which convened on May 7th of that year.

Because the information was not filed during the term at which the defendant was recognized to appear and answer the charge made against him, it is argued, as is indicated in the motion in arrest of judgment, that the district court was without jurisdiction to try the accused or to render judgment on the verdict returned by the jury. This same question was presented and received consideration at our hands in the case of *Leisenberg v. State,* 60 Nebr., 628, and it was there held that the contention of the defendant was unsound. We, in reviewing that prosecution by proceedings in error, held in substance that, while the detention of an accused person after the term at which he was recognized to appear and answer the charge when no information had been filed against him was illegal and that he was entitled to be discharged from custody, nevertheless that fact would not deprive the district court of jurisdiction to try the accused when an information was filed at a subsequent term on a plea of not guilty, and that a motion in arrest of judgment upon such ground was properly denied. Careful consideration of the instructive brief of counsel for the defendant in the case at bar serves only to confirm our judgment as to the correctness of the views we expressed in the case cited, to which we adhere and which must be held decisive of the question now presented. While other matters might be considered as bearing upon the point in issue, yet, conceding as entirely correct the premises of the counsel for defendant as to the state of the record in the case at bar, the conclusions proper to be drawn therefrom are so effectually disposed of by the authority referred to that further comment would seem to be an act of supererogation.

The judgment, for the reasons given, must be

AFFIRMED.

SULLIVAN, J., absent, not voting.

CONCORDIA LOAN & TRUST COMPANY, APPELLANT, V. ESTHER M. PARROTTE, APPELLEE.

FILED OCTOBER 1, 1901. No. 10,039.

Commissioner's opinion, Department No. 1.

1. **Guarantor:** PURCHASE AT TAX-SALE. One who guarantees the payment of a note and mortgage can not obtain a lien upon the premises, as against the holder of the note and mortgage, by purchasing the real estate at tax-sale.
2. **Tax-Sale Certificates:** AGENT TRUSTEE. Where a corporation pays for its tax-sale certificates and tax receipts, but takes the title in the name of its agent, the latter is a mere trustee of that property for the former.
3. **Indorser:** GUARANTOR BY AGREEMENT: PURCHASE AT TAX-SALE. An indorser of a note, who also by an agreement became guarantor and collector of the principal sum and interest, and who had held out that it paid taxes to protect its guaranty and the interest of its patrons, can not, as against the secured, build up a superior lien upon the property given to secure the debt by buying in the property at tax-sale.

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

H. W. Pennock and *A. B. Coffroth*, for appellant.

William A. DeBord, contra.

DAY, C.

In August, 1887, Johanna Schutt and husband executed a bond in the sum of $2,200 to the Lombard Investment Company, secured by a mortgage upon certain real estate situated in the city of Omaha. A few days thereafter the bond and mortgage were duly assigned to William Holloway, the bond having an indorsement thereon by which the mortgagee agreed as follows: "First—To guarantee the payment of the coupons, attached hereto, at the maturity thereof; second, to collect at its own expense and to pay over the principal hereof at maturity, provided the same is paid by the makers; third, in the event of default being made

by the makers, to collect at its own expense and to pay over the principal hereof, within two years from the maturity of the same and to pay interest thereon at the rate of six per cent. per annum, payable semi-annually until the principal is paid." Holloway assigned the bond and mortgage as collateral security to the Union National Bank of Philadelphia. The mortgagor failing to pay the taxes and assessments levied against the real estate, it was, on January 7, 1892, sold for delinquent taxes to the mortgagee, and afterwards other delinquent taxes and assessments were paid by the mortgagee, which for purposes of its own took the certificates of sale and tax receipts in the name of the Concordia Loan & Trust Company.

It was conceded upon the argument that the Concordia Loan & Trust Company had no greater rights in the premises and was subject to the same disabilities as the Lombard Investment Company. The mortgagor also failed to pay the interest upon the loan and the mortgagee paid the overdue interest coupons and had the coupons put in the name of the Investors Company, which latter company brought a foreclosure suit thereon. In that suit Holloway and the Union National Bank were made parties defendant, but the mortgagee and the Concordia Loan & Trust Company were not made parties. In that foreclosure suit the premises were sold to Holloway, who thereafter sold and conveyed them to Esther M. Parrotte, one of the appellees. This suit was brought by the Concordia Loan & Trust Company in the district court of Douglas county to foreclose the tax lien upon the premises acquired in the manner above mentioned, and prayed to have the tax liens declared a first lien upon the premises. The court found appellant's lien to be a second lien upon the premises, and that the interest and estate of appellee was a first claim thereon, and that she was the legal owner of the premises at the time of the commencement of the suit. From this judgment appellant brings the case to this court on appeal.

The question to be determined is the priority of these

incumbrances. The evidence established that appellant was a Kansas corporation, organized and managed by the Lombard Investment Company for the purpose of holding and managing tax certificates and tax titles upon lands upon which the latter company held mortgages, and was the agency through which the Lombard Company carried on its tax business. In short, the appellant was a department of the business of the Lombard Investment Company. The Lombard Investment Company has long been insolvent and was at the time of the commencement of this suit. The appellant holds merely the legal title to the certificate and tax receipts in trust for the Lombard Investment Company, and its rights in this action are, therefore, the same as the Lombard Investment Company. The evidence also disclosed that the Lombard Investment Company had branch offices in many of the larger eastern cities, and that it issued and circulated pamphlets in which it gave a statement of the manner of conducting its business, and that these pamphlets were distributed among persons known to be investors and to persons who had invested in the securities handled by that company. In one of the pamphlets the following language is used: "When the loans reach our eastern offices, they are registered and are ready for sale at par, and accrued interest, and when sold the care we take of them has only begun, for we look after every detail connected with every loan until the same is paid off; we see that the taxes are paid each year, and if not paid by the borrower, we pay them ourselves in order to protect ourselves, as well as the investor, who is saved all trouble and annoyance. * * * Great care is exercised in protecting the loans from unpaid taxes." The Lombard Investment Company indorsed the bond and guaranteed the payment of the interest and the collection of the principal at its own expense, within two years after maturity.

A mortgagor has never been permitted to imperil his mortgage by allowing his taxes to become delinquent, buy-

ing them in and foreclosing for the purpose of extinguishing the mortgage. Cooley, in his valuable work on Taxation, page 500, says: "Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers on grounds which are apparent when their relation to the tax and to the property is shown. * * * So the mortgagor, remaining in possession of the land, owes to the mortgagee a duty to keep down the taxes; and the law would justly be chargeable with connivance at fraud and dishonesty, if a mortgagor might be suffered to permit the taxes to become delinquent, and then discharge them by a purchase which would at the same time extinguish his mortgage. There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." The duty to pay the debt is an obligation upon the guarantor equally with the maker, in the event the latter does not pay. It seems, therefore, that the guarantor ought, equitably, to be under the same disability with the maker in the matter of injuring the means of payment. It would be as great a connivance at fraud and dishonesty in law to suffer the guarantor to pay the taxes on the property covered by the mortgage and given him a priority over the security, as it would be to allow the maker to do those things. It is fully as equitable to prevent this wrong to the secured when done by the guarantor as when done by the maker, and that can be accomplished by placing both under the same disability.

We think a fair inference to be drawn from the testimony is that the Lombard Investment Company was to look after the payment of the taxes, to protect its patrons and its guaranty, and having done so, equity will not per-

mit that it build up a hostile and paramount lien upon the security which is given for the debt. The same question presented here was before the court of appeals of Kansas, in *Howard Investment Co. v. Benton Land Co.*, 46 Pac. Rep. [Kan.], 989, wherein it was said: "One who guarantees the payment of a note and mortgage can not obtain a lien upon the mortgaged premises, as against the holder of the note and mortgage, by purchasing the real estate at tax sale." The Lombard Company had agreed to look after the collection of the principal and to pay it over to the owner of the bond within two years after maturity, and represented to its patrons that it looked after the payment of taxes to protect its guarantee. It was not carrying out that agreement in good faith when it not only permitted the taxes to become delinquent but brought them in and endeavored to set them up as superior to the claim it had guaranteed and undertaken to collect. It will not now be permitted to contend in a court of equity that it owed no duty in reference to the payment of delinquent taxes, but was at perfect liberty to buy in such taxes and put them ahead of the claim it was collecting. The rule of good faith between persons standing in a fiduciary relation forbids such conduct. We therefore conclude that where a corporation pays for its tax-sale certificates and tax receipts, but takes the title in the name of its agent, the latter is a mere trustee of that property for the former. The guarantor of a note secured by a mortgage can do no act to the detriment of the security which the mortgagor could not do. As the Lombard Investment Company would not be permitted to place this lien for taxes in advance of the estate of appellee in the property involved, it follows that appellant will not be permitted to do so.

It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

WILLIAM C. PATTERSON, APPELLANT, V. W. H. LANNING, APPELLEE, IMPLEADED WITH JOHN COOKE, APPELLANT.

FILED OCTOBER 1, 1901. No. 10,059.

Commissioner's opinion, Department No. 1.

1. **On Conveyance to Trustee Grantor May Prescribe Terms of Sale and Application.** An owner of property who conveys it to a trustee to be used in payment of another's debts, has the right to prescribe the terms and conditions of its sale and application.

2. **Terms of Trust Agreement Construed.** A trust agreement providing for a sale within such reasonable time "as may best conserve the interest of all parties to the best of his [the trustee's] judgment, it being my desire that the same shall be paid as soon as may be without unnecessary sacrifice of said stock," the residue of the trust property after satisfying the trust to be accounted for to the trustor, grants such discretion to the trustee that mere lapse of time, without a showing of abuse of discretion on his own part, does not show a violation of the trust.

APPEAL from the district court for Adams county. Heard below before BEALL, J. *Affirmed.*

Charles B. Keller and *W. P. McCreary*, for appellants.

Tibbets Bros., Morey & Ferris, contra.

DAY, C.

In 1892 Charles Cameron, since deceased, being indebted to M. E. Smith & Co., executed and delivered to said M. E. Smith & Co. two certain promissory notes, in which John Cooke, one of the defendants herein, joined as surety.

After the decease of said Charles Cameron, the said Cooke, on December 31, 1894, executed and delivered to Smith & Co. his promissory note for $1,274.74, the same being an extension of the indebtedness evidenced by the two notes upon which Cooke was surety. This latter note was subsequently transferred by the payee to William C. Patterson, and by him reduced to the judgment which forms the basis of this action. On March 19, 1893, Louise Cameron, the wife of said Charles Cameron, deceased, executed and delivered a certain trust instrument to W. H. Lanning, whereby she sold, assigned, and set over to said Lanning one hundred shares of the capital stock of the Exchange National Bank of Hastings, Nebraska. The conveyance was made in trust and contained recitals as follows: "Whereas, the following named persons are sureties for debts of my deceased husband as follows: * * * John Cooke, J. M. Sewall, J. B. Keedle and T. Farrell on a stay bond in favor of Carrie McCleery, and John Cooke, on note of M. E. Smith & Co., and, Whereas, it is my desire to indemnify said persons to the extent of this conveyance against final loss by the payment of such judgments and said note: Now, therefore, this conveyance is made to said W. H. Lanning for the purpose of enabling him to sell and dispose of, or pledge said stock, or as much thereof as may be necessary, and with the proceeds to pay off said judgment and said note, such disposition of said stock to be within such reasonable time hereafter, and for such price as may best conserve the interest of all parties to the best of his judgment, it being my desire that the same shall be paid as soon as may be without unnecessary sacrifice of said stock." The instrument further provided that it was made for the protection of those sureties named who should "accept and abide its provisions, without in any manner causing trouble to me or my said trustees by importunities or otherwise"; and also, in event of sale, the balance of the proceeds to be returned and accounted for to the trustor by the trustee. Patterson obtained a judgment upon the note in Douglas county against John Cooke

and M. E. Smith & Co. as surety; filed a transcript thereof in Adams county, upon which execution was issued against Cooke, which was returned *nulla bona*. This suit was brought by Patterson in the district court of Adams county against W. H. Lanning and John Cooke. The plaintiff alleged in his petition the facts hereinbefore referred to, and prayed for a construction of the trust instrument; that the defendant Lanning be removed as trustee from the trust; that a suitable and competent person be appointed in his stead to execute the trust; or that an order be made requiring the said Lanning to proceed within a reasonable time to sell and dispose of the stock held under the trust and for such other and further relief as may be just and equitable. From the judgment of the court dismissing the cause for want of equity, the plaintiff has appealed.

It will be borne in mind that the property pledged belonged to Mrs. Cameron; she was under no legal obligation to use it in payment of her husband's debts, and in pledging it had the right to make such conditions with respect to the time of sale and its application as she deemed best. It will be observed that the trust provides for a sale of the pledged property within such reasonable time and for such price as may best conserve the interest of all parties to the best of his, the trustee's, judgment, and without unnecessary sacrifice of the stock. Undoubtedly, if the agreement had provided generally that the trust property be sold within a reasonable time without any further discretion vested in the trustee by the terms of the trust, then mere lapse of time since the making of the agreement would probably entitle the *cestui que trust* to apply to the court for an order to proceed with the sale. But this agreement provides for more, and couples with the reasonable time a provision for such delay as the trustee shall deem to best conserve the interest of all parties. This includes the interest of the trustor as well as the creditors for whose benefit it was created. There was no proof whatever that the delay has not been in good faith, or that it was not

reasonably required to carry out the trust for the best interest of all. The sole reliance of the plaintiff being that the mere lapse of time since the creation of the trust, would be a sufficient breach to entitle him to apply to the court for an order of sale. We hold that mere lapse of time, under the provision of the trust, is not sufficient to show a breach. There was some proof offered which tended to show that some of the judgments had been paid, but the proof showed that Mrs. Cameron had borrowed the money and given her note and allowed the pledge to stand as security for such loan. This she had a right to do, as she had a reversionary interest in the stock.

We have examined the pleadings and the proof, and we think the judgment of the district court correct.

It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

ALICE KAY ET AL. V. WILLIAM S. MCAULEY.

FILED OCTOBER 1, 1901. No. 9,957.

Commissioner's opinion, Department No. 2.

Action for Damages for Breach of Contract: PAYMENT: CANCELLATION OF SECURITIES. An action to recover damages for a breach of contract to purchase securities can not be maintained by one who, after making such contract to sell, has received payment thereof from the maker of such securities and has canceled the securities.

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

L. J. Capps, for plaintiffs in error.

Batty & Dungan, contra.

SEDGWICK, C.

Plaintiffs in error began this action in the district court for Adams county to recover the purchase price of a real estate mortgage which they alleged they sold to defendant. Upon the trial below the court instructed the jury to return a verdict for defendant. Upon the verdict so returned judgment was entered, and plaintiffs bring the case to this court upon petition in error.

Plaintiffs sold a house and lot in Holstein, Nebraska, to one Carson, and took his note and mortgage on the premises for part of the purchase price. There was afterwards correspondence between the plaintiffs and the defendant in regard to the purchase of the securities by the defendant. The plaintiffs claim that this correspondence ripened into a contract between them, whereby the defendant agreed to purchase and the plaintiffs agreed to sell the note and mortgage in question. And that afterwards, being duly requested, the defendant refused to complete the transaction and pay the agreed price for the securities. It appears from the uncontradicted evidence in the record that soon after the refusal of defendant to complete the transaction, and before the commencement of this action, the plaintiffs, through their agent at Holstein, delivered the note secured by the mortgage to Carson, and accepted Carson's deed of the property described in the mortgage in full payment of the note. The note was thereupon canceled. The plaintiffs admit that they ratified this action of their agent, and that they still hold the deed. It seems to us that the proposition is too plain to admit of discussion, that under the circumstances the plaintiffs could not maintain an action at law for damages against the defendant on account of his refusal to receive and pay for the securities, the plaintiffs having canceled

the securities and put it absolutely beyond their power to complete the transaction. Various collateral matters are shown in the evidence, but if the plaintiffs have any ground for complaint of the part that defendant took in these collateral matters, they clearly have no remedy therefor in this action.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

ISAAC W. TEEGARDEN, ADMINISTRATOR, APPELLEE, V. G. F. S. BURTON, ADMINISTRATOR, ET AL., APPELLANTS.

FILED OCTOBER 1, 1901. No. 10,305.

Commissioner's opinion, Department No. 2.

1. **Limitation of Action in Foreclosure of Mortgage.** In determining the period of limitation on an action to foreclose a real estate mortgage given for the security of a promissory note, section 6 of the Code of Civil Procedure should be construed in connection with section 22 of such code.

2. **Limitation Begins at Date of Last Interest Payment.** Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Affirmed.*

Beeson & Root, for appellants.

Alva L. Timblin, contra.

OLDHAM, C.

This is an action to foreclose a real estate mortgage executed by defendant's intestate and her husband on four lots situated in the city of Plattsmouth, Nebraska. The mortgage was made and executed for the security of a note due November 15, 1879. Two of the lots included in the mortgage were the homestead of defendant's intestate and her husband. Interest payments were made on the note each year until 1894 and this cause of action was begun in 1897. The heirs at law of defendant's intestate filed an answer setting up the plea of the statute of limitations. There was judgment below for the plaintiff and defendants appeal.

Defendants' contention is that the property mortgaged included the homestead of his intestate; that no payment made by her husband on the note, for the security of which the mortgage was given, would extend the lien of the mortgage beyond the ten years period of limitation which followed the maturity of the note. There is evidence in the record, however, tending to show that at least one payment on the note had been made by defendant's intestate herself less than ten years before the institution of this suit. If it be material to show that payments were made by the knowledge and consent of defendant's intestate to save the bar of the statute, this evidence would be sufficient to sustain the finding of the trial court on that question. The case, however, must finally turn on a construction of section 6 of the Code of Civil Procedure, as applied to mortgages—which is as follows: "Sec. 6. An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages. Provided, however, that there shall be no limitation to the time within which any county, city, town, village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street,

alley or other public grounds or city or town lots." If the right to prosecute an action on a mortgage is controlled by this section alone then the contention of defendant would be well taken, but in this state a mortgage on real estate is regarded simply as a security for a debt and when the debt is paid the mortgage is satisfied. True, an action for the foreclosure of a mortgage may be maintained in this state after an action on the debt it secures is barred; and the reason for this apparent anomaly is that the condition of the mortgage is for the payment of the debt and not for its bar by the statute of limitations. *Kerr v. Lydecker,* 51 Ohio St., 240, 37 N. E. Rep., 267; *Allen v. Everly,* 24 Ohio St., 97. Under our statute the legal title to the mortgaged premises remains in the mortgagor and no right of action accrues on the mortgage until its conditions are broken. And where, as in the case at bar, it is given for the security of the payment of a promissory note the ten years bar of the statute does not begin to run until a right of action has accrued on the note. It then follows that in determining the question of the limitation on the right of an action on a mortgage given to secure the payment of a promissory note, section 6 of the Code, *supra,* must be construed in connection with section 22, which is as follows: "Sec. 22. In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." Under this section of the statute a right of action accrues on a promissory note at any time within the statutory period after the last payment on, or the written acknowledgment of, the obligation. Payments after the maturity of the note, made before the bar, toll the statute, and a new right of action accrues after each payment; and hence an action to foreclose a mortgage is not barred when payments on the note, secured thereby, have been made within ten years of the

beginning of the action. *Schifferstein v. Allison,* 123 Ill., 662, 15 N. E. Rep., 275; *Mahon v. Cooley,* 36 Ia., 479; *Smith v. Scherck,* 60 Miss., 491; *Hambrick v. Jones,* 64 Miss., 240, 8 So. Rep., 176; *Merriam v. Goodlett,* 36 Nebr., 384; *Carson v. Cochran,* 53 N. W. Rep. [Minn.], 1130. There is nothing in the conclusions here reached in conflict with the doctrine announced by this court in the case of *Stevenson v. Craig,* 12 Nebr., 464. In that case no payment was made on the note until after the bar of the statute had run against the mortgage, and then the acknowledgment of the indebtedness was made by the husband, without the knowledge or consent of the wife, and the court held, and properly too, we think, that such acknowledgment by the husband would only have the effect of reviving his liability on the note and not the effect of reviving the lien of the mortgage. But in the case at bar the statute had never run against the note when any of the payments were made. Hence this cause does not fall within the rule announced in *Stevenson v. Craig, supra.*

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

SULLIVAN, J., absent, not voting.

LEONARD A. DAVIS V. ALLEN R. KELLY ET AL.

FILED OCTOBER 1, 1901. No. 10,247.

Commissioner's opinion, Department No. 2.

1. **Homestead: CONSTRUCTIVE OCCUPANCY: TEMPORARY ABSENCE.** Where property not occupied by the claimant and his family is claimed as a homestead, such claimant must show either a constructive

occupancy, as in case of temporary absence without abandonment, or a bona-fide present intention and preparation to occupy followed by actual occupancy within a reasonable time.

2. ———: OCCUPANCY: PRESENT INTENTION: EVIDENCE. Bare intention to occupy such property as a homestead at some future time is not of itself sufficient to impress it with the character of a homestead, while it remains unoccupied; there must be a present intention so to occupy the property as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention.

3. **Two Homesteads:** INTENTION TO OCCUPY IN FUTURO. No one can have two homesteads at the same time. Hence where the claimant and his family are actually occupying property belonging to him as a home, intending to remain for the present, an intention to remove to some other tract owned by him and occupy the latter as a home at some indefinite future period will not enable him to claim it as a homestead.

4. **Certificate of Acknowledgment.** A certificate of acknowledgment in proper form may be impeached only by clear and convincing evidence of its falsity.

ERROR from the district court for Douglas county. Tried below before SCOTT, J. *Reversed.*

Montgomery & Hall, for plaintiff in error.

W. C. Lambert, contra.

POUND, C.

In June, 1892, the defendant, Allen R. Kelly, borrowed $1,500 of the plaintiff, and as security for such loan executed a mortgage upon the property in controversy. At that time the property was wholly vacant and unoccupied. The money was used in erecting a house upon it, but proving insufficient for that purpose, Kelly obtained of the plaintiff the further sum of $500, and, in October, 1892, executed a new mortgage for $2,000, the old one being released. Mrs. Kelly's name appeared to be signed to this mortgage, and there is a certificate of a notary that she duly acknowledged it before him as her voluntary act and deed. The house was completed in the fall of 1892 and was rented to tenants for the next four years. It was not

occupied by Kelly and his wife until October, 1896. When the mortgage was executed they lived in a house upon an adjoining lot which, we think the evidence fairly shows, belonged to Kelly. This lot was sold about that time; but instead of moving into the property in controversy, they occupied another house in a different block which he owned also. This suit was brought to foreclose the mortgage last executed. The defendants Kelly answered separately, alleging that the property was their homestead at the time the mortgage was executed, and that Mrs. Kelly neither signed nor acknowledged the instrument. On the trial it appeared and was admitted that she signed it, and we think it was made reasonably to appear that she did so knowingly and understandingly. But she testified that she did not acknowledge the instrument, and the lower court, holding the certificate of acknowledgment sufficiently impeached, and that the property had been shown to have been a homestead at the date of the mortgage, rendered a decree for the defendants and dismissed the suit.

We think the trial judge was clearly wrong upon both points. It is true that actual occupancy is not absolutely required in every case where a homestead is claimed. Nevertheless, occupancy is the test established by the statute, and it is only through liberal construction to meet the beneficent ends of the statute that certain substitutes therefor have been permitted. The most usual is what has been called constructive occupancy, as, for example, where property occupied as a homestead has been temporarily vacated without abandonment and with a bona-fide and subsisting intention to return. Another has been permitted in case of vacant and unimproved property in present process of preparation for a home and in other cases where property purchased for use as a homestead is for some temporary reason not available as such, but is preparing as fast as may reasonably be expected. In such cases, where there is a bona-fide present intention and preparation to occupy the property as a homestead, followed by

actual occupancy within a reasonable time, it is entirely within the bounds of legitimate construction to hold the property a homestead. *Hanlon v. Pollard,* 17 Nebr., 368; *Swaney v. Hutchins,* 13 Nebr., 266. But it does not follow that a bare intention to occupy such property at some future time will of itself suffice to impress the property with the character of a homestead while it remains unoccupied. Much less, where an unreasonably long period intervenes, during which tenants are placed in possession and the claimant and his family actually live upon other land belonging to him, should such a vague and general intention suffice to make the belated occupancy relate back to the acquisition of the land. There must be a present intention to occupy it as a homestead as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention. *Grosholz v. Newman,* 21 Wall. [U. S.], 481; *Evans v. Calman,* 92 Mich., 427, 52 N. W. Rep., 787; *Ingels v. Ingels,* 50 Kan., 755, 32 Pac. Rep., 387, and cases cited; *Edgerton v. Connelly,* 3 Kan. App., 618, 44 Pac. Rep., 22; *O'Brien v. Woeltz,* 58 S. W. Rep. [Tex.], 943; *Wilkerson v. Jones,* 40 S. W. Rep. [Tex. Civ. App.], 1046. The cases cited in behalf of defendants are in full accord with these principles. In *Hanlon v. Pollard,* 17 Nebr., 368, the property was purchased for a homestead, but occupancy was prevented by the unexpired term of a tenant. Possession was promptly taken on its expiration, and the levy there in question was made but a few days prior thereto. In *Deville v. Widoe,* 64 Mich., 593, 31 N. W. Rep., 533, the claimant was actually building his house upon the land at the time of the levy, and as soon as it was completed, which was within a few months, moved into it. The court held it was a homestead at the date of the levy. In the case at bar, if the defendants Kelly had proceeded to occupy the house when completed, there would be ground for their claim. But their failure so to do for four years is not to be disposed of by the general statement that they were unable to furnish the house, uncorroborated by a single act of preparation, especially in view of their occu-

pancy of other houses belonging to the husband which they evidently could furnish. They acquired the land six or seven years before they occupied it. Their acts in the meantime are not consistent with the alleged intention. *State Bank v. Peak,* 3 Kan. App., 698, 44 Pac. Rep., 900. Moreover, no one can have two homesteads at the same time. Where the claimant and his family are occupying property belonging to him as a home, intending to remain for the present, an intention to remove to some other tract owned by him and occupy the latter as a home at some indefinite future period will not enable him to claim it as a homestead. *Swenson v. Kiehl,* 21 Kan., 533; *Archibald v. Jacobs,* 69 Tex., 248, 6 S. W. Rep., 177; *O'Brien v. Woeltz, supra; Allen v. Whitaker,* 27 S. W. Rep. [Tex. Civ. App.], 507. "If he occupies one dwelling as a residence, and intends to continue such occupation for the present, a purchase of another residence does not invest that with the character of a homestead simply because of an intent, at some future and more convenient time, to make it his home." *Swenson v. Kiehl, supra.* In the case at bar, the defendants disposed of one homestead and acquired other property which they occupied as a home long after the house on the property in question was completed. Under such circumstances, to allow their general intention to use that property as their home at some time in the future to relate back four years to the time when the mortgage was executed and the house built, would stretch the language of the statute beyond all reason. *Gibson v. Mundell,* 29 Ohio St., 523, 528.

We think also that the evidence is not sufficient to impeach the certificate of acknowledgment. Where there is such a certificate in proper form, it may be impeached only by clear and convincing evidence of its falsity. *Thams v. Sharp,* 49 Nebr., 237, 241, and cases cited. The notary testified positively that Mrs. Kelly acknowledged the instrument. Her testimony to the contrary is characterized by not a little evasion and equivocation, and is shaken by her attempts to deny, first that she signed the mortgage,

and afterwards that she signed it knowingly. She admitted signature, and her own testimony affords good ground for belief that she knew what she was signing.

It is recommended that the decree be reversed and the cause remanded with directions to render a decree of foreclosure as prayed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the opinion the decree is reversed and cause remanded with directions to render decree as prayed.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

CHARLES BATTELLE, APPELLANT, V. JAMES H. MCINTOSH ET AL., APPELLEES.

FILED OCTOBER 1, 1901. No. 10,326.

Commissioner's opinion, Department No. 2.

1. **A Purchase at Judicial Sale is Subject to Liens Deducted from Appraisement.** A purchase of property at a judicial sale at which certain liens have been duly certified and deducted in the appraisement is a purchase subject to such liens, and the purchaser will be estopped from questioning their validity in subsequent proceedings, although he may have paid more than two-thirds of the gross appraisement.

2. **Answer: DENIAL: ADMISSION: TAX-SALE CERTIFICATE.** An answer admitting that a certain certificate of tax-sale set forth in full in the petition was sold, assigned and transferred to the plaintiff and that plaintiff "is now the holder of said certificate," followed by a general denial of the other allegations of the petition, amounts to an admission of the issuance and existence of the certificate so set forth.

3. **The Office of Appeal is the Review of Judgment on Pleadings and Evidence Admitted.** The office of an appeal is only to review the judgment or final order of the district court upon the pleadings and the evidence admitted at the hearing. Review of rulings rejecting evidence must be sought by petition in error.

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

Charles Battelle, for himself.

Ralph W. Breckenridge, also for appellant.

James H. McIntosh, contra.

POUND, C.

This is an appeal from a decree dismissing a petition for the foreclosure of certain tax liens. The record is in a most unfortunate condition, since the trial judge, conceiving that the tax-sale was void and that the taxes in question were illegal, rejected the greater part of the evidence offered by the plaintiff, and failed to rule upon or held his rulings "in abeyance" with respect to much of the remainder. Under such circumstances, it has been necessary to search a voluminous record with some little patience in order to ascertain what questions are fairly before this court.

The first point made by appellant, to the effect that defendants are estopped to question the existence or validity of the tax liens is, in our opinion, well taken. It is pleaded and appears in evidence that the defendant James H. McIntosh purchased the property at a judicial sale at which the taxes in question had been duly certified and deducted in the appraisement as liens upon the property. The only reason advanced why this fact should not operate as an estoppel is that the purchaser bid more than two-thirds of the gross appraised value of the property. We do not think that this fact alone would prevent an estoppel from arising, nor has counsel suggested to us why it should do so. The price paid was considerably less than the gross appraised value and was based, as far as the evidence disclosed, upon the appraisement. We think that a purchase under such circumstances must be presumed to be subject to the liens deducted in the appraisement. Presumably there were bidders present at the sale, and the property

would have brought its full and fair value had it not been for the supposed liens. That the purchaser might have bought for less under the appraisement, had there been no one else to bid, does not alter the situation. The case appears to come squarely within the well settled rule that one who purchases subject to a lien can not question its existence or validity in subsequent proceedings. *Arlington Mill & Elevator Co. v. Yates,* 57 Nebr., 286; *Farmers Loan & Trust Co. v. Schwenk,* 54 Nebr., 657.

Conceding, however, that defendants were estopped to deny the existence and validity of the tax liens, the question still remains whether appellant has shown himself entitled to assert them. He claimed under a certificate of tax-sale and by virtue of payment of subsequent taxes and municipal assessments for its protection. The defendants assert that the evidence admitted by the trial court fails to show a sale to plaintiff's assignor, but on the contrary, shows a sale to one Garske, and that all evidence as to the payment of subsequent taxes and assessments was excluded. With respect to the first contention, appellant is placed in an awkward situation by the action of the court in rejecting the treasurer's certificate of tax-sale. But we think such certificate is before us and may be considered by reason of admissions in the answer. The second paragraph of the petition sets out the certificate *in hæc verba.* The third paragraph alleges that after its issuance "said tax-certificate" was sold, assigned and transferred to the plaintiff and that plaintiff "is now the holder of said certificate." The answer admits "each and all the allegations of the third paragraph of the plaintiff's petition," following such admission by a general denial of the remainder. The "said certificate," which is thus admitted to have been sold and transferred and to be held by the plaintiff, is the one set out in full in the second paragraph, to which reference is clearly made in the paragraph admitted by the answer. Hence the admission in question amounts to an admission of the issuance and existence of the certificate set forth in the petition. *State v.*

Hill, 47 Nebr., 456, 497, and cases cited. The statute makes this certificate, which the defendants admitted in their pleading, presumptive evidence of the regularity of all prior proceedings (Compiled Statutes, ch. 77, art. 1, sec. 116), so that, in view also of the general presumption in favor of official acts, the burden of showing a sale to Garske, or some one other than the person to whom the treasurer issued the certificate, would be upon the defendants. We do not think they have done so. The treasurer's clerk made a memorandum of a sale to Garske at the time, and made a return that he had sold to the latter. But he testifies that he knew Garske was bidding for and on behalf of Baer, plaintiff's assignor, and made the memorandum and return as he did because he did not know what Baer's wishes were as to the person to whom the certificate should run. He issued the certificate to Baer, and it does not appear that Garske ever claimed it or that a certificate was ever issued to him, while the officials in the treasurer's office make it clear how it happened that the memorandum and return contain Garske's name instead of Baer's. As the defendants are estopped to question the lien of the county for taxes, and plaintiff's assignor became entitled to assert such lien by reason of payment of the taxes named in the certificate (*Adams v. Osgood,* 60 Nebr., 779), it follows that a decree of foreclosure should be rendered therefor.

With respect to the subsequent taxes and municipal assessments alleged to have been paid under the certificate, the case is very different. As to these also, defendants are estopped to question the validity of the liens of the county and city. But the plaintiff could not assert such liens except upon showing that he had paid such taxes and assessments and become subrogated to the rights of the public. The answer denied that these payments had been made, and the trial court rejected all evidence by which they were sought to be established. It is very clear from inspection of the record that the theories upon which these rulings were made were erroneous in view of *Adams v.*

Osgood, 60 Nebr., 779, and *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Nebr., 393. But we can not review them in the present proceeding. The office of an appeal is only to review the judgment or final order of the district court upon the pleadings and the evidence admitted at the hearing. Review of rulings rejecting evidence must be sought by petition in error. *Zimmerman v. Zimmerman,* 59 Nebr., 80.

It is recommended that the decree be reversed and the cause remanded with directions to render a decree of foreclosure for the amount of the certificate set forth in the petition and interest thereon at the rates fixed by law.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed, and cause remanded with directions to render a decree of foreclosure for the amount of the certificate set forth in the petition and interest thereon at the rates fixed by law.

REVERSED AND REMANDED.

SULLIVAN, J., absent, not voting.

ARMINIUS CULLEY V. SARAH G. TAYLOR.

FILED OCTOBER 1, 1901. No. 10,251.

Commissioner's opinion, Department No. 3.

1. **Evidence: FINDINGS.** Evidence examined, and found to support findings of fact by trial court.

2. **Cropper's Right and Extent of Possession.** One who contracts to cultivate lands of another to a specific crop, upon shares, is entitled only to such possession of the land as is necessary and convenient for the use intended. In such case the owner of the premises will not be held to have worked an eviction, or an abandonment or rescission of the contract, by entering upon them after the season is too far advanced for the planting of

the specified crop and clearing them of weeds and planting another crop thereon.

3. **Measure of Damages Upon Breach of Cropper's Contract.** When one commits a total breach of his contract to cultivate lands of another in a workmanlike manner to a specific crop, the measure of damages is the injury to the lands, if any, from allowing them to lie idle and become foul with weeds, and the probable value of the landowner's share of the crop, had the contract been fulfilled.

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

Richard J. Nightingale, for plaintiff in error:

The amended petition alleges that on October 28, 1894, the defendant in error made an oral lease with plaintiff in error for thirty-five acres of land for the term of one year, commencing on March 1, 1895, and ending on March 1, 1896; that the covenants of the lease were: (1) to pay as rent one-third of the crop to be delivered at the premises of Alonzo Zink, plaintiff in error's agent, and to give defendant in error the use of the corn-stalks; (2) to farm the thirty-five acres in a good and workmanlike manner; (3) to plant all of the land to corn; that plaintiff in error took possession of the land on March 1, 1895; that plaintiff in error has broken said covenants, and that defendant in error is damaged thereby in the sum of $87.50, to which petition defendant demurred. This demurrer was overruled. Thereupon plaintiff in error answered (1) by general denial; (2) alleging an agreement on express condition that the lease should be reduced to writing and signed by the owner of the land, and not by her agent, and that no written lease was ever given; that the terms not being complied with, the offer of plaintiff in error was withdrawn; (3) plaintiff in error pleaded the statute of frauds; (4) rescission, to-wit, that on or about August, 1895, defendant in error leased the premises to William Hancock during the alleged term of plaintiff.

The reply denies the new matter in answer.

The petition does not state a cause of action. The lease is not brought within the statute of frauds. Compiled Statutes, 1897, ch. 32, sec. 5.

An oral lease can not begin *in futuro*. Taylor, Landlord & Tenant [8th ed.], 30; *Rawlins v. Turner*, 1 Raym. [Eng.], 736; *Atwood v. Norton*, 31 Ga., 507.

The principal object of the statute of frauds is to provide for contracts affecting the possession of land, greater certainty of evidence. If an oral lease *in futuro* be good where the term commences in four months from the date of the contract, it is good where it commences in four years thereafter. Such a construction would be an intolerable nuisance to the community. Where the contract is oral and the term of the lease ends more than one year from the date of the agreement, the transaction comes within the prohibition of the statute. *White v. Holland*, 3 Pac. Rep. [Ore.], 573; *Cook v. Redman*, 45 Mo. App., 397; *Comstock v. Ward*, 22 Ill., 248; *White v. Levy*, 9 So. Rep. [Ala.], 164; *Bain v. McDonald*, 20 So. Rep. [Ala.], 77; *Greenwood v. Strother*, 16 S. W. Rep. [Ky.], 138.

Long & Mathew and *Aaron Wall, contra:*

A parol lease to commence *in futuro*, will support an action for rent without entry being made by lessee. *Birckhead v. Cummins*, 4 Vroom [33 N. J. Law], 44; Woodfall, Landlord & Tenant [1st Am. 13th Eng. ed.], vol. 1, *197, vol. 2, *534.

AMES, C.

This action was tried in the district court for Sherman county upon a petition alleging that on or about the 28th day of October, 1894, the parties entered into an oral contract of lease by which the defendant in error Taylor, demised to the plaintiff in error Culley, a certain 35 acres of land lying in said county, for the term of one year beginning March 1, 1895, the lessee agreeing to cultivate the premises to corn, and to pay as rent therefor one-third

of the produce, to be delivered, as the same should be husked, upon the premises of one Alonzo Zink, an agent of the plaintiff; the lessor also to be entitled to the stalks left standing in the field after the husking; and that as a further consideration for said leasing Culley agreed to farm said premises in good and workmanlike manner. It is further alleged that the plaintiff in error went into possession of the lands under the lease, but neglected to cultivate or plant them to corn, and allowed them to become foul with weeds, so that the lessor was damaged both by the loss of her share of the anticipated crop, and by the injury to the soil caused by the weeds, for which damages she prays a recovery. The answer for a first defense contains, first, a general denial; second, an admission that the plaintiff in error on October 28, 1894, entered into a negotiation with the defendant in error by her agent the said Zink, for the leasing of said premises for the term mentioned in the petition, but that the covenants of such lease were not finally nor definitely agreed upon, and that the plaintiff in error expressly refused to consider the contract complete, or himself bound thereby, unless the same should be first reduced to writing and signed by the parties, which was never done. This defense further specifically denies that the contract ever was completed, or that the plaintiff in error ever entered into the possession of the premises, but alleges that on the contrary the defendant in error, at all times, remained in possession of the same until some time in July or August, 1895, when she leased them to one Hancock, who went into possession and planted and cultivated them to winter wheat. For a second defense it is pleaded that the alleged contract was not in writing, and not to be performed within one year, and is therefore void by reason of the provisions of the statute of frauds. For a third defense it is pleaded that even if the defendant had entered into the alleged contract, "that said lease was thereafter rescinded, abandoned and annulled by plaintiff" by the entering upon said premises in June or July, 1895, and cutting the weeds thereon

and by leasing the same to Hancock, as before stated, and putting the latter in possession thereof. This last defense comes dangerously near admitting the contract sued on.

As to what in fact occurred there is very little conflict in the evidence, and the trial court was abundantly justified in finding especially as matters of fact, as he did do, in substance: First, that an oral contract, substantially as set out in the petition, was entered into between the parties at the time alleged, and second, that at various times and up to the latter part of May, 1895, there were conversations between the parties, in which the existence of the contract was recognized, and in which it was understood between them that the plaintiff in error was to cultivate the land in substantial accordance therewith, and that in the last of these conversations it was agreed that the plaintiff in error might, if he should choose to do so, cultivate the land to millet instead of corn. It becomes, therefore, unnecessary to discuss the statute of frauds. It may be fairly said, however, that a contract made October 28th to cultivate a field of corn in the coming season is a contract to be performed within one year from its date. The land was not cultivated nor occupied by the plaintiff in error, nor by any one during the summer of 1895, except that late in the season the defendant in error caused the weeds on a part thereof to be mowed at an expense of $6, and that later she caused the same to be cultivated to winter wheat, substantially as alleged in the answer.

Upon the question of damages, the court admitted testimony as to what was the yield and value of corn raised during the year 1895, on other similar lands in the neighborhood, and found from such evidence that if the lands had been properly cultivated, they would have yielded twenty-five bushels per acre, of the value of fifteen cents per bushel, and assessed the total damages, including injury to the land from permitting it to lie idle and grow up to weeds, for which amount and costs of suit, judgment was rendered.

There is in our opinion no merit in the contention that

the lessee suffered such an ouster or invasion of his possession as amounted to a rescission, or repudiation of his contract by the lessor. If the agreement is properly called a lease, or whether it be so or not, it contemplated only such possession of the land as was necessary or convenient for the specific use which the contract contemplated. The cutting of the weeds and the plowing of the land and cultivating it to wheat in the fall or latter part of the summer, after the season had too far advanced to permit of its cultivation to corn or millet, and after the plaintiff in error had apparently abandoned the fulfillment of the contract on his part, wrought him no injury, and was not an interference with his possession of which he can complain. The relation between the parties, in such cases, is not the ordinary one of landlord and tenant for a definite term, and at a fixed rent, and the owner of the land is entitled to any use or possession of the same, not inconsistent with the enjoyment of the rights reserved by the contract to the cultivator of the soil. Washburn, Real Property [3d ed.], p. 496, and authorities cited.

Upon the question of the measure of damages neither party cites any authority directly in point, nor have we, with the limited time at our disposal, been able to find any, but as at present advised, we are of opinion that the method adopted by the trial court is correct. The contract between the parties created a relation in the nature of a partnership in which one party was to furnish seed, time, labor and skill, and the other the use of the land upon which they were to be expended, and the gross produce was to be divided between them in the proportion named. We are of opinion, therefore, that the case falls within the principles of *Bagley v. Smith,* 10 N. Y., 489, which was an action for wrongful dissolution of a partnership, and in which damages were allowed for the loss of anticipated profits. About the item for damages to the soil from permitting it to lie uncultivated, there can be no reasonable doubt.

We recommend 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.

SULLIVAN, J., absent, not voting.

COUNTY OF CUSTER V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

FILED OCTOBER 1, 1901. No. 10,116.

Commissioner's opinion, Department No. 3.

1. **Taxes**: LEVIED FOR UNAUTHORIZED PURPOSE: INVALID EXCEPT FOR NON-LIABILITY: FORMAL PROTEST. Under section 144, chapter 77, Compiled Statutes, where it is claimed that the taxes were levied for an illegal or unauthorized purpose, or that they are invalid for any reason, other than that the property was not liable to taxation, or that it had been twice assessed in the same year, no formal protest is required.

2. **Demand**: SPECIFICATION. The demand for a return of taxes, required by said section, is sufficient if it specifies the taxes sought to be recovered, the ground upon which their return is demanded, and includes a demand for repayment.

3. **County Attorney**: CONFESSION OF JUDGMENT AGAINST COUNTY. A county attorney has no authority to enter a voluntary appearance in court, and confess judgment against the county.

4. ———: ———: AUTHORITY OF COUNTY BOARD. A mere resolution of the county board, authorizing the county attorney to confess judgment against the county, does not authorize him to enter a voluntary appearance and confess such judgment; and a judgment confessed, under such circumstances, is void.

5. **Levy of Tax to Pay Invalid Judgment Void**. A levy of a tax by a county board for the payment of judgments is unauthorized if there are no judgments against the county when the levy is made.

6. **Allowance of Claim**: JUDGMENT. An order of a county board allow-

ing a claim against the county is not a judgment, within the meaning of the statute providing for the levy of a tax to pay judgments against the county.

7. ———: ———: APPEAL. No appeal lies from an order of the county board, disallowing a claim, made in pursuance of the provisions of section 145, article 1, chapter 77, Compiled Statutes.

8. ———: BASIS OF ACTION. An order of a county board, acting in pursuance of said section in the rejection of a claim, is not such an adjudication as will bar the claimant's right to maintain an original action on such claim in the district court.

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

J. R. Dean, for plaintiff in error.

J. W. Dewcese, Nathan K. Griggs, John S. Kirkpatrick and *Frank E. Bishop, contra.*

ALBERT, C.

This action was brought in the district court by the Chicago, Burlington & Quincy Railroad Company, plaintiff, against Custer county, defendant, to recover taxes paid by the plaintiff under what is claimed to have been an illegal levy. A trial to the court, without a jury, resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The petition sets forth three causes of action, but, as plaintiff's right to recover on the first and second is conceded, the third alone concerns us at this time.

The tax in question was levied in 1895, at which time there was levied for ordinary county revenue nine mills, and, in addition thereto, among other items, four and one-half mills for the payment of judgments against the county. The plaintiff paid its share of the four and one-half mill levy under protest, and, within due time, demanded its return. On defendant's failure to comply with such demand, the plaintiff brought this action assailing the validity of the four and one-half mill levy, on the ground that no judgments existed against the county at

the time of the levy, and for that reason it was unauthorized and illegal.

The first assignment of error relied on by the defendant is that the court erred in overruling its objection to the introduction of any testimony. This assignment is based on the alleged insufficiency of plaintiff's protest and demand. In support of its position the defendant cites *City of Omaha v. Kountze,* 25 Nebr., 60. The case cited is not in point. It was brought under section 1 of chapter 12 of the Laws of 1883, which provides for the recovery of special taxes levied by cities of the first class, and provides in specific terms that "no court shall entertain any complaint * * * not specified in said notice fully enough to advise the city of the exact nature thereof," and relates entirely to cities of the first class. The procedure for the recovery of illegal taxes from a county is regulated by section 144, article 1, chapter 77, of the Compiled Statutes, which specifies two classes of cases. The first includes cases where the property on which the tax was levied was not liable to taxation or had been twice assessed in the same year, and taxes paid thereon; the second, where the taxes are levied for an illegal or unauthorized purpose, or for any other reason are invalid. Under the second, no protest is required, but the party paying the tax is required, within thirty days after payment, to demand the same in writing from the treasurer of the county, and, if the taxes are not refunded in ninety days, the party may bring his action against the county therefor. The case at bar falls within the second class and no formal protest was required. The demand was in writing and covers almost a page of closely written matter. It is amply sufficient to inform the defendant of the taxes referred to, that they had been paid by the plaintiff, the ground upon which plaintiff claimed they were invalid and contained a demand for their return. Such a demand is sufficient under the statute.

The other assignments search the entire record, and squarely present the question whether the taxes levied for

the payment of judgments against the county were valid. The authority of the county board to levy a special tax for the payment of judgments is to be found in sections 1 and 2 of article 6 of the chapter just referred to, and which, so far as are material at present, are as follows:

"Sec. 1. Whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, * * it shall be the duty of the county commissioners * * * to make provisions for the prompt payment of the same.

"Sec. 2. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgments remaining unpaid, it shall be the duty of the proper officers of the corporation, against which any such judgment shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments."

From the sections just quoted it is clear, we think, that the existence of judgments against the county at the time of the levy is a condition precedent to a valid exercise of the power by the county board to levy a tax for the payment of judgments. Hence, the question presented is, whether at the time of the levy complained of there were any judgments in existence against the county. But one judgment is claimed to have existed in the district court against the county at that time. The record introduced in evidence to establish the fact of the existence of such judgment is as follows: "On this 3d day of December, 1892, this cause came on to be heard and the defendant by its attorney in open court confesses judgment in favor of the plaintiff for the sum of $1,522.29." This confession is followed by no adjudication of the court, and we do not think it will be seriously urged that, standing alone, it constitutes judgment, so we may dismiss it from further consideration. The other judgments relied upon to support the levy were rendered in the county court upon the vol-

untary appearance and confession of the county attorney, whose only authority in the premises was the following resolution of the county board: "Resolved, that the county attorney be instructed to confess judgment in the county court on all allowed claims for the year 1894, which cannot go into warrants, whenever the owner of the claim asks for judgment."

Where there has been no service of process to give the court jurisdiction to render judgment by confession, the law requires the personal appearance of the party or of his attorney, acting under a warrant of attorney. Code of Civil Procedure, secs. 433-437. It is clear that the county can not appear personally. Whether any officer or body of officers is authorized to execute a warrant of attorney on behalf of the county we are not required to determine, for the reason that the resolution under which the county attorney acted is not, and does not purport to be, such warrant. The judgments are absolutely void; the county court had no jurisdiction over the county, to say nothing of the subject matter. *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Nebr., 722; *Grand Island & N. W. R. Co. v. Baker,* 71 Am. St. Rep., 926.

The judgments above referred to were based on claims previously allowed by the county board, and the defendant insists, that though there were no judgments in the district or county courts, the orders of the county board allowing such claims were judgments, within the meaning of the statute, and sufficient to authorize a levy for their payment. In support of this position many decisions of this court are cited, holding that in the allowance or rejection of a claim a county board acts judicially, and the act is in the nature of a judgment. *Heald v. Polk County,* 46 Nebr., 28; *State v. Vincent,* 46 Nebr., 408; *State v. Merrell,* 43 Nebr., 575. We do not doubt the soundness of the rule announced in those cases, but it has no application to the case at bar. The statute, in express terms, refers to judgments obtained in court. While a county board, in some matters, exercises judicial func-

tions, it is not a court, within a constitutional sense, nor within the general acceptation of that term. *Stenberg v. State,* 48 Nebr., 299. The statute under consideration was enacted by the territorial legislature, and was intended to supplement section 31 of chapter 9 of the Revised Statutes, which made a judgment a lien on public property, but provided that no execution could issue thereon, until the county commissioners should have had six months in which to levy a tax for their payment. The object of the supplemental act was to make the duty to provide for the prompt payment of judgments clearly mandatory, and it applies exclusively to judgments upon which execution may issue. To hold otherwise would be to hold that so often as a claim is allowed by the county board, whatever its nature, for the payment of which the ordinary revenues of the county are insufficient, that the county board should at once proceed to provide for its payment by a special levy. *Jackson v. Washington County,* 34 Nebr., 680. When we take into account the frequency with which claims are allowed under such circumstances, we can form some conception of the confusion that would result from a practical application of the doctrine that the allowance of a claim by the county board is a judgment, within the meaning of the statute under consideration.

It is urged that some of the claims allowed were for the fees and salaries of officers of the county, and that, to that extent, at least, the levy should be upheld so long as it does not exceed the fifteen-mill limit. We are unable to concur in that view. The levy was for a specific purpose, namely, the payment of judgments against the county. We have seen that no such judgments existed, and that the levy for that reason was unauthorized.

It is suggested, rather than argued, that plaintiff's claim for the taxes was first filed with the county board, disallowed by that body and no appeal taken from the order disallowing it, and, for that reason, that there is some doubt whether plaintiff may maintain an original action in the district court therefor. Section 144, article 1, chap-

ter 77, of the Compiled Statutes, as hereinbefore stated, provides the remedy for the recovery of taxes levied for an illegal or unauthorized purpose. That section provides for a demand on the county treasurer. The section immediately following it expressly provides for the transmission of a copy of the demand to the county board, and that such board shall pass upon it as any other claim. It is further provided by section 144 that unless taxes levied for an illegal or unauthorized purpose are refunded within ninety days after such demand on the county treasurer, as therein provided, the claimant may sue the county for the amount so demanded. From the record it appears that the statutory directions were strictly pursued, and that the action of the county board was in pursuance of such directions only. The provisions of section 145 are intended to enable the county board to inquire into the merits of the claims filed, and to pay such of them of that character as it may deem just without litigation. It makes no provision for an appeal, and, taken in connection with the preceding section, which gives the claimant the right to sue unless the taxes are refunded within a given time, it is clear that it was not the intention of the legislature that the action of the county board in pursuance of section 145 should operate as an adjudication against the claimant.

We discover no error in the record, and therefore recommend that the judgment of the district court should be affirmed.

AMES and DUFFIE, CC., concur.

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

AFFIRMED.

SULLIVAN, J., absent, not voting.

NION STATE BANK V. GEORGE E. HUTTON.

FILED OCTOBER 16, 1901. No. 10,030.

1. Verdict: INSTRUCTIONS. The jury are bound to give their verdict in obedience to the instructions of the court.
2. Instructions: MOTION FOR NEW TRIAL: ASSIGNMENT OF ERROR: LAW OF THE CASE. An instruction which is neither complained of in the motion for a new trial, nor assigned for error in this court, is the law of the case.
3. Estoppel: IGNORANCE OF BENEFICIARY. In order to estop a party by mere silence, it must appear that the person claiming the benefit of the estoppel was ignorant of the rights of the party against whom the estoppel is alleged.

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

Thomas H. Matters, for plaintiff in error.

John C. Stevens, contra.

SULLIVAN, J.

George E. Hutton, who was plaintiff below, alleged in his petition that he was the owner of a bay mare which the defendant, the Union State Bank, unlawfully seized and converted to its own use. The answer was a general denial coupled with a plea of estoppel by conduct amounting to an actual or constructive fraud. The jury found in favor of the plaintiff for the sum of $22.36, and judgment was rendered on the verdict. In the fourth instruction the court said to the jury that if George E. Hutton was the owner of the mare at the time she was taken from his possession by the agents of the bank, their verdict should be for the plaintiff. Of this instruction no complaint was made in the motion for a new trial; and it is not assigned for error here. Under these circumstances we have no authority to review it. Whether right or wrong, it is the law of the case and the jury were bound to render their verdict in obedience to it. *Aultman v. Reams,* 9 Nebr..

487; *Omaha & R. V. R. Co. v. Hall,* 33 Nebr., 229; *World Mutual Benefit Ass'n v. Worthing,* 59 Nebr., 587. The evidence warranted the jury in finding that the plaintiff was in fact the owner of the mare. The verdict can not, therefore, be condemned while the instruction under which it was given stands unchallenged.

There is another reason why the judgment should be affirmed. On the question of estoppel the defendant had the burden of proof. It was required to show, among other things, that it altered its position—that it lost some advantage, incurred expense, paid out money, parted with property, assumed an obligation or did, or failed to do, some other act or thing by which it was prejudiced—in reliance upon plaintiff's conduct and in ignorance of his rights. *Burke v. Utah Nat. Bank,* 47 Nebr., 247; *State v. Bank of Commerce,* 61 Nebr., 22; *Lingonner v. Ambler,* 44 Nebr., 316; 11 Am. & Eng. Ency. Law [2d ed.], 436. It was shown conclusively at the trial that before the bank sold the mare it was informed of Hutton's claim of ownership. When it obtained this information does not appear, but we find nothing in the record upon which to ground an inference that it was obtained after, rather than before, the right to plead an estoppel had arisen. The judgment is

AFFIRMED.

MARION PLUMMER, APPELLEE, v. BARTON PARK, APPELLEE, IMPLEADED WITH EDMOND BONNEAU ET AL., APPELLANTS.

FILED OCTOBER 16, 1901. No. 10,096.

1. **Transfer of Mortgage by Administrator to Heir: FORECLOSURE BY HEIR.** Where there are no creditors of an estate and the heirs are competent to, and do, consent to the transfer by the administrator of a mortgage belonging to the estate, to one of the heirs in part satisfaction of his share of the estate, and such transfer is afterwards ratified by the court in which the estate is being administered, such ratification relates back to the transfer and is equivalent to a prior authorization; and such heir, or

his assignee, may sue in his own name to foreclose the mortgage.

2. **Allegation of No Action at Law, Must Be Proved.** In a suit to foreclose a real estate mortgage the allegation that no action at law has been brought to recover the mortgage debt must be proved if it is not admitted.

3. **Stipulation:** TAXES: PUBLIC POLICY. A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute nor contrary to public policy and may be enforced.

4. **Payment of Taxes After Commencement of Action, Does Not Deprive Mortgagee of Right.** And the payment of such delinquent taxes after the commencement of an action to foreclose the mortgage, does not deprive the mortgagee of the right secured by the exercise of his option.

5. **Rendition of Two Decrees Not Reversible Error.** The rendition of two decrees in a case at the same term, but not on the same day, is not reversible error if the rights of the litigants have been correctly determined.

APPEAL from the district court for Burt county. Heard below before FAWCETT, J. *Reversed.*

H. H. Bowes, Willis G. Sears and *R. Wade Gillis,* for appellants.

M. R. Hopewell and *John A. Singhaus, contra.*

SULLIVAN, J.

This action was instituted by Marion Plummer against Barton Park, Edmond Bonneau, and others to foreclose a real estate mortgage. The court, upon the issues joined, found in favor of the plaintiff and awarded him the relief for which he prayed. There was also a decree in favor of the defendant Park foreclosing a second mortgage upon the land described in the petition. The two decrees were rendered at the same term of court, but not upon the same day. This appeal is prosecuted by Bonneau. His objections to the decree foreclosing the senior lien will be first considered. They are (1) that the evidence does not establish plaintiff's ownership of the mortgage; and (2)

that the evidence does not tend to prove that no legal proceedings had been commenced to recover the mortgage debt. It appears from the record that the mortgage was given to one S. P. Byram who died intestate before this action was begun; that H. D. Byram, as administrator of the estate of the deceased, transferred the mortgage to G. M. Byram who sold and assigned it to the plaintiff; that the transfer by the administrator to G. M. Byram had the sanction and approval of all the heirs of S. P. Byram, but was made without any order of distribution having been entered by the county court of Burt county, the court in which the estate was being administered; that G. M. Byram was one of the heirs of S. P. Byram, and that while this action was pending the county court of Burt county ratified and confirmed the transfer made by the administrator. It also appears that there are no creditors of S. P. Byram's estate. Possession of the note and mortgage was evidence of ownership. *Collins v. Gilbert,* 94 U. S., 753; *Jackson v. Love,* 82 N. Car., 405; *Perot v. Cooper,* 17 Colo., 80; *Rubey v. Culbertson,* 35 Ia., 264; *Commercial Bank v. Burgwyn,* 108 N. Car., 62; *Somervail v. Gillies,* 31 Wis., 152. But it is insisted by counsel for appellant that the administrator could not, without an order of the county court, transfer the title to property which he held in trust. But who can question the transfer? Not the heirs of S. P. Byram, for they consented to it under circumstances that make their consent irrevocable; and not the creditors of the estate, for there are none. In *Stanley v. Mather,* 31 Fed. Rep., 860, Gresham, J., discussing a question identical in substance with the one now before us, said: "It does not follow because the administrator is the proper party to collect the debts due a decedent, and pay creditors, and for that purpose bring suits, that under no circumstances can the heirs at law maintain a suit to collect a debt which has not been collected by the personal representative. Having paid all creditors, and all expenses of administration, the administrators delivered the notes and mortgages to the complainants, the

only persons entitled to them in equity; and there is no reason why their possession should now be disturbed." The plaintiff was entitled to foreclose the mortgage because he was not only the equitable, but also the legal owner of it. The action of the county court confirming and approving the transfer by the administrator to G. M. Byram related back to the time the transfer was made; it had all the force and effect of a prior authorization. *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Nebr., 68.

The second objection to the decree, namely, that there is a lack of evidence tending to show that no action at law was commenced to recover the mortgage debt, will have to be sustained. It has been several times determined by this court that the statement required by section 850 of the Code of Civil Procedure to be inserted in a petition to foreclose a mortgage is an essential averment which must be proved if put in issue. *Jones v. Burtis*, 57 Nebr., 604; *Kirby v. Shrader*, 58 Nebr., 316; *Miller v. Nicodemus*, 58 Nebr., 352. These decisions must be regarded as conclusive; the question which they decide is now at rest. The plaintiff produced no evidence to show that he had not commenced a law action to recover the mortgage debt and, consequently, the judgment in his favor must be reversed.

We turn now to the other branch of the case. The second mortgage contains this provision: "But if said sum of money or any part thereof, or any interest thereon is not paid when the same is due or if the taxes and assessments against said premises are not paid at or before the time the same by law become delinquent, or if said mortgagors shall fail to keep and perform any of the contracts herein contained on their part to be kept and performed, then the whole of said sum and interest shall immediately become due and payable." The answer and cross-petition of the defendant, Barton Park, was filed February 13, 1897. At that time the taxes charged against the mortgaged premises for the year 1895 were unpaid. For this

reason, among others, Park declared the entire debt due The stipulation in the mortgage authorizing the mortgagee to accelerate the maturity of the debt was a lawful one; it was neither forbidden by statute nor contrary to public policy (*Hartsuff v. Hall,* 58 Nebr., 417; *National Life Ins. Co. v. Butler,* 61 Nebr., 449), and the right secured by the exercise of the option was not lost when Bonneau paid the taxes to the county treasurer in July, 1897.

With respect to the complaint grounded on the fact that two decrees were rendered in the case, it is only necessary to remark that if the two adjudications had correctly determined the rights of the litigants, we are unable to see any good reason why either of them should be set aside. Both must, however, be reversed, and for the same reason. Park made no attempt to prove that he had not instituted a legal action for the collection of the debt secured by his mortgage. The cause is remanded to the district court with direction to try the issues raised by the denial of the eighth paragraph of the petition and the fifth paragraph of the answer of Barton Park, and to render an appropriate decree.

REVERSED AND REMANDED.

BARBARA RACEK V. FIRST NATIONAL BANK OF NORTH BEND.

FILED OCTOBER 16, 1901. No. 10,193.

1. **Fraudulent Conveyance Not Void Generally.** Under section 17, chapter 32, Compiled Statutes, 1899, conveyances and assignments made to defraud creditors are not void generally, but only as against persons defrauded.

2. **Subsequent Creditor Must Show He Has Been Defrauded.** A subsequent creditor can not successfully assail a fraudulent transfer of property without showing that he has been actually defrauded thereby.

3. **Transfer in Trust.** All transfers of property made in trust for the use of the person making the same, are void as against existing and subsequent creditors of the transferrer.

4. **Contract Between Husband and Wife:** RELEASE OF HOMESTEAD SUFFICENT CONSIDERATION. The release of a homestead right is a sufficient consideration to support a contract made between husband and wife for an equal division of the money derived from a sale of the family homestead.

5. **Intervener's Claim:** EVIDENCE. An intervener who claims a fund in dispute between the plaintiff and defendant, must, if his claim is adverse to both the original parties, establish his right by a preponderance of the evidence.

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

I. J. Dunn and *J. J. O'Connor,* for plaintiff in error.

Frank Dolezal and *J. C. Cook, contra.*

SULLIVAN, J.

The First National Bank of North Bend commenced an action in the district court against Joseph Racek and garnished John Zakavec as a debtor of the defendant. During the pendency of the action Barbara Racek intervened and asserted a claim to the money in the hands of the garnishee. The bank answered the petition of intervention, and the issue thus formed was tried to the court and decided against the intervener. The only ground relied upon for a reversal of the judgment is the want of sufficient evidence to sustain it. It appears that the defendant was the owner of a farm in Saunders county and that he conveyed it to his wife, Barbara Racek, without any substantial consideration being paid therefor; that the farm was afterwards sold to the garnishee and that the fund in controversy was one of the deferred installments of the purchase price. These facts are undisputed. It was contended at the trial that the conveyance from Joseph to Barbara was made for the purpose of defrauding creditors and that it was therefore void. Whether the transaction was tainted with actual fraud, we need not determine. The plaintiff was a subsequent creditor and as such could not have been prejudicially affected by a trans-

fer made long before its cause of action arose. Under section 17, chapter 32, Compiled Statutes, 1899, conveyances and assignments made to defraud creditors are not void generally, but only "as against the person so hindered, delayed or defrauded." A subsequent creditor can not successfully assail a fraudulent sale or transfer of property without showing that he has been actually defrauded thereby. *Jansen v. Lewis,* 52 Nebr., 556; *Graham v. Estate of Townsend,* 62 Nebr., 364. But the claim of the bank to have the judgment in its favor affirmed, does not rest alone upon the charge of fraud in the transaction between the defendant and the intervener. The evidence tends to prove that the farm was conveyed to Barbara Racek to be held for the use and benefit of herself and Joseph, and that it was agreed between them, when the sale was made to the garnishee, that each should have half the purchase price. Section 7 of chapter 32 aforesaid is as follows: "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." Under this section it is clear, we think, that any interest which Joseph had in the land might be seized by either prior or subsequent creditors for the satisfaction of their claims against him. But even if there had been no secret trust in favor of the defendant the court was justified in finding on the evidence that he became, by the agreement between himself and his wife, the legal owner of a moiety of the purchase price. The release of his homestead right was a sufficient consideration for the agreement. The intervener alleged in her petition that the money belonged to her. This allegation was denied by the answer of the bank, and it was not, in the opinion of the trial judge, sustained by the proof. The burden was on the intervener to make good her claim to the fund, but she failed to show to the satisfaction of the court that the balance due from the garnishee belonged exclusively to her; she did not even

prove that the note evidencing the indebtedness of the garnishee was payable to her. There is sufficient evidence to sustain the judgment and it is, therefore,

AFFIRMED.

C. J. STEVENS ET AL., APPELLEES, V. HORACE A. BURNHAM ET AL., APPELLANTS.

FILED OCTOBER 16, 1901. No. 10,206.

1. **Mechanic's Lien:** TENANT: LANDLORD. A tenant can not, without the authority or consent of his landlord, charge the leased premises with a lien for material used in the construction of a building thereon.

2. ———: ———: AGRICULTURAL FIXTURE: EVIDENCE. In the absence of evidence showing that such building was not permanently annexed to the soil, or that it was intended as a mere agricultural fixture, it can not be treated as the tenant's property and subjected to a lien in favor of the person furnishing the materials used in its construction.

3. **Trade Fixture:** RIGHT OF REMOVAL. The right of a tenant, or of those claiming through or under him, to remove a trade or agricultural fixture from the leased premises, expires with the tenancy.

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

Kirkpatrick & Hager, for appellants.

Augustus R. Humphrey, contra.

SULLIVAN, J.

There has been in this court no attempt to defend the judgment appealed from, and it seems to us to be indefensible. The action was brought to foreclose a mechanic's lien upon a quarter section of land in Custer county. The asserted right to a lien is based upon a sale of lumber which was used in the construction of a barn. The lumber was bought and the barn built by Horace A. Burnham in

1893 while he was living upon and farming the land. The appellants, S. H. Burnham and S. W. Burnham, contend that they are the legal and equitable owners of the farm and deny that they gave any authority for the purchase of the lumber or the erection of the barn. The evidence fully sustained this contention and the trial court, therefore, refused to give the plaintiffs a lien on the land. It did, however, give them a lien on the barn on the theory, we suppose, that it was a removable fixture. There are two reasons why the decree can not stand. In the first place there is not a particle of evidence tending to prove that the barn was not permanently annexed to the soil, or that it was intended to be a mere agricultural fixture. But even if it were a removable structure, the right to remove it did not survive the tenancy of Horace A. Burnham. The right to sever and remove perished when the tenancy expired. Such is the import of our decisions. *Friedlander v. Ryder,* 30 Nebr., 783; *Free v. Stuart,* 39 Nebr., 220; *Fuller v. Brownell,* 48 Nebr., 145.

The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

WOODMEN ACCIDENT ASSOCIATION V. WALTER D. PRATT, REVIVED IN THE NAME OF J. W. BYERS, ADMINISTRATOR.

FILED OCTOBER 16, 1901. No. 9,765.

1. **In Contracts of Insurance, Forfeitures Are Not Favored.** Forfeitures are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties. *Phenix Ins. Co. v. Holcombe,* 57 Nebr., 622.

2. **Construction of Policy.** In construing conditions in a policy of insurance, to be complied with subsequent to an event resulting in loss or injury for which indemnity is claimed, with respect to the giving of notice of the loss or injury, and preliminary proofs thereof, a more liberal construction will be given in

favor of the beneficiary than when the conditions are to be complied with prior to loss or injury for the purpose of continuing the policy in force and effect.

3. **Provisions as to Time Are Not Always to Be Literally Complied With.** Provisions as to time in which the notice is required to be given of a loss or injury for which indemnity is claimed, are not necessarily and in every instance to be literally complied with in order to prevent a forfeiture of the policy.

4. **Reasonable Construction as to Provision of Time.** A reasonable and natural construction will be given such provisions in order to carry out the evident intention and manifest purpose of the parties to the contract, and the object to be accomplished thereby.

5. **Time in Accident Policy, Condition Precedent.** When a time is fixed in a policy of accident insurance for the giving of the notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will ordinarily be regarded as a condition precedent to be complied with before a recovery can be had.

6. **Circumstances and Conditions May Change Application of Law.** But when because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter, and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist; the question of the sufficiency of the excuse offered, and the reasonableness of the time in which the act is performed, to be determined according to the nature and circumstances of each individual case; the beneficiary in all cases being required to act with diligence, and without laches on his part.

7. **Accident Producing Dementia Excuses Failure to Give Notice.** Where a person suffered a fall by accident, resulting in a concussion of the brain, which deranged and crazed his mind so that he could not intelligently give the notice and required information regarding the accident and injury within the time stipulated, this fact excuses him in law from compliance with the conditions of the policy in that regard during the time of the existence of the disability.

8. **Evidence Sufficient.** Evidence examined, and found sufficient to support the finding of the jury.

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

Talbot & Allen, for plaintiff in error.

Hastings & Sands, contra.

HOLCOMB, J.

Plaintiff, defendant in error, was the holder of an accident policy of insurance in defendant company, plaintiff in error. Having suffered an accident on the 17th day of October, 1895, resulting in an injury totally disabling him from pursuing his ordinary business or occupation for a considerable period of time and partially disabling him for yet a further period, the plaintiff brought an action against the defendant to recover on the policy of insurance according to its terms and conditions. For answer to the petition of the plaintiff the answer alleges: "That it [defendant company] is not liable to the plaintiff, and is not indebted to the plaintiff, in any sum on account of any pretended injury received as stated in plaintiff's petition or otherwise, because in said certificate issued by the defendant to the plaintiff and sued on herein, it is there stipulated that as a condition precedent to any liability thereunder, the plaintiff shall give a written notice to the defendant at its home office in Lincoln, Nebraska, of any injury received for which indemnity is claimed, within ten days from date of such injury, and that plaintiff failed to so notify said company and said company did not receive any notice of said injury for a long time subsequent to the expiration of said ten days."

To the defense thus pleaded the plaintiff alleges in his reply that:

"By reason of said injury and as a direct result thereof he became and was sick and distempered in mind and body, so much so that he was entirely deranged, out of his head and crazy from the time he received his said injury for more than four months next thereafter ensuing, and was sick in body as well, and was confined to his house wholly unable to attend to, or transact any kind of busi-

ness or to give any direction or advise with any person concerning the same; that neither his wife nor any other member of his family knew of the existence of said policy mentioned and described in plaintiff's petition and by a mere accident, the wife of this plaintiff, on or about the 25th day of November, 1895, in looking over some of his papers, found the same and caused forthwith a notice in writing to be given said defendant of such accident, the time when it was received and the particulars concerning the same, as is in said policy provided, whereupon said defendant at once denied all liability on said policy and assigned as the sole and only reason therefor that the notice had not been given within ten days from the date said injury was received. When in truth and in fact this plaintiff by reason of his said injury and as a direct cause thereof was crazed and deranged and bereft of all reason and power to give said defendant said notice, but that said notice was so as aforesaid duly given so soon as the said policy was found and while this defendant was still bereft of sense and by reason of his said injury and before he had recovered his reasoning faculties."

On the issue thus raised by the pleadings, a trial was had to the court and jury resulting in a verdict and judgment in favor of plaintiff for the sum of $265.41. Defendant prosecutes error.

But two questions are presented for consideration and argued in briefs of counsel and they are: First, are the terms of the policy of indemnity as to notice to be given the company by the assured in case of accident and injury to him to be construed literally and to be actually complied with in the time stated as a condition precedent to a right of recovery; and second, if not, is the evidence sufficient to sustain the general finding of the jury that plaintiff was excusable in the present instance from the time of the accident until the notice was actually and in fact given.

The accident occurred on the 17th of October and the notice thereof was mailed to the defendant on the 29th of

November, following, and received by it on the 30th, when acknowledgment thereof was made and the claim of the plaintiff denied and declined because the notice was not given within ten days as provided by the terms of the policy. The provision is as follows:

"Written notice shall be given the said association at Lincoln, Nebraska, within ten days of the date of the accident, and injury for which claim to indemnity or benefit is made, with full particulars thereof including statement of the time, place and cause of accident, the nature of the injury and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claims to indemnity or benefit under this certificate shall be forfeited to this association."

The defense is purely technical. The risk assumed by the insurer has not been increased or in anywise jeoparded by the failure of the insured to comply literally with the provisions for notice of the accident and the injury flowing therefrom. The insurer has received the stipulated consideration for the indemnity contracted for, and which the insured should not be deprived of after he receives an injury, save for his violation of the letter and spirit of the contract in respect of subsequent conditions to be performed as contemplated and intended by the parties thereto under well recognized and established rules of construction of contracts of the kind under consideration. A company of this character organized for the purpose of providing indemnity to those suffering injury and loss from accident should, and we assume does, have a higher mission than merely the collection of revenues. If the provision quoted must under all circumstances and regardless of conditions be absolutely and strictly complied with according to the letter thereof, then the contract can only be regarded as a snare and pitfall sure to entrap the unwary and deprive them of the protection and indemnity contracted for on their part in the best of faith and honesty of purpose. If the contract is legally incapable of any other construction than that contended for, requiring

a literal and exact compliance as a condition precedent to be performed in the time mentioned, then if for eleven days the insured is irrational and deranged in his mind as a result of the accident, as he appears to have been, and therefore incapable of complying with this provision, he would be altogether debarred from relief and the failure would, on legal principles, be as fatal as would be the case if the time were forty-four days as in the present instance. Such a construction would be shocking to our sense of justice, unconscionable and unreasonable. There is, presumably, pervading every contract a reason based upon something substantial, capable of conception and analysis by the human mind, for the terms and conditions mentioned and prescribed therein. It is well to note here that we are not considering a question of complying with conditions before loss or injury, such as the payments of assessments and dues at the time stipulated, observing requirements affecting the nature and desirability of the risk in order to continue a policy of insurance in force and effect. Such stipulations are and should be regarded as of the very essence of the contract and on their compliance depends the life and success of the company. Nor is it to be questioned seriously that the terms of a contract of the nature of those under consideration have a substantial basis and valid cause for their existence, in all respects reasonable in character and to be enforced, with proper qualifications and exceptions under certain circumstances, in all instances where the enforcement of the terms of the contract is invoked by one of the parties thereto. The reason for the notice required is made manifest by a reading of the provisions of the policy requiring the same to be given. It is for the purpose of advising the insurer of the accident and the injury resulting therefrom for which claim to indemnity is made, with full particulars as to time, place, and cause of accident, and the nature of the injury. With this information the company is better enabled to protect itself from fraud, imposition and demands unjust in character, and for which no legal liability ex-

ists. This is not only reasonable and proper but also commendable. It indicates good business judgment, prudence and foresight. But if this is the reason and object to be accomplished by the notice, as we apprehend will be cheerfully conceded, then it must have been the intention of the parties that the notice is not to be given until some person with knowledge of its requirements and mental capacity to act thereon is in a position to comply with its terms. It is not the notice of the accident alone that is the important information desired, but the particulars and circumstances surrounding the incident which is regarded and contracted for as of equal importance. How then ought this provision of the contract to be construed? Must it be by a hard and fast rule which admits of no deviation or qualification and for a failure to give the required notice during the time stated the policy is *ipso facto* forfeited, or can there be a legal excuse for failure to comply literally and with exactness with its terms which the law recognizes as valid and allows a recovery notwithstanding the failure of the insured to give the notice in the time stipulated? This court has frequently said that forfeiture clauses in contracts of the kind under consideration are not to be enforced literally except such construction be found necessary to conform to the obvious intention of the parties. "Forfeitures," says SULLIVAN, J., in *Phenix Ins. Co. v. Holcombe,* 57 Nebr., 622, "are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties." And in *Springfield Ins. Co. v. McLimans,* 28 Nebr., 846, it is held that "forfeitures" are not favored and should not be enforced unless the courts are compelled to do so, and that such rule applies to insurance companies. Of the same import are: *Estabrook v. Hughes,* 8 Nebr., 496; *Hibbeler v. Butheart,* 12 Nebr., 526, 531; *Connecticut Fire Ins. Co. v. Jeary,* 60 Nebr., 338.

In respect of the rule of construing provisions in a contract of insurance for notice of accident and injury or

loss or damage and proof of the same to be given "forthwith" or "immediately" or within a stipulated time, the authorities are not entirely harmonious, and yet from the examination we have been able to make in the limited time at our command the great weight of authority is to the effect that the exercise of due diligence and reasonable effort on the part of the insured to meet the requirements thus imposed, to be determined under all the circumstances as disclosed in each individual case, is deemed a compliance with such provisions although not within the time according to the strict letter of the terms used in defining the same. Some authorities hold to the contrary rule and require strict compliance with the letter of the contract. Notably of this class are the cases of *Gamble v. Accident Assurance Co.*, 4 Ir. R. C. L., 204, and *Patton v. Employers' Liability Assurance Corporation*, 20 Law Rep. [Ir.], 93, in which it was held that the notice was a condition precedent and omission to give a notice of death within the prescribed time, even when death was instantaneously caused by accident, was a good defense and that such notice might have been given by any person acting on appointment by the assured or in behalf of any person interested in the policy, and that it was not necessary that it should be given by the legal personal representative of the assured; that the provision was the deliberate contract of the parties and should be enforced as made. The construction appears harsh and unnatural and is, we think, not in accord with the spirit and trend of American authority regarding a proper construction of the same or similar provisions. We are also cited to the case of *Heywood v. Maine Mutual Accident Ass'n*, 27 Atl. Rep. [Me.], 154, in support of the contention of the defendant. In that case the question arose on demurrer to the petition which disclosed that notice was required by the terms of the policy sued on, and that none had, according to the pleading, been given nor was any excuse or reason pleaded for not giving the notice. It being, for the purpose of the question decided, admitted that no notice had been given

and no excuse existed for failure to give the notice, the question could not well be decided otherwise. *Simons v. Iowa State Traveling Men's Ass'n,* 71 N. W. Rep. [Ia.], 254, is also cited. In that case it appears that the assured had suffered from two accidents, for one of which he had been indemnified. Suit was brought for an injury caused by the second accident. The evidence disclosed that all the notice given, which consisted of ordinary correspondence, was with relation to and concerning the first accident and that the insurance company at no time had been notified of any injury from the second accident nor the particulars thereof nor was any reason or excuse given for not giving the required notice. Under such circumstances it would seem that the insured could not and ought not to recover.

In *Foster v. Fidelity & Casualty Co.,* 75 N. W. Rep. [Wis.], 69, also cited, the policy required "immediate" notice of the accident causing the injury or death to be given to the company and it is held that death resulting, the beneficiary of the policy having knowledge of the cause of death, could not wait 29 days before giving the required notice under the terms requiring "immediate" notice. The court in that case emphasizes the fact that after being acquainted with all the facts connected with or related to the accident resulting in death the beneficiary made no attempt to give the notice for the period mentioned. The evidence clearly shows want of diligence and laches on the part of the beneficiary. It is there held that the word "immediate" in the connection used means such convenient time as was reasonably necessary under the circumstances to do the thing required. Other authorities are cited distantly related to the question under consideration, in support of contention of counsel for defendant, but generally with reference to conditions and requirements of policies of insurance as to the payment of premiums, premium notes, dues and assessments, all of which in our view are to be regarded as not altogether in point for the reason heretofore stated and regarding which this

court has frequently expressed itself in accord with the rule announced in the authorities cited.

More directly in point are the authorities which deal with the question of the proper construction of provisions in policies regarding notice of the happening of the event which gives rise to a claim for indemnity, and proofs of loss or injury which generally are required to be given within a stated period after the happening of such event, or as is frequently expressed, "immediately" or "forthwith." These latter two words certainly have a meaning and definition as clear and well defined and susceptible of no misconstruction as though the time was stated in exact words as a stipulated number of days after the happening of the event.

In a fire insurance suit, *Continental Ins. Co. v. Lippold*, 3 Nebr., 391, it is held by this court that: "A condition in a policy of insurance requiring the insured, in case of fire, to give immediate notice of his loss, need not be literally complied with. The exercise of due diligence, and the giving such notice as may be reasonable in the particular case, is all that can be demanded." The same contention was then made as in the case at bar as to the necessity of giving notice of the loss within the time stated being a condition precedent to a right of recovery for the loss sustained. Says MAXWELL, J., who wrote the opinion: "No action can be maintained on the policy until the proof of loss is made, or waived by some act of the insurer. Yet it is a sufficient compliance with the condition of a policy, requiring notice of loss to be given 'forthwith' or 'immediately,' that the party has used due diligence under all the circumstances," citing *New York Ins. Co. v. National Ins. Co.*, 20 Barb. [N. Y.], 475; *Bumstead v. Dividend Mutual Ins. Co.*, 12 N. Y., 81.

In a Massachusetts case, *Harnden v. Milwaukee Mechanics Ins. Co.*, 164 Mass., 382, it is held that under a provision that "proof of loss shall be forthwith rendered" it is a question for the jury under all the circumstances of

the case whether such proof rendered two months after the loss was "forthwith rendered," a number of authorities being cited in the opinion to support the holding.

Carey v. Farmers & Merchants Ins. Co., 40 Pac. Rep. [Ore.], 91, holds that under a policy providing that in case of loss, the assured shall give immediate notice and render a particular account thereof to the company, reasonable diligence is required in making proof of loss; and when such proof was made over four months after a fire and there was nothing in the pleadings to show that it could have been made sooner, the question of reasonable time was for the jury. Says the author of the opinion: "The term 'immediately,' as used in the policy, required the exercise of reasonable diligence by the plaintiff, which would be measured by his ability to make the necessary proof within a given time." See also *Trask v. State Fire & Marine Ins. Co.,* 29 Pa. St., 198; *Edwards v. Lycoming County Mutual Ins. Co.,* 75 Pa. St., 378; *Ermentraut v. Girard Fire & Marine Ins. Co.,* 65 N. W. Rep. [Minn.], 635; *Carpenter v. German-American Ins. Co.,* 31 N. E. Rep. [N. Y.], 1015, all holding to the same rule of construction.

While these cases refer to policies of fire insurance, the same reasoning and underlying principle on which the construction is based apply with equal force to policies of accident insurance, as in the case at bar. In fact Judge May, recognized as high authority on the law of insurance, says in his second volume of May on Insurance, section 536, while treating of the subject of accident insurance, "The general rules heretofore stated as to preliminary proof in other branches of insurance are also applicable here." That this rule does in fact apply in the construction of similar provisions in policies of accident insurance is recognized by the supreme court of Wisconsin in the case of *Kentzler v. American Mutual Accident Ass'n,* 60 N. W. Rep., 1002, where the policy provided that "immediate" notice of the accident should be given and notice was not given until May 26, the accident resulting

in death occurring November 9, preceding, showed a reasonable compliance with the terms of the policy. The case is in principle and reasoning directly in conflict with the cases reported from Ireland heretofore cited, and strongly relied on by counsel for the defendant. Says Judge Cassoday, writing the opinion of the court, after giving the definition of the word "immediate" as defined by the lexicographers, "If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that: 'The word "immediately," although in strictness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing,' "—citing a large number of decisions in support of the rule. To the same effect is *McFarland v. United States Mutual Accident Ass'n*, 27 S. W. Rep. [Mo.], 436. It is there said, p. 439, "So, though the time in which the notice shall be given is fixed under the contract, if the circumstances of the accident are such as to make it impossible to comply with the condition, giving the notice within a reasonable time after it becomes possible has been held sufficient."

More directly in point is the case of *Trippe v. Provident Fund Society*, 35 N. E. Rep. [N. Y.], 316, where the policy provided as in the case at bar that notice of any accident with full particulars of the accident and injury should be given in ten days or the policy would be forfeited, it is held that the time for giving the notice did not begin to run until the fact of the death of the insured and the circumstances under which it occurred had been ascertained. Says the court: "The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries. * * * The provision requires not only notice of the death, but 'full particulars of the

accident and injury.' It is quite conceivable that in many cases of death by accident the fact can not be, and is not, known until days, or even weeks, after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable and practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. * * * The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred, and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident, or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained." In *Insurance Co. v. Boykin,* 12 Wall. [U. S.], 433, 436, Mr. Justice Miller, who delivered the opinion of the court, expressed its views as to such a condition in an insurance policy in the following terse language: "Based on the facts of the case the defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery. The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature, and amount of the loss. Second, if he was so insane as to be incapable of making an intelligent statement, this would of itself excuse that condition of the policy."

Delirium of the insured during the ten days in which notice was required to be given of an accident and injury resulting therefrom, is held to be a sufficient excuse for noncompliance therewith in the case of *Manufacturers Accident Indemnity Co. v. Fletcher,* 5 Ohio Cir. Ct. Rep., 633. In that case the insurance company, it would seem, was content with the judgment rendered and did not ask for a review of the lower court's ruling on the question, by the supreme court.

The supreme court of Georgia, in the case of *United Benefit Society v. Freeman,* 36 S. E. Rep., 764, distinctly recognizes the right of the assured to be excused from the performance of a condition requiring notice to be given in ten days after the date of the injury when grounds exist which render it impossible to give the notice within the time required by the terms of the policy. Says the author of the opinion: "So, granting that it was impossible for the insured to use his eyes at all during the ten days, we do not think this fact would be sufficient to excuse a noncompliance with the condition as to giving the notice during that period of time. The evidence was not sufficient to support a finding that it was impossible for the plaintiff to give the notice to the society within ten days from the date of his injury." As bearing upon the same question we also cite *Globe Accident Ins. Co. v. Gerisch,* 45 N. E. Rep. [Ill.], 563; *Hoffman v. Accident Indemnity Co.,* 56 Mo. App., 301; *Oddfellows Fraternal Accident Ass'n v. Earl,* 70 Fed., 16; 2 Biddle, Insurance, secs. 985, 986.

From the foregoing, the conclusion is, we think, fairly deducible that in construing conditions in a policy of insurance with respect to the giving notice of the happening of the event and the particulars thereof and preliminary proofs, to be complied with subsequent to the event resulting in loss or injury and for which indemnity is claimed, a more liberal construction in favor of the beneficiary should be given than when the conditions are to be complied with prior to the happening of such event and for the purpose of continuing the policy in force and ef-

fect; that such provisions as to the time in which the notice is required to be given or proofs furnished are not necessarily and in every instance to be literally complied with in order to prevent a forfeiture of the policy, or entitle a party to recover for a loss or injury resulting from the happening of the event for which indemnity is claimed; that a reasonable and natural construction should be given such provisions in order to carry out the evident intention and manifest purpose of the parties to the contract and the object to be accomplished thereby; that when a time is fixed in a policy of accident insurance for the giving of notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will be regarded as a condition precedent to be complied with before recovery can be had, but when because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist, the question of the sufficiency of the excuse offered and the reasonableness of the time in which the act is performed to be determined according to the nature and circumstances of each individual case, the beneficiary in all cases being required to act with due diligence and without laches on his part.

It is, however, urged that, conceding the plaintiff did not forfeit his rights under his policy because he failed to give the notice required within the ten days' stipulated time after the accident happened resulting in the injury and loss of time for which the action is prosecuted, the delay in giving the notice for the time elapsing until given was unreasonable and unnecessary and the evidence is insufficient to excuse him from not giving the notice sooner and is insufficient to support the finding of the

jury in his favor in respect thereto. A careful reading of the testimony leads to the conclusion that the evidence pertinent to the question of giving notice is sufficient to sustain the jury's finding. The reply heretofore quoted clearly states the reason for not giving earlier notice and receives, we think, substantial support by the evidence introduced as shown by the record. The trial court instructed the jury that it was necessary for the plaintiff, in order to entitle him to recover, to show by a fair preponderance of the evidence that by reason of his deranged and disordered condition of mind he was prevented from giving the notice in the time required by the conditions of the policy; and that if the plaintiff had lucid intervals so that he might have advised his family of his policy of insurance and had notice given to the defendant more than ten days prior to November 29th, 1895, then he could not recover. The instructions were very fair and as favorable to the defendant as it could reasonably ask. The evidence discloses that the injury was occasioned by plaintiff falling from a windmill tower, producing a concussion of the brain from which he was utterly unconscious for about sixteen hours and thereafter his mind appeared deranged and crazed for some three or four months. At times he was somewhat rational; he had lucid intervals in the sense that he could recognize the members of his family and immediate friends, could come and go to and from his house. But that he had not regained the possession and use of his mental faculties in their normal state, during the time intervening between the accident and the time notice was given, is entirely manifest from the evidence, and that he did not in fact recover from his mental derangement until long subsequent to the time is equally apparent. He was because of his mental condition incapacitated from attending his ordinary affairs of life. He was wild and visionary, trying to run away, and imagined that he was preparing to go to another state. His mind during all this period was deranged and disordered and at times he became violently insane. His wife knew

nothing of the policy. She was opposed to his carrying such insurance, and, from the litigation following, her confidence in its wisdom and prudence is probably not strengthened. She discovered among his papers correspondence indicating that he carried accident insurance and when she asked him if he held such a policy he answered in the negative. She, however, discovered the policy and sent the required notice in his name. The verdict of the jury was proper and the evidence sufficient in our opinion to excuse the plaintiff from earlier notifying the defendant of the accident and the injury following, with the particulars and other information called for by the terms of the provision quoted. The justness of the judgment and the regularity of the proceedings are fully established by the record.

The judgment should be, and therefore is, in all respects

AFFIRMED.

N. H. MEEKER, TRUSTEE, APPELLEE, V. H. R. WALDRON ET AL., APPELLANTS.

FILED OCTOBER 16, 1901. No. 10,292.

1. **Chose in Action:** PARTY IN INTEREST. A party holding the legal title to a chose in action, in whose name the contract was made for the benefit of another, may maintain an action thereon in his own name as agent or trustee without joining the beneficiaries, although he may have no beneficial interest therein. Code of Civil Procedure, sec. 32.

2. **Principal:** SURETY: COLLATERAL SECURITY. Where collateral security is given by a principal debtor to a surety as indemnity because of his suretyship, such security will be regarded in equity as a trust for the better security of the debt, and a court of equity may properly decree the application of the proceeds of the collateral security to the payment of the principal indebtedness.

3. **The Statutory Method of Foreclosing Chattel Mortgages, Is Not Exclusive.** Notwithstanding the parties to a chattel mortgage have stipulated therein for the foreclosure and sale of the mortgaged property by advertisement in the manner authorized by statute, a court of equity has jurisdiction to entertain an action

thereon, and adjudicate the respective rights of the parties in such action. The statutory method of foreclosure is not exclusive.

4. **Giving of New Note, Does Not Release Collateral.** The giving of a new note for an existing indebtedness will not of itself release collateral security held for the payment of such indebtedness.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Affirmed.*

Samuel M. Chapman, for appellants.

Strode & Strode, contra.

HOLCOMB, J.

Plaintiff, appellee here, brought as trustee or agent for four creditors of the defendant and appellant Waldron, an action in equity for the foreclosure of a chattel mortgage given by appellant, and the application of the proceeds of the sale of the personal property mortgaged, to the payment *pro rata* of the indebtedness due to the several creditors of the appellant as aforesaid.

From the record it appears that the defendant Waldron was indebted to the four creditors mentioned, for whom and in whose behalf it is alleged the action is brought by plaintiff, as trustee, for sums aggregating over $3,000; one J. H. McKinnon being liable for the payment of such indebtedness as surety on the instruments evidencing the same. During the existence of the said indebtedness, and some time prior to the institution of the present proceedings, the said Waldron executed his certain note for $1,000, and the chattel mortgage securing the same, which is now in controversy, which it is alleged in the petition was given for the purpose of indemnifying McKinnon for becoming surety on the notes evidencing the principal indebtedness to the several parties mentioned, and that said thousand dollar note and the chattel mortgage securing the same was by said McKinnon, for a valuable consideration, assigned and transferred to the plaintiff, as trustee, on behalf

and for the benefit of said creditors of Waldron. On the thousand dollar note which the mortgage in controversy secures appears the following indorsement: "This note is given to secure Joseph McKinnon against loss as surety on notes now outstanding or that he may hereafter sign as surety (secured by mtg.) (signed) J. H. McKinnon."

The assignment of the note and mortgage to plaintiff is as follows: "For value received, I hereby sell, assign, transfer and set over unto N. H. Meeker as the legal agent and trustee of the First National Bank of Greenwood, and Mr. L. C. Sterling, Carolina Finlay and Gertrude Cutler, the within mortgage and notes accompanying the same and authorize him to collect and discharge the same."

It is also alleged that the principal debtor and his surety are insolvent and have been for more than a year past. It is prayed that a decree may be entered foreclosing the mortgage, fixing the time and place and manner of sale of the mortgaged property and that the proceeds arising from the sale may be applied *pro rata* on the respective debts due the several creditors for whom the plaintiff was acting. Waldron answered and after issues were formed a trial was had resulting in findings in favor of the plaintiff and granting to him the relief prayed. There is no serious contradiction or conflict in the evidence and the matters presented to us by the appeal are largely questions of law rather than of fact. The trial court found the several amounts due the creditors of Waldron, specifying the same and to whom due, for the satisfaction of which the plaintiff brought the action as trustee; also the execution and delivery to McKinnon of the note and mortgage made the basis of the equitable action; that they were executed for the purpose of indemnifying him as surety on the four several notes evidencing the indebtedness mentioned and for the purpose of securing payment of said notes; that the said mortgage and the note accompanying the same were assigned and transferred by McKinnon to the plaintiff as trustee in behalf of and for the benefit of the four several creditors; that no part of the sum secured

thereby had been paid and that by its terms and conditions there was owing to the plaintiff as trustee from the maker thereof $1,000; and that the mortgage was a valid lien on the property described therein which was ordered advertised and sold as upon execution and the proceeds thereof applied after the payment of the costs of action, *pro rata,* on the indebtedness found due the respective creditors for whom the plaintiff was acting as trustee.

It is contended by counsel for appellant, defendant below, (1) that the plaintiff can not maintain the action; that he is a self-constituted trustee or agent without authority to prosecute the action, which should be brought and maintained by the real parties in interest, that is, the creditors of the defendant Waldron; (2) that the note and mortgage was given to indemnify the surety McKinnon personally, and until he has suffered some loss no right of action has accrued thereon and that in no event can the creditors of the defendant maintain the action when no payment has been made or loss suffered by the mortgagee to whom it was given as indemnity; (3) that an action in equity to foreclose a chattel mortgage will not lie under the stipulation of the mortgage, the statutory method of foreclosure by notice and sale being exclusive; (4) it is also contended that the note evidencing the indebtedness to the First National Bank was given subsequent to the execution of the note and mortgage in controversy which, under no view of the case, could be considered as collateral security for such indebtedness.

In respect of the contention that the plaintiff is not the real party in interest and can not, therefore, maintain an action on the instruments under which he claims relief, it appears from the assignment to him heretofore quoted that he is the legal holder thereof as trustee or agent of the creditors of the mortgagee. The assignment conveys or purports to convey to him in the capacity mentioned all the title, right and interest of the assignor and authorizes him to proceed and collect the sum due thereunder as fully and effectually as might be done by the mortgagee

and payee were it not for the transfer of title and interest by virtue of the assignment.

It is quite true that the creditors have the beneficial interest in the note and mortgage, assuming they were given to secure the indebtedness owing by Waldron to them, but will this prevent the legal holder from maintaining an action without joining the beneficiaries as plaintiffs, or must they bring an action alone and without regard to the plaintiff's rights by virtue of a legal and valid assignment to him for the purpose stated? We incline to the view that this question has already been answered in plaintiff's favor by the prior decisions of this court. Section 32 of the Code of Civil Procedure provides that a person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.

In *Stoll v. Sheldon,* 13 Nebr., 207, it is held that when a promissory note is made to an agent in his own name as promisee, he may maintain an action thereon without joining the person beneficially interested in the note. Says the court: "The Code requires an action to be brought in the name of the real party in interest, but excepts trustees of express trusts, executors and administrators, and persons in whose names contracts are made for the benefit of others. Judge Bliss has referred to the cases bearing upon this question. See sec. 57 Code Pleading, and Pomeroy more fully in Remedies and Remedial Rights, secs. 171-182. The law seems to be definitely settled by the decisions referred to, that when a contract is entered into with an agent in his own name, the promise being made directly to him, he may maintain an action on such contract in his own name without joining the person beneficially interested."

In an Iowa case, under a section of the Code quite similar to our own, it is held by the supreme court of that state that "the party holding the legal title to a cause of action, though he be a mere agent or trustee with no beneficial interest therein, may sue thereon in his own name." *Cas-*

sidy v. Woodward, 77 Ia., 354. Says the court, after setting forth the provisions of their Code, which are very similar to ours: "It has uniformly been held by this court that, under this provision of the Code, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name," citing a number of prior decisions. Of the same import are *Wetmore v. Hegeman,* 88 N. Y., 69, and *Lundberg v. Northwestern Elevator Co.,* 42 Minn., 37. The plaintiff was the holder of the legal title of the note and mortgage on which the action is grounded. The contract was made in his name as agent or trustee, and his right to maintain an action in his own name is authorized by the section of the Code referred to.

The second contention is that, under the agreement of the parties to the note and mortgage in controversy, it was available only to McKinnon in case he sustained actual loss by reason of his becoming and being surety for Waldron, and that it was not a chose in action which could be assigned by McKinnon, and a cause of action arise thereon in favor of the assignee, and in no event could a cause accrue until after McKinnon had paid all or part of the indebtedness for which he was surety. It is pleaded in the petition and supported by the evidence that both the principal and surety on the original indebtedness were wholly insolvent and had been for some time. This, in our judgment, would constitute ample equitable grounds to justify a court of equity in directing the collateral security to be sold and the proceeds applied on the principal indebtedness. Under well settled and recognized principles of equity it seems quite clear that the lien of the mortgage on this property is ultimately for the benefit of the holders of the original indebtedness, who, in a proper case, should be adjudged entitled to subrogation to the rights of the surety. When the surety is insolvent, as in this case, or for failure otherwise to discharge the legal obligation he had assumed, it would seem the equitable principle of subrogation could be in-

voked. The object and purpose of the chattel mortgage to be finally accomplished was to secure payment of the principal indebtedness by the mortgagor, who was primarily liable therefor. It was his obligation, and to secure its satisfaction out of his own means as the one on whom the obligation first rested, he entered into the contract with his surety whereby the mortgage was executed so that in case he did not satisfy the debt and the surety was compelled to, recourse could be had to the collateral security. The payment by the surety of the debt would not cancel it as to the principal debtor, who yet would remain liable for its satisfaction out of his own property. Had the principal creditors possessed collateral security and the personal surety had paid the indebtedness it would hardly be doubted that he would be entitled to be subrogated to the rights of the creditors to such collateral security; and on a parity of reasoning, we can see no difference in principle as to the right of the principal creditors to be subrogated to the rights of the surety upon his inability or failure to respond to his obligation.

This court has held in *Richards v. Yoder,* 10 Nebr., 429, that "Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security." Chancellor Walworth in *Curtis v. Tyler,* 9 Pai. Ch. [N. Y.], 431, 435, states the principle as follows: "It is well settled, however, that where a surety, or a person standing in the situation of a surety for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. And it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence."

Minshall, J., in the case of *Pendery v. Allen,* 19 L. R. A. [Ohio], 367, 370, uses the following language: "It is a well-settled rule in equity that where a surety, for his own indemnity, takes a collateral security from his prin-

cipal, such security is regarded, in equity, as a trust for the better security of the debt, and chancery will compel the execution of the trust for the benefit of the creditor," citing *Vail v. Foster,* 4 N. Y., 312; *Kelly v. Herrick,* 131 Mass., 373; *Green v. Dodge,* 6 Ohio, 80; *Eastman v. Foster,* 8 Met. [Mass.], 19; *Paris v. Hulett,* 26 Vt., 308; *Chamberlain v. St. Paul & S. C. R. Co.,* 92 U. S., 299, 23 L. Ed., 715; *Heath v. Hand,* 1 Pai. Ch. [N. Y.], 329.

From the foregoing, we think it must be regarded as conclusive that the trial court was warranted in treating the principal creditors as entitled to subrogation to the rights of the surety in the collateral security he possessed, and especially so in view of the assignment to the plaintiff of all the interest and title of the surety in and to the property mortgaged for the purpose of having the proceeds applied in satisfaction of the principal indebtedness.

It is next contended that the trial court had not jurisdiction to entertain the action and decree a foreclosure of the chattel mortgage when the parties thereto had stipulated in the instrument as to the method of foreclosure by advertisement and public sale in the manner authorized by statute. The contention is not, in our judgment, tenable. The statutory method of advertisement and sale is not exclusive even though the parties stipulate in the mortgage for the foreclosure of the mortgagor's equity of redemption in that manner. It is the law in this state in respect to personal property mortgaged or pledged as security for the payment of a debt that the legal title to the property remains in the mortgagor until divested by foreclosure proceedings and sale as provided by law and that until the title is so divested the mortgagee acquires and has only a lien thereon. *Bedford v. Van Cott,* 42 Nebr., 229; *Musser v. King,* 40 Nebr., 892; *Murray v. Loushman,* 47 Nebr., 256. Equity courts are especially vested with jurisdiction in matters pertaining to the adjudication of the rights of parties in respect of liens and conflicting interests arising therefrom upon property both real or personal. In the present controversy there were involved questions appeal-

ing peculiarly to a court of equity and the action could, we think, be rightfully maintained as an action in equity for the purpose for which it was instituted. It is the right, says the chancery court of New Jersey, for a mortgagee to foreclose his mortgage in equity. He is not bound to incur the risk of selling the property without the sanction of a decree. *Freeman v. Freeman,* 17 N. J. Eq., 44.

A mortgagee of chattels may either resort to a court of equity to compel a redemption or to foreclose the mortgagor's right to redeem or he may obtain the same object by a fair sale of the property after due notice to the mortgagor. *Wilson v. Brannan,* 27 Cal., 258, 270; *Rich v. Milk,* 20 Barb. [N. Y.], 619. The power of sale contained in a mortgage of chattels does not preclude the mortgagee from proceeding in equity to foreclose the mortgage. *Bennett v. Reef,* 16 Colo., 431. The fact that there is a power of sale in a chattel mortgage does not affect the right to foreclose it by action. *Forepaugh v. Pryor,* 30 Minn., 35, and authorities therein cited.

Our attention is also called to the fact that of the notes evidencing the principal indebtedness the one in favor of the First National Bank of Greenwood was executed subsequent to the time the mortgage indemnifying the surety was given and for that reason it is insisted the mortgaged property can not be held as collateral security for the indebtedness represented thereby. But it is entirely clear from the evidence that the indebtedness was existing at the time and was intended to be secured to the same extent and the mortgage given for the same purpose as that of the indebtedness of the other three creditors mentioned. The fact that a new note had been given to evidence the same debt would not change the respective rights of the parties with relation to the collateral security; and the trial court rightly included this particular item of indebtedness with the others mentioned, as resting on an equality and entitled to share in the proceeds of the sale of the collateral security.

We arrive at the conclusion that the decree appealed

from was entered in conformity with law and principles of equity and should therefore be affirmed, which is accordingly done.

AFFIRMED.

IOWA LOAN & TRUST COMPANY, APPELLEE, V. BENJAMIN WHISTLER ET AL., APPELLANTS.

FILED OCTOBER 16, 1901. No. 10,336.

1. **Description of Land in Mortgage and Decree.** When agricultural lands are described in a mortgage and decree of foreclosure and order of sale as certain numbered lots in a given section, town and range, and sold by the sheriff in one body or tract, the appraisement and sale of the land in one body will be taken as *prima facie* evidence that it consists of only one body or tract of land, used and enjoyed for one purpose, and sufficient to support the appraisement as made, in the absence of a showing that the land as described consists of separate and distinct tracts or parcels.

2. **Appraisers: FREEHOLDERS: RETURN OF SHERIFF PRIMA FACIE EVIDENCE.** When the return of the sheriff shows that the appraisers were freeholders, this is *prima facie* evidence of that fact, even though in the certificate of appraisement it is not certified the appraisers are freeholders.

3. **Notice of Sale Sufficient.** Notice of sale *held* sufficient, although not stating whose interest in the land was being sold, nor the amount due for the satisfaction of which the land was to be sold.

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

Willis D. Oldham and *J. M. Easterling,* for appellants.

Fred A. Nye, contra.

HOLCOMB, J.

From a final order of confirmation of sale of real estate on an order of sale in foreclosure proceedings and the overruling of objections thereto and to the appraisement made of the property sold, the defendants appeal. The objec-

tions argued in brief of counsel for appellants are as follows: It is first contended that the land was not appraised and sold in separate "lots" or parcels as should be done. The decree covered and included, as did the mortgage, under the findings of the court, the entire tract appraised and sold, which is described as "lots six, seven, eighteen, and nineteen in section eighteen in township twelve, north of range sixteen, west of the sixth principal meridian, in Buffalo county, Nebraska." The land is all in one section, evidently agricultural land, and in the absence of anything to the contrary we can only infer that it is one tract or parcel enjoyed and used for one purpose only and as such may be properly appraised and sold in one body, especially in view of the fact that its total value is less than required to satisfy the mortgage lien. The designation of the land as certain numbered lots in the section is the designation ordinarily used in the governmental survey where a quarter section can not be subdivided into tracts of forty acres each, the subdivisions when so made being more or less than forty acres, and yet, as respects the question of whether the land is composed of one body, tract or parcel, would be the same as were it described, as is generally the case, by subdivisions of the sections into quarters, eighties and forties. It is not contended nor is it argued that the body of land sold consisted of more than one parcel or tract except as it is designated as lots, and the sheriff's action in appraising and selling it as one entire tract, in the absence of a contrary showing, should, we think, be held sufficient *prima facie* evidence of that fact.

It is next contended that the certificate of the sheriff in the matter of the appraisement does not show that the appraisers called were freeholders and for that reason the appraisement is invalid. But it is shown by his return to the order of sale under which he acted and made the appraisement, that the two appraisers, naming them, who with him made the appraisement were two disinterested residents and freeholders. The return is in nowise challenged and is sufficient to show that the appraisers were

possessed of the qualifications required by statute in respect to their being freeholders.

Lastly, the notice of sale is challenged as being faulty and insufficient in that it does not state whose interest was to be sold nor the amount for which the sale was to be made. The notice contains all that is required by statute. The other information which it is urged it should contain is a matter of public record to which it refers and which may be ascertained by any one interested. *Stratton v. Reisdorph,* 35 Nebr., 314. The notice, we think, was sufficient.

The order of confirmation is

AFFIRMED.

LILLIAN ACKERMAN, APPELLEE, V. ANDREW G. ALLENDER, IMPLEADED WITH HENRY L. PETERS, APPELLANT.

FILED OCTOBER 16, 1901. NO. 10,351.

1. **Order Vacating Appraisement Presumed Made on Sufficient Showing.** An order vacating an appraisement of real estate being sold under an order of sale in foreclosure proceedings, entered on the application of the plaintiff, on the ground that one of the appraisers was not a freeholder, will, in the absence of the evidence on which the order was made, be conclusively presumed to have been made upon a showing amply sufficient to sustain the action taken.

2. **Vacating Appraisement:** HARMLESS ERROR. When an appraisement of real estate is set aside and a new appraisement is made, which is much higher than the first, and under which the land is sold, a party claiming to own the land is not prejudiced by the order vacating the first appraisement, and, even if erroneous, it is no sufficient ground of objection to the confirmation of the sale.

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

E. A. Cook, for appellant.

W. H. Thompson and *Thompson & Thompson* and *J. L. Ensminger, contra.*

HOLCOMB, J.

Defendant appeals from a final order of confirmation of sale of real estate, made in foreclosure proceedings. The ground of the objection, as urged in brief of counsel for appellant, is that a second appraisement of the mortgaged premises was made and the property sold thereunder before the same had been twice offered for sale under a prior appraisement and not sold for want of bidders. There are two very substantial reasons why the objection can not prevail. The record presented discloses that after the first appraisement, on motion of the plaintiff, it was by the order of court vacated and set aside on the ground that one of the appraisers was not a freeholder as required by law. No exception was taken to this order nor is the evidence preserved and presented to us on which the court acted when the order was entered, and it will, in the absence of such evidence, be conclusively presumed that the court acted upon a showing amply sufficient to sustain the action taken. The defendant at no time made any attempt to have this order vacated for any reason and it must now, we think, be regarded as having been correctly entered.

It also appears from the record before us that the first appraisement, which the defendant is contending the sale should be made under, fixed the gross value of the lands ordered sold at the sum of $1,600, while the second appraisement, which is objected to, finds the gross value to be $2,400. It is hard to conceive, admitting an irregularity existed in setting aside the first appraisement, how the defendant has been prejudiced by the procedure taken. The second appraisement being higher the appellant is benefited and has no valid objection on that ground to the confirmation of the sale. *Nebraska Loan & Trust Co. v. Hamer,* 40 Nebr., 281.

The order of confirmation is accordingly

AFFIRMED.

THOMAS MULLALLY V. JOSEPH DINGMAN.

FILED OCTOBER 16, 1901. NO. 10,383.

1. **Question of Fact:** CONFLICTING EVIDENCE: REVIEW. Questions of fact determined upon fairly conflicting evidence by a jury will not be examined in error proceedings in the supreme court. *Lydick v. Gill*, 57 Nebr., 89.

2. **Interest:** DELAYED PAYMENT. When money is due and withheld by unreasonable delay of payment, interest may be allowed at the rate of seven per cent. per annum. Compiled Statutes, 1901, ch. 44, sec. 4.

3. ———: CHARGE OF COURT. It is not error, as to a defendant in a suit for wages alleged to be due and unpaid, to charge the jury that plaintiff could recover interest on whatever sum was found due him at the rate of seven per cent. per annum after six months from the time the amount has been witheld to the time of the trial.

4. **Plea of Payment:** BURDEN OF PROOF. When payment is pleaded, which is disputed, the burden is on the party pleading payment to prove the same by a preponderance of the evidence; and if he fails to do so, or if the evidence on that issue is evenly balanced, proof of payment is insufficient, and it is not error to so instruct the jury.

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

J. G. Thompson, for plaintiff in error.

C. M. Miller, contra.

HOLCOMB, J.

The plaintiff below, defendant in error, sued to recover for wages alleged to be due for three months' employment by defendant, plaintiff in error, for which it is alleged in the petition he was to receive $16 per month, no part of which had been paid except the sum of $22.59. Judgment was prayed for in the sum of $25.41 and interest. The answer alleged the contract of employment was for a period of six months at the agreed price of $15 per month; that the plaintiff had worked only two months and that $28.70

had been paid to him therefor; that the defendant had been damaged in the sum of $15 by the plaintiff's breach of contract, and that after allowing all just credits there was due defendant from plaintiff $13.70 for which he prayed judgment. The case went to trial upon the issues thus formed and resulted in a verdict and judgment in favor of the plaintiff for $26.50. Defendant brings error.

It is argued that the verdict is not sustained by sufficient evidence. On the points in issue, as to whether the contract of employment was for the period of six months or by the month for no specified time, and the amount paid plaintiff over and above the sum admitted by him, the evidence is fairly conflicting, which precludes us from saying the verdict is not supported by sufficient evidence. *Lydick v. Gill*, 57 Nebr., 89.

Two instructions given the jury were excepted to by defendant and the giving thereof is assigned and argued as error prejudicial to him. The first is as follows: "If you find in favor of the plaintiff in this action you will then allow him interest on such amount as you find due him at the rate of seven per cent. per annum six months from the time said amount has been withheld up to the present time." Under the plaintiff's theory of the contract, which it is evident the jury found to be the correct one, he would be entitled to interest on the money withheld from the time it was due, which would be at the expiration of the term of service, unless perchance each month's wages became due and payable at the end of the month, which we need not here determine. The statute provides that, on money due and withheld by unreasonable delay of payment, interest may be allowed at the rate of seven per cent. per annum. Compiled Statutes, 1901, ch. 44, sec. 4. The defendant insists that interest can not be recovered until six months after the money becomes due. This, in effect, is what the court told the jury. The money could not be withheld until it became due, and therefore the instruction conforms to the defendant's view of the law of the case. Even treating the amount sued for as the bal-

ance of an unsettled account, the instruction must be regarded as giving to the defendant all that he could rightfully ask. It can not, we think, under any reasonable rule of interpretation be said that the money was or could be withheld until the termination of the services rendered, and the instruction advises the jury not to allow interest until six months after that time. The instruction was more favorable to the defendant, in our judgment, than he was entitled to. The other instruction excepted to is as follows: "You are instructed that the burden of proof of payment in this action is upon the defendant, and, if you find that the evidence in this action is equally balanced upon the point of payment, you will then find as to such point in favor of the plaintiff." As to the amount claimed to have been paid in excess of the sum admitted by the plaintiff, the burden of proof was certainly on the defendant to establish payment by a preponderance of the evidence, and if he failed to do so or if the evidence was on that controverted point evenly balanced, the plaintiff was entitled to a finding in his favor as to such disputed payment. Although not clearly expressed, we think this is the purport of the instruction.

Other errors assigned are not argued and are, therefore, deemed waived.

Perceiving no prejudicial error in the record, the judgment of the trial court is

AFFIRMED.

EDWIN A. BOOTH, APPELLANT, V. GUSTAV KESSLER ET AL., APPELLEES.

FILED OCTOBER 16, 1901. NO. 10,392.

1. **Finding of Court Based on Conflicting Evidence, Will Not Be Disturbed.** When the evidence is fairly conflicting or where the case, as made by the evidence, is such that reasonable minds might fairly differ as to the correct and proper conclusion to be drawn therefrom, a finding of fact made by the trial court will not be disturbed on appeal.

2. **Finding of Court of Same Weight as Verdict of Jury in All Cases.** Findings on questions of fact by a trial court are entitled to the same weight and same presumption of correctness as a verdict of a jury, and the rule is the same whether the case is brought to this court on error or appeal, and applies to all classes of actions. *Burlingim v. Warner*, 39 Nebr., 493.

3. **Evidence:** FINDING. Evidence examined, and *held* sufficient to support the finding and decree of the trial court.

APPEAL from the district court for Thayer county. Heard below before HASTINGS, J. *Affirmed.*

Richards & Dinsmore, for appellant

John T. McCuistion, contra.

HOLCOMB, J.

The plaintiff, appellant here, began an action in equity for the foreclosure of a real estate mortgage, grounding his cause of action and right to the relief prayed upon allegations the substance of which was the execution and delivery of the promissory note and mortgage sued on to one C. M. Weiss, and his purchase of the same in the ordinary course of business for a valuable consideration and before maturity, thereby placing himself in the attitude of an innocent holder of the note for value before maturity. The defendants, appellees, pleaded a want of consideration and that the note and mortgage were given to the said Weiss but that he was acting as the agent of the plaintiff, who was the principal in the transaction, although the note and mortgage were taken in the name of the agent, and that the plaintiff was not an innocent purchaser for value before maturity. After reply a trial to the court was had on the issues raised by the pleadings, which resulted in findings generally in favor of the defendants, and that Weiss acted as the agent of the plaintiff, who was his principal, and undertook in the first instance to make the loan through Weiss, as his agent, and in whose name the note and mortgage were executed. Plaintiff appeals, and ar-

gues in his brief that the evidence is insufficient to sustain the findings of the trial court, and is contrary thereto.

The defendant, Gustav Kessler, undertook to procure a loan of $450, which with money he then had on hand was sufficient to pay a prior mortgage on his land for the sum of $1,000. A very slight examination of the bill of exceptions containing the evidence convinces one that, as between the proposed borrower, Kessler, and Weiss, the latter was acting as agent of an undisclosed lender, and undertook to negotiate a loan for the amount desired. The written application was made and the note and mortgage executed to Weiss for the purpose of sending them to an "eastern party," as expressed by him, who was to make the loan and forward to him the funds thus to be borrowed. Whether or not the plaintiff, as between him and the mortgagor, did in fact take the note and mortgage from Weiss as one of the principals in the transaction, or as purchaser in the ordinary course of trade, presents a more difficult proposition under the evidence submitted in the case. The real and decisive test is the question of agency.

The evidence, we think, shows that in the execution of the note and mortgage, Weiss took them in his own name for the purpose of obtaining the loan from the plaintiff, and that he did not intend nor was it understood by the parties that he was negotiating the loan on his own behalf as lender. The note and mortgage were by their terms made payable at the First National Bank of Candor, New York, where the plaintiff resided. At the time of the execution of the note and mortgage to Weiss there was also executed by the defendants a formal application for a loan, stating the security offered, the condition and situation of the same, prior incumbrances, what the money was wanted for, and much other information of interest to a prospective lender. In this application Weiss was designated as the agent of the borrower, but if an agent at all, he was obviously the agent of the plaintiff, notwithstanding such designation. There was also a long list of questions and answers prepared as a part of the application,

giving information pertaining to the proposed loan and its desirability, to which Weiss as "correspondent" signed his name as such, and in which the loan was recommended to be made as applied for, and on the security offered. The mortgage was filed and recorded and an abstract of title completed showing the exact status with respect to title to the land, and with blank indorsements on the note, and coupons for interest, all the papers mentioned were sent to the plaintiff. Very shortly afterward a draft for the money, also the money on another loan, was by plaintiff sent to and received by Weiss, who credited the same to plaintiff's account in the bank in which Weiss was cashier, and which afterwards failed, without payment thereof to the defendant or on the prior incumbrance for the partial satisfaction of which the loan was applied for. Upon the receipt of the draft for the amount of the loan, Weiss executed a formal assignment of the mortgage to the plaintiff. It is shown that a number of similar transactions were had between the plaintiff and Weiss with respect to other loans. But little of the correspondence regarding these transactions is in evidence. In a letter from the plaintiff to the defendants' attorneys, long after the transaction, he says with regard to the satisfaction of the balance of the prior mortgage: "If this mtg. is actually paid or whose money paid it whether by the money I sent Weiss or by Kessler's own money (or it may not have been paid at all) I have no way of knowing * * *." The language is, we think, inconsistent with the idea that plaintiff purchased the note and mortgage from the payee therein named but rather indicates that he sent the money to Weiss in response to the application of the mortgagor for a loan for the purpose mentioned. In this connection it is pertinent to remark that the evidence is entirely clear upon the point that the application for the loan was made for the purpose of paying a balance due on a prior mortgage; that the prior mortgage was not satisfied and that plaintiff was advised of this fact when he accepted the note and mortgage in question; and that he forwarded the money

to Weiss evidently for the purpose of having the prior mortgage satisfied before he intended the transaction should be closed. Other evidence of much the same character was introduced. We can not say the trial court was not justified, from all the facts and circumstances shown in evidence, in finding that in the transaction Weiss acted as the agent of the plaintiff and that plaintiff did not in fact purchase the note and mortgage of Weiss as alleged. There is no very serious conflict or contradiction in the evidence. Aside from the testimony of the plaintiff wherein he testifies that he bought the note and mortgage of Weiss and paid him for them,—which is in the nature of a conclusion rather than a statement of fact,—there is no substantial controversy as to the facts surrounding the transaction and which lead up to and establish the ultimate fact and chief point in controversy; that is, the character of the transaction as between the three active agents thereto and principal participants therein. We incline to the view that, as established by the evidence, it is a case where reasonable minds might very properly differ as to the proper conclusions to be drawn therefrom, and, if so, we are not warranted in disturbing the finding, even though we might be of the opinion that a different conclusion than that reached by the trial court might be more proper. The rule is that in appeal and a trial *de novo* the findings of the district court will not be disturbed unless they can not be reconciled with any reasonable construction of the testimony (*Gadsden v. Phelps,* 37 Nebr., 590); that when only questions of fact are presented as to which there is sufficient evidence to sustain the findings of the district court, judgment will be sustained. *Cunningham v. Katz,* 38 Nebr., 29. Findings on questions of fact by a trial court are entitled to the same weight and the same presumption of correctness as a verdict of a jury, and the rule is the same whether the case is brought to this court on error or appeal, and applies to all classes of actions. *Burlingim v. Warner,* 39 Nebr., 493.

The decree appealed from must be

AFFIRMED.

EMILY H. KETCHUM, APPELLANT, V. COLUMBIA HARRISON ET AL., IMPLEADED WITH CHARLES B. MARSH, APPELLEE.

FILED OCTOBER 16, 1901. No. 10,435.

When the Transcript Is Fatally Defective, the Decree Will Be Affirmed. At the time of confirmation of sale in a mortgage foreclosure proceeding an order was entered giving to a party the right to cultivate, harvest, and remove the crops planted by him on the premises sold, from which the plaintiff, being the purchaser, appeals. No transcript of the pleadings forming the issues in the case or of the findings and decree at the time of the rendition of the decree of foreclosure being preserved in the record presented, we are unable to determine whether the order complained of is within the issues tried and determined, and therefore affirm the same.

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

Warren Pratt, for appellant.

B. O. Hostetler, contra.

HOLCOMB, J.

At the time of entry of the final order of confirmation of a sale of real estate made in proceedings of foreclosure of a mortgage on the premises sold, the court made the following additional order or decree: "It is further ordered, adjudged and decreed by the court that the defendant Charles B. Marsh, the grantee of the defendants Columbia and Sarah M. Harrison, is to have the right to cultivate, harvest and remove the crops now growing on said land and planted by him."

The plaintiff who purchased the premises at the foreclosure sale appeals from that part of the final order or decree which is quoted. The record upon which we are asked to pass upon the question consists of a transcript of an order of sale issued on the decree of the district court in the action, and the subsequent proceedings had thereunder.

No evidence appears to have been submitted at the time of confirmation of sale and the entry of the order complained of. No transcript of the pleadings forming the issues in the case or of the findings and decree at the time of the rendition of the decree of foreclosure is presented, and whether or not the order complained of is within the issues tried and determined in that action we are unable to say from the record brought to this court, and we are therefore precluded from passing upon the question thus raised and presented.

The right of the party in whose favor the order was made to the use of the land for the crop season mentioned may have been superior to the interest of the mortgagee or the purchaser at the foreclosure sale, and may have been so found and determined in the prior proceedings, and the question thus tried may have been altogether within the issues raised by the pleadings, from all that appears from the record upon which we are asked to decide the correctness of the order excepted to.

For the reasons stated the order and decree is

AFFIRMED.

SOUTH OMAHA WATER-WORKS COMPANY V. FRANK VOCASEK, ADMINISTRATOR.

FILED OCTOBER 16, 1901. No. 9,815.

Commissioner's opinion, Department No. 1.

1. **Contributory Negligence:** EVIDENCE: GUY-WIRE: ELECTRIC CURRENT: KNOWLEDGE: WARNING. Evidence that deceased, a lad of seventeen years, knew that a guy-wire of an electric-light post carried an electric current, and that he voluntarily laid his hands upon it after being told by a younger companion to watch out and get away, does not conclusively establish contributory negligence where it also appears that the current had been running over this guy-wire for several days, with notice to defendant, and that the wire had been handled, pulled and shaken frequently by various parties during that time, and, a few minutes previously to the fatal occurrence, by deceased, and by other in his presence, without harm.

2. ——: ——: ——: ——: ——: REFUSAL OF INSTRUCTION. Instructions to the effect that if such a lad, knowing such a guy-wire was carrying an electric current, voluntarily took the wire in his hands, his doing so was such negligence as precluded any recovery for his death from the act, *held* properly refused.

3. **Next of Kin:** RELATIVES: EVIDENCE. Where there was proof tending to show that the next of kin, the father, was receiving from him pecuniary assistance in supporting the mother and brothers and sisters of deceased, it was not error to admit proof of the existence of such relatives.

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

Woolworth & McHugh, for plaintiff in error.

John C. Cowin, W. C. Lambert and *A. L. Sutton, contra.*

HASTINGS, C.

Action for causing the death of Robert Vocasek through an electric shock from a guy-wire attached to a post in plaintiff in error's electric lighting plant. Verdict for plaintiff below. Defendant brings error by eighteen assignments, only three of which are relied upon in the briefs and argument: (1) That the evidence conclusively shows such negligence on the part of plaintiff's intestate as to entirely preclude any recovery on account of his death; (2) that the trial court did not properly submit to the jury the issues as to such contributory negligence, particularly in refusing defendant's instructions No. 3 and No. 5; and (3) error in permitting testimony as to the existence of a wife and other children of the deceased's father, the plaintiff. The errors will be discussed in their order.

As to the first, it seems clearly established that the deceased knew before the fatal contact that the guy-wire carried an electric current. It appears also that it had for some days become quite the regular thing for the boys of the vicinity to gather about the post and guy rope and experiment with the current, and defendant's evidence in-

dicates that on the night of the injury twenty-five or thirty or more persons, variously denominated "kids" and "boys," had gathered around the place. It seems that pretty shortly after the lamps were lighted on July 3, 1896, the deceased with one Strangland came to the place and there found one Dwyer; deceased being seventeen, the others fifteen years of age. Strangland touched the guy-wire with a nail stuck through a piece of weed a few inches long and received quite a shock, which he supposes deceased must have known of. Deceased grasped and pulled on or shook the wire twice, dropping it quickly as his companions suppose, because of the shock received. Both of deceased's companions had touched the wire on previous occasions and received some shock. It appears from the testimony of both these lads that other boys were touching the wire that night. It appears also from the testimony of a police officer, Philip Connell, that other boys were catching hold of the guy wire, and pulling it, causing sparks at the point where it rubbed against the electric light wire. It appears that on the second time that deceased seized the wire, one, at least, of his younger companions suggested that he "watch out," to which he replied by asking if doctors did not give electricity to people, and Dwyer replied, "Yes, a certain amount." After something more than a half an hour of this, the two companions tried to coax deceased to "go up town." Strangland at least seems to have used some playful force, but after going some 90 or 100 feet he broke from them and turned back. About 9 o'clock the policeman, Connell, testifies that in crossing the street from the pole and guy wire to Koutsky's saloon, he met deceased, and as he reached the saloon door looked back and saw him throw up his hands and fall, and on going across found him dead. The saloon-keeper, Koutsky, says he saw him put his hands on the wire and he dropped dead. Some effort is made to discredit the two lads who, at the time of the trial, a year later, were still only sixteen years of age. It seems hardly worthy of counsel to do so. Their testimony is not volun-

teered nor seemingly colored by any bias for the defendant, at least, on the part of Strangland, with whom Dwyer's testimony is quite in harmony; and Connell's statement does not necessarily conflict with either, the only discrepancy being as to the time after they left till the fatality occurred, and the disagreement as to that is not serious. The fact that Connell did not see Vocasek till just as he was crossing to his death indicates simply that all three had started away without his observing them, or before he came. There seems no doubt as to the precise character of the occurrences. We are not of the opinion that they constitute *per se* contributory negligence, which must relieve the defendant from liability for this result of its admitted failure to exercise due care of its dangerous current. The fact that a large number of young men and boys were playing with this wire, touching it and catching it and pulling it away from its contact with the other wire, and so making sparks, that deceased himself had with impunity handled it earlier in the evening, was enough to disarm his caution and deprive of its negligent character the contact which killed him. Unless the doctrine is true, which counsel partly claim in their brief, but expressly renounced at the argument, that a youth of seventeen is to be presumed to know and consider even against the evidence of his own eyes and sense of touch, that a waste current of electricity through a guy wire is dangerous, then this is not *per se* contributory negligence.

As to the second point, instruction No. 3 asked by defendant expressly tells the jury that voluntarily taking hold of a wire carrying a current from an electric light wire was such negligence as precludes recovery for the resulting death. If the foregoing conclusion as to the effect of such a condition of affairs with such a degree of continuance as in this case is correct, the instruction was rightly refused. Instruction No. 5, also refused, is to much the same effect, with the additional suggestion that if the deceased had a reasonable belief that his action was safe, it was still negligent. As we have concluded that

what he had seen and experienced was sufficient to give the youth a reasonable belief that his action was safe, and therefore it was not negligent, it follows that this instruction was rightly refused. The fact that sparks came from the point of contact of the wires when the guy-wire was pulled would seem to indicate that pulling broke the connection, and the fatal result was rather due to his simply seizing the wire, as described by the witness Koutsky. But whatever weight might be given to the suggestion that the fatal current was due to deceased's pulling of the wires into contact, if taken by itself, the other matter in this instruction 5 vitiates it. It can hardly be possible that our youth are required, at the peril of their lives, to learn the actual, as distinguished from the reasonably apparent, qualities of wires stretched in much frequented city streets.

The third error of course has to do only with the amount of damages, and not with the right of recovery. The jury assessed the full amount of damages allowed by the statute, and it is claimed that the trial court should not have permitted testimony that plaintiff had a wife, the mother of Robert, and other children, his brothers and sisters. Defendant claims that these facts appear in other parts of the record without objection, and if their appearance at the place complained of is error it is without prejudice. Of course, the establishment of the poverty of plaintiff, or the dependence upon him of the mother and other children, as a direct ground for the jury's action upon the matter of damages, is wholly inadmissible. The cases cited by plaintiff in error seem, so far as we have examined them, to be of that nature. Such is Judge Cooley's line of argument in *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich., 205. But where it is claimed that deceased at the time of the injury was contributing to the assistance of the next of kin, his father, in the performance of the latter's legal duty of supporting the mother and other children, the fact of the existence of such mother and other children would seem

to be entirely admissible, not as a direct ground for the jury's action, but as showing what deceased was doing and likely to do to make his life pecuniarily valuable to plaintiff. The evidence is admissible not as establishing directly a greater right to consideration from the jury, but as showing what consideration plaintiff was actually receiving, and likely to receive in the future from this son.

It is therefore recommended that the judgment of the lower court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MARSEILLES MANUFACTURING COMPANY v. A. D. PERRY.

FILED OCTOBER 16, 1901. No. 10,269.

Commissioner's opinion, Department No. 2.

1. **Mortgagor:** WAIVER. A mortgagor of chattels can waive the benefit of the provisions of the statute relating to foreclosures.
2. **Rights and Obligations of a Mortgagee of Chattels.** The provisions of a chattel mortgage that the mortgagee may, upon default, take the property and sell the same at public or private sale are valid, but under such provision the mortgagee has no right to the possession of the property except for the purpose of foreclosure; and if he takes the property and holds the same longer than is reasonably necessary for that purpose, he will be held to have elected to take the property, so far as its value will go, in satisfaction of his claim, and if the value is greater than the amount of his claim, he holds the surplus for the mortgagor.

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

William M. Clark, for plaintiff in error.

J. L. Epperson & Sons, contra.

SEDGWICK, C.

This action was tried in the district court of Clay county on appeal from a justice of the peace. It resulted in a verdict and judgment for the defendants, and the plaintiff below has brought the case here for review upon petition in error.

The action was to recover the balance due upon promissory notes. The notes had been secured by a chattel mortgage, which, in addition to the ordinary provisions, provided that upon default the mortgagee might take possession of the property "and remove and sell the same, at either public or private sale, at their option, without notice, and out of the proceeds of said sale, retain the amount due on said notes." The plaintiffs allege that there was default, and "that on the 21st day of August, 1896, they, by its agents, sold the said machine for the sum of $100 to one E. E. Stone, and now give him credit as of that date, on the said notes so given by the defendants; * * * that on the 28th day of March, A. D. 1898, there will be due and unpaid the sum of $111.55 from the defendants," —and ask judgment for this balance. It appears that no service was had upon the defendant Miles, and the defendant Perry answered, admitting the notes and mortgage alleged in the petition, and alleged that the plaintiff on or about the 15th day of February, 1894, took possession of the mortgaged property, but did not advertise the same for sale, and did not sell the same at public auction as required by law, but converted the same to its own use, and that the property on that date was of the value of $235, and that the amount due on the note at that date was $160, and that the plaintiff unlawfully retained possession of said property and permitted the same to stand without shelter, whereby the same was damaged by rusting and warping, until about August 21, 1896, when the plaintiff sold the same at private sale illegally, and without authority from this defendant, and that the plaintiff did not take, hold and sell said property in good faith

and to the best advantage to this defendant and failed to account to the defendant for the value of the property from the time it took possession of the same. The reply was a general denial.

The first question presented is upon the sufficiency of the answer. The court admitted evidence under the allegations of the answer, and the plaintiff insists that this was error. We think that the answer is sufficient. The mortgagor of chattels can waive the benefit of the provisions of the statute relating to foreclosures. *Lexington Bank v. Wirges,* 52 Nebr., 649. There is no doubt of the mortgagee's right, under the mortgage, to take possession of the mortgaged property upon default, and to foreclose the mortgage by selling the property at private sale. In making such sale he must obtain a fair price for the property. Under the terms of this mortgage plaintiff had no right to the possession of the property, except for the purpose of foreclosure, and must proceed with his foreclosure without unreasonable delay. *Murray v. Loushman,* 47 Nebr., 256; Jones, Chattel Mortgages [3d ed.], 773. The objection was rightly overruled.

The objection that the evidence is insufficient to support the verdict is without merit. The evidence was somewhat conflicting, but there is no such failure of evidence as to require a reversal upon that ground.

The plaintiff offered to prove that "Plaintiff made various attempts to sell the machine to various parties, but could not obtain any purchaser for the same, and that plaintiff sold the machine for $100 to one E. E. Stone, at its real value, August 21st, 1896." It is manifest that this offer was properly overruled, for two reasons: There were no allegations in plaintiff's pleadings to support such evidence; and it was wholly immaterial to the issues being tried, since the plaintiff, by taking the property and holding it for more than two years, must be held to have elected to take the property, so far as its value would go, in satisfaction of his claim, and if the value was greater than the amount of his claim, he would hold the balance for the mortgagor.

There is argument in the brief as to partnership between the two men who bought the machine and gave the mortgage in question, but we do not see that the question of partnership is in any way involved.

We recommend, therefore, that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN A. DOE, APPELLANT, V. SAMUEL STARTZER, SHERIFF, ET AL., APPELLEES.

FILED OCTOBER 16, 1901. No. 10,405.

Commissioner's opinion, Department No. 2.

1. **A Judgment of District Court, Except by Confession, Is a Lien on Land from First Day of Term.** A judgment of the district court in an action commenced before the term at which it was rendered, except it be a judgment by confession, is a lien upon the lands of the judgment debtor within the county from the first day of the term, no matter on what day of the term it was actually pronounced.

2. **A Judgment Against the Vendor of Real Estate, Is a Lien on His Interest in Land.** Where a judgment is recovered in the district court against the vendor of real estate in the same county, who has not made a deed for such real estate, nor received the whole of the purchase money therefor, such judgment is a lien on whatever interest the vendor had in the land at the time the lien attached.

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

Gregory, Day & Day and *J. H. Van Dusen,* for appellant.

H. C. Lefler and *John F. Stout, contra.*

OLDHAM, C.

This is an action in which the plaintiff seeks to restrain the defendants from selling certain real estate situated in Sarpy county, Nebraska, under an execution issued out of the district court of Sarpy county, Nebraska, to satisfy a judgment in favor of defendant Davidson's intestate and against one Charles W. Key. The judgment was rendered on the 1st day of July, 1896, at the February term of the said court, which term convened on the 24th day of February, 1896. The action on which judgment was rendered was instituted on the 23d day of August, 1895. Plaintiff, as his ground of action, alleges that he purchased the real estate in controversy from Charles W. Key on the 14th day of December, 1895, for the sum of $12,000 and made a payment of $2,000 on the purchase on that day; that he paid $2,000 on this purchase on or about the first day of February, 1896, and that he continued to make payments on such purchase until the delivery of the deed on the 6th day of April, 1896, at which time full payment was made. Defendants answered, denying the allegation that there was any sale of the land in good faith to the plaintiff by Charles W. Key or that any payments had ever been made by the plaintiff, and alleging that the pretended sale of the premises was a sham and a fraud, made without any consideration and for the purpose of hindering and delaying defendant Davidson's intestate in the collection of his debt against Charles W. Key. On issues thus joined the court below found for the defendants and dismissed plaintiff's petition, and plaintiff appeals.

An examination of the pleadings and the transcript shows that the term of court at which judgment was rendered in favor of plaintiff's intestate was begun on the 24th day of February, 1896; that the pretended deed was not delivered to the plaintiff until the 6th day of April, 1896. It also appears from the plaintiff's petition that final payment of the alleged contract of purchase of the premises in dispute was not fully made until the delivery

of the deed and not until after the beginning of the term of court at which judgment was rendered.

An examination of the testimony contained in the bill of exceptions reveals such manifest proof of the absolute *mala fides* in the transaction between the plaintiff and Charles W. Key in the alleged sale and purchase of the property in dispute that, if the judgment of the trial court had rested on this finding alone, it would be fully sustained by the testimony.

This court has held, in the case of *Norfolk State Bank v. Murphy,* 40 Nebr., 735, that a judgment of the district court in an action commenced before the term at which it was rendered, except it be a judgment by confession, is a lien upon the lands of the judgment debtor within the county from the first day of the term, no matter on what day of the term it was actually pronounced. An examination of the record of the judgment sought to be enjoined shows that the action on which it was rendered was begun long before the first day of the February term of the district court, and that judgment was contested and not confessed by the defendant. Consequently this judgment became a lien on all the interest that the defendant had in the lands in Sarpy county on the 24th day of February, 1896. The deed to plaintiff was not executed and delivered until the 6th day of April, 1896, nor was final payment made of the purchase price of said lands until said date, as appears from the allegations of plaintiff's petition. This court has held that where a judgment is recovered in the district court against the vendor of real estate in the same county, who has not made a deed for such real estate nor received the whole of the purchase money therefor, such judgment is a lien on whatever interest the vendor had in the land at the time the lien attached. *Courtnay v. Parker,* 21 Nebr., 582.

It therefore follows that the judgment in the case at bar was a lien on whatever interest Charles W. Key held in these lands on the 24th day of February, 1896, and that the action of the trial court in refusing to enjoin an exe-

cution and sale under this judgment was fully warranted, and it is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOSIAH L. BROWN, V. LAWRENCE M. WELSH.

FILED OCTOBER 23, 1901. No. 12,348.

County Supervisors in a District Containing a City, Are to Be Elected at Large. Under the provisions of article 4, chapter 18, Compiled Statutes, 1901, entitled "Township Organization" (Session Laws 1895, ch. 28), when a county is divided into supervisor districts in which are located cities of one thousand or more inhabitants, and which, by reason of population, are entitled to two superivsors, with or without contiguous territory attached thereto, such supervisors are to be elected at large by the electors of such city and contiguous territory, if any, and not by the electors of a portion of the city by dividing it into, and the formation of, two separate superivor districts.

ORIGINAL application for mandamus to compel the clerk of the county of Buffalo to print on the official ballots for the coming general election the name of the relator as a candidate for the office of supervisor of districts numbered six and seven, city of Kearney. *Writ allowed.*

Frank E. Beeman, for relator.

Norris Brown, contra.

HOLCOMB, J.

This is an original action in which the relator, by his petition for a writ of mandamus, seeks to have the clerk of the county of Buffalo print on the official ballots for

the coming general election the name of the relator as a candidate of the republican party for the office of supervisor of supervisor districts numbered six and seven, the same comprising the territory included in the corporate boundaries of the city of Kearney, which it is alleged is a city having a population in excess of one thousand inhabitants. The petition is demurred to. A proper decision on the issue raised by the demurrer calls for a construction of several sections of chapter 28 of the Session Laws of 1895, which is incorporated in the Compiled Statutes of 1901 as chapter 18, article 4, commencing on page 491. The act referred to provides for the adoption of township organization, and the division of the counties adopting such organization into supervisor districts, and the election of supervisors therefrom and restricts the number of supervisors to seven. Provisions are also made for those counties which, at the time of the taking effect of the act in question, had, under the pre-existing law, adopted township organization, to redistrict such county into seven supervisor districts, and to continue its organization in conformity with the law as modified and changed by the passage of the later act.

The city of Kearney, it appears from the allegation of the petition, was, after the passage of the act of 1895, divided into two supervisor districts, numbered six and seven, respectively, the main street of the city running north and south to the corporate boundary lines forming the line of division of the two supervisor districts. Heretofore it has been the custom—which, it is argued by the respondent, is according to law, and should be continued —to elect one supervisor from each of the two districts at the time required by law. At such election only the electors residing within the numbered district as thus established would participate in the election of a supervisor for that district. It is now insisted, and the petition demurred to is framed on the theory, that the supervisors to be elected from the city of Kearney, having within its boundaries, as it does, a sufficient number of inhabitants

to entitle it to two supervisors, should be elected by the electors thereof at large, and not by the electors of a portion of the city by dividing it into two separate districts, as has heretofore been done. In other words, it is claimed that the city can not, under the law referred to, be divided into separate supervisor districts, each one electing its own supervisor, but that one should be elected at large from the even or odd numbered district, as the case may be, the two numbers designating, and the supervisors being elected from, but one territorial division.

We prefer to call attention to several sections of the statute under consideration in an order different from their arrangement by the legislature. After the electors of a county have, by a majority vote, adopted township organization for the government of the county, in the division of the county into supervisor districts, it is provided by section 6 of the act that, in the event any city having one thousand inhabitants or more shall have enough inhabitants to form one supervisor district, then such city shall constitute one district, and that, in case the number of inhabitants is less than the number in other districts in the county, then so much contiguous territory shall be added to such city to give it a sufficient number of inhabitants for one supervisor district. By section 4 it is provided that in cities having more than one thousand inhabitants, and more inhabitants than the average outlying districts, the supervisor district in which such city is situated shall be formed by adding enough contiguous territory to such city so that the inhabitants of such city and contiguous territory shall be equal to the number of inhabitants of two of the other districts, and when the supervisor district is so formed in which such city is located the district shall elect two supervisors, to be elected at large within such district. It is further provided that, if any such city has more than the requisite number of inhabitants for two districts, then sufficient outlying territory may be added to such city to make three districts, and that the supervisors in such city districts shall be elected

at large, *i. e.*, by the electors of the entire city and those residing in the outlying territory added to such city to give it the number of inhabitants to entitle the district to three supervisors. In numbering the supervisor districts into which the county is to be divided, section 5 requires that in numbering the city districts formed as contemplated by section 4 they shall give such city district two or more numbers, one odd and one even number. In counties which had already adopted township organization under the law as existing prior to the passage of the act under consideration, it is provided by section 62*c* that a meeting of the board of supervisors shall be called by the county clerk, and that at such meeting the board of supervisors, or a quorum of the members thereof, shall at once proceed to divide the county into supervisor districts, and number the same; all of which shall be done as provided by sections 4, 5 and 6 of the act. The sections last mentioned, as will be seen by an inspection thereof, provide for the division of the county into supervisor districts by the county board immediately after the adoption of township organization by the electors of the county, while section 62*e*, above referred to, provides for the accomplishment of the same object by the county board of supervisors in counties then under township organization immediately after the passage and taking effect of the law as at present existing. Section 62*f* declares that the supervisors selected and appointed upon the organization of the county under the present law shall hold their respective offices until the next general election following their selection or appointment, and until the election and qualification of their successors in office. By section 62*g* it is provided that at the next general election following the adoption of township organization, or the division of any county then under township organization into supervisor districts, there shall be elected in each supervisor district one supervisor, who shall be nominated and elected by the qualified electors of the district for which such supervisor is elected, and the person receiving a plurality

of the votes cast for supervisor within the district shall be declared elected. Section 62*h* provides that at the next general election after the adoption of township organization and the division of the county into supervisor districts as contemplated by the act there shall be elected in each supervisor district one supervisor, and the supervisors elected in odd numbered districts shall hold their offices for one year and those elected in the even numbered districts shall hold their offices for two years. It is also provided that in double or city districts the ballots shall state which supervisor is elected for the odd and which for the even numbered district, and that each district shall thereafter elect one supervisor every two years, and each supervisor after the first election, as stated above, shall hold his office for the term of two years. To give the section last mentioned a literal interpretation would make it impossible to construe the statute as contended for by the relator. In those counties having cities with sufficient population, with or without contiguous territory, to entitle such district to three supervisors, two of them must be elected every alternate year, while the act apparently contemplates the election of but one supervisor in any one supervisor district at any general election. We, however, are not specially concerned as to this seeming conflict and inconsistency in the different provisions of the statute, because in the present instance the supervisor district in which the city of Kearney is situated is, according to population, entitled to but two supervisors, and therefore one representing the city as an even numbered district may be elected at one election and the one representing it as an odd numbered district at the succeeding election, and further than this we need not, at this time, extend our consideration of the question.

It seems reasonably clear that in the formation of the different supervisor districts contemplated by the statute the law is the same whether done by a board of county commissioners after the voters have adopted the township organization form of government, or whether by a board

of supervisors in counties then having township organization as provided by the law in force when the present legislation was enacted. It is equally clear that in the formation of supervisor districts the legislative intendment is that cities having one thousand inhabitants or more shall, either with or without contiguous territory, be entitled to one or more supervisors, according to the population within such district as compared with the total population of the county; and that where, by reason of population, such city, with or without contingent territory, shall be entitled to two supervisors, such district shall be given an even and an odd number, and that the supervisors elected by and from such district shall be elected at large,—that is, by all the electors residing within the district from which the two supervisors are chosen. "At large" is defined as "not limited to any particular place, district, person, matter or question." Black, Law Dictionary. The provisions relating to the question, we think, exclude the idea that a city shall be divided into two or more separate and distinct districts or divisions, even though the population be sufficient in number to entitle such city to more than one supervisor; and the right of representation on the county board of supervisors according to population is met by providing in such case for the election of two or more supervisors at large, and from but one division of territory, although including theoretically more than one supervisor district. No other construction can be given without doing violence to the language used, and ignoring altogether different provisions to which reference has been made. It is our duty to construe these several sections together, and to give force and effect to all their several parts, when no conflict exists, and thus give effect to the legislative will. To the writer, the legislation in respect of the questions under consideration is a discrimination in favor of the cities and against the rural portion of the counties. There is no more reason why a city should not be divided into supervisor districts, having due regard to boundary lines of wards, than a

county should be divided into districts, as is the law, having due regard to township boundary lines; and the same reason for such division exists with respect to one as the other. It consolidates the representation from the cities in matters pertaining to county government, and diversifies that of the country. It gives the predominating party, influence, or interest in a city an advantage over those predominating in the country. One is strengthened by being united, and the other weakened by being divided. It is, in principle, antagonistic to and inconsistent with other provisions of the law providing for the division of counties and cities into commissioner districts in those counties governed by the commissioner system. However this may be, it is not the province of the court to remedy the evil, if one there be. That is a matter which belongs to the legislature. While these considerations are fairly entitled to notice when there exists any serious doubt as to a proper interpretation of the statute relating to the manner in which supervisors are to be elected from districts in which a city is located having a population sufficient to entitle it either as a whole, or when divided into separate districts, to more than one supervisor, we are convinced that the question under consideration can be determined in but the one way, which we have indicated; and that the section of the statute bearing upon the question admits of no other construction than that in such cities the supervisors elected therein and therefrom and the district in which such city is located are to be elected at large, and not by the division of the city into different supervisor districts. For these reasons it is the duty of the county clerk to prepare the ballots so that candidates for the office of supervisor for the district in which the city of Kearney is located may be voted for by the electors at large, and a writ requiring him so to do will accordingly issue as prayed.

PEREMPTORY WRIT ALLOWED.

CHARLES GOLDSTEIN V. FRED KRUG BREWING COMPANY.

FILED NOVEMBER 7, 1901. No. 9,743

1. **Justice's Docket as Evidence.** Entries by a justice of the peace upon his docket of material matters proper to appear there are evidence of the facts therein stated.
2. **Service of Summons on Nominal Defendant within the Bailiwick; Jurisdiction of Party in Interest.** Where an action is brought against a nominal defendant in one county, who has no bona-fide interest in the controversy, a summons can not properly be issued and served upon a party in another county.

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

Willard E. Stewart, for plaintiff in error.

Charles L. Burr, Lionel C. Burr and *Roscoe Pound, contra.*

NORVAL, C. J.

Charles Goldstein sued Henry Hanneman and Fred Claus before a justice of the peace of Lancaster county to recover $157 for work and labor claimed to have been performed by him for them, and the further sum of $13.05, for goods sold and delivered. After the service of summons upon them in Lancaster county, Goldstein filed an amended bill of particulars, making the Fred Krug Brewing Company a party defendant. An alias summons was directed to the sheriff of Douglas county, which was served, and return of writ was made to the justice issuing the same. On the return day the Fred Krug Brewing Company made special appearance, objecting to the jurisdiction of the court, and moving to quash the service of summons upon it for the reason that its general office and principal place of business was in Douglas county, and it could not be sued in Lancaster county. The justice overruled the objections to the jurisdiction, and thereupon the Fred Krug Brewing Company applied for and obtained

a continuance of the cause. Afterwards there was another continuance of the case by consent of parties. At the time to which the last adjournment was taken, plaintiff dismissed the action as to Hanneman. On the trial before the justice the corporation attempted to show as a defense that Claus was not liable to plaintiff on the causes of action set out in the bill of particulars; that Claus had been made a defendant to enable the court to issue its process to Douglas county to bring in the corporation. The justice rendered judgment against both Claus and the corporation, from which an appeal was prosecuted to the district court, where the plaintiff filed a petition. The Fred Krug Brewing Company answered, pleading as a second defense that Claus had no interest in the controversy, was not a necessary or proper party defendant, and that plaintiff had collusively sued him with the answering defendant to obtain jurisdiction over the latter in Douglas county. The district court, upon verdict in favor of Claus, dismissed the action as to him, which fact the corporation set up as a third defense by answer.

Plaintiff recovered a verdict against the Fred Krug Brewing Company, and the latter moved for a judgment in its favor *non obstante veredicto,* which motion was sustained, and judgment was rendered accordingly. Error proceeding has been prosecuted by the plaintiff.

The transcript of the proceeding had before the justice of the peace contains among others the following recitals:

"February 17, 1894. Issued alias summons returnable February 24, 1894, at 9 o'clock A. M., and directed same to the sheriff of Douglas county, and cause continued to February 24, 1894, at 9 o'clock A. M. * * *

"February 24, 1894. Fred Krug Brewing Company files special appearance and objections to the jurisdiction of the court, supported by the affidavit of William Krug. Objections overruled, and cause continued, on application of said defendant, to March 24, 1894, at 1 o'clock P. M. * * *

"March 29, 1894. * * * Plaintiff dismissed cause as to Henry Hanneman."

It is insisted that these recitals are no part of the record, under section 1086 of the Code of Civil Procedure. This section enumerates certain things the justice is required to enter upon his docket, but we can not believe that the legislature intended that no other matter should be noted by the justice upon his docket. The statute does not specify that a motion to dissolve an attachment or the ruling made by the justice thereon shall be entered upon the docket, yet they are entirely proper things for him to note upon his docket, and no less so are the matters to which objections are now made. The recitals in question are not mere voluntary entries of immaterial matters, but relate to facts pertinent and proper to be noted by the justice upon his docket, and are evidence of the facts so stated.

The judgment of the district court *non obstante veredicto* was entirely proper. The Krug Brewing Company was served in Douglas county, and their co-defendants were at that time out of the case; there having been a dismissal as to Hanneman, and a verdict and judgment in favor of Claus, who was not a necessary or proper party defendant. *Hurlburt v. Palmer,* 39 Nebr., 158; *Herbert v. Wortendyke,* 49 Nebr., 182; *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Nebr., 897; *Barry v. Wachosky,* 57 Nebr., 534.

It is argued that service upon Hanneman in Lancaster county was service upon the corporation, since the former was the managing agent of the latter. This can not be so for two reasons: First, no summons was served upon Hanneman as managing agent; he was served as a party to the suit only; second, no summons was issued against the Krug Brewing Company directed to the sheriff of Lancaster county, hence it could not be legally served in that county.

The judgment below is clearly right, and it is accordingly

AFFIRMED.

JOHN MORRIS, APPELLEE, V. PHŒBE R. E. E. LINTON, APPELLANT, ET AL.

FILED NOVEMBER 7, 1901. No. 10,294.

Appointment of Receiver. Authority is conferred upon a judge of the district court to appoint a receiver.

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

John T. Cathers, for appellant.

Edward W. Simeral, contra.

NORVAL, C. J.

This suit was to foreclose a real estate mortgage. The petition for foreclosure alleges that the mortgaged premises are of insufficient value to pay the amount of the mortgage. Shortly after the filing of this petition the plaintiff made application for the appointment of a receiver to collect the rents, alleging that the property was insufficient to pay the mortgage. This application was heard by one of the judges of the district court of Douglas county, who appointed a receiver. The defendant has appealed from this order, claiming that the judge had no jurisdiction at chambers to appoint a receiver. This contention is untenable. Section 23, article 6, of the constitution declares that "the several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." Section 266 of the Code of Civil Procedure provides: "A receiver may be appointed by the supreme court, or the district court, or by the judge of either, in the following cases: * * * Second—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," etc. Section 57, chapter 19, Compiled Statutes, reads: "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 * * * To discharge such other duties or to exercise such other powers as may be conferred upon a judge in contradistinction to a court." In the light of these provisions, there is no room to doubt that a judge of the district court has jurisdiction at chambers to appoint a receiver in a proper case. The constitution authorizes a judge of a court of record to perform any duty at chambers that may be given by law. Section 266 of the Code of Civil Procedure, already quoted, authorizes the district court, or a judge thereof, to appoint a receiver; and section 57, chapter 19, Compiled Statutes, expressly confers jurisdiction upon a judge of the district court, at chambers, to discharge such duties or to exercise such powers as may be conferred upon a judge in contradistinction to a court. The authority to appoint a receiver being conferred upon a judge of the district court, in contradistinction from the court itself, makes the provisions of said section 266 applicable. The order appealed from is

AFFIRMED.

BEE PUBLISHING COMPANY V. WORLD PUBLISHING COMPANY.

FILED NOVEMBER 7, 1901. NO. 9,105.

1. **Admission of Incompetent Evidence, Presumed Prejudicial.** When incompetent evidence is admitted to prove a fact not otherwise conclusively established, and it does not affirmatively appear from the record that the incompetent evidence did not affect, unfavorably to the objecting party, the verdict returned by the jury, the error in admitting such evidence will be deemed prejudicial and the judgment reversed.

2. **Witness:** ERROR: WAIVER. Where a question is asked a witness, and the adverse party examines such witness as to the competency of the proposed evidence and then interposes an objection to the question which is overruled and an exception taken and the witness is again asked the same question to which an

answer is given without further objection, the objection made to the question first asked and an exception taken to the ruling thereon is sufficient to present for review the admissibility of such evidence.

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

Rehearing of case reported in 59 Nebr., 713. *Judgment of affirmance vacated.* SULLIVAN, J., dissenting.

Edward W. Simeral and *Eleazer Wakeley,* for plaintiff in error.

Hall, McCulloch & Clarkson, contra.

HOLCOMB, J.

On the application of the plaintiff in error a rehearing has been granted in the present action, the opinion of the court on the former hearing being found in 59 Nebr., 713. A decision was there rendered affirming the judgment of the trial court, conditioned on the defendant in error, plaintiff below, filing a remittitur reducing the judgment obtained in the trial court to the principal sum of $4,000.

The cause of action is based on a libelous publication of and concerning the financial responsibility, standing, and business integrity of the plaintiff, well calculated to injure it in the conduct of its business and create serious doubts among its present and prospective patrons as to its ability to continue for but a short period of time its business, meet its obligations and fulfill contracts pertaining to its business, and necessary in the conduct of its affairs. It was represented that it was on the verge of bankruptcy, about to be swallowed up by another newspaper plant, and could not much longer continue as a paying business concern. Both the parties to the action are large newspaper concerns, engaged in the publication of daily and weekly newspapers of wide and general circulation. The libelous article was published by the defendant, and thus given general currency throughout a

wide extent of territory in which the plaintiff's paper circulated, and among many from whom it derived business patronage. Manifestly the article was given publicity in a reckless and wanton disregard of the right of the plaintiff to pursue its business unmolested by false and defamatory statements reflecting on its financial standing, its business integrity and permanency and stability as a newspaper concern. The article was, in the former opinion, held to be libelous *per se,* and with the correctness of the holding there is no room for doubt or discussion. In several particulars the views expressed in the opinion heretofore rendered are challenged, but a most careful consideration and re-examination of the subject confirms us in the views we have heretofore given expression to, save, perhaps, in respect of one question therein commented on and decided, which we will consider at greater length hereafter.

It is contended that the trial court erred in admitting evidence of express malice on the part of the chief proprietor and general manager of the defendant publishing company with respect to the publication of the libelous article. It is held—and, we think, without doubt correctly—in the opinion heretofore rendered in the case that under the issues raised, and in view of the answer tendered by the defendant, which was in effect a plea of the truth of the article, and that it was published with good motives and for justifiable purposes, that proof of malice, not for the purpose of enhancing the damages, but to refute the defense pleaded in the answer, was without prejudice, and proper, especially in view of the instructions given by the court which restricted a recovery of damages to the actual loss sustained. We are content with the views on this phase of the case heretofore expressed, and regard it as not conducing to a better understanding of the case to here again attempt to enlarge upon or more exhaustively discuss this assignment of error.

What we have said respecting the above subject ap-

plies with equal pertinency and force to the contention of counsel for plaintiff in error to the purport and effect that inadmissible testimony was permitted to go before the jury in the nature of expert or opinion evidence of two of the witnesses called on behalf of the plaintiff below to prove the probable effect on a large newspaper establishment, of a libelous statement given circulation regarding its financial standing, permanency and business stability. The evidence we regard as competent, and regarding a subject which the average mind would be illy prepared to pass intelligently upon in estimating the injury sustained by a libelous publication of the kind which is made the basis of this action, in the absence of testimony of those qualified to speak on the subject of the kind objected to. The plaintiff conducted an intricate and complex business enterprise on a large scale, involving an annual outlay of near two hundred thousand dollars. To meet its current expenditures, it was dependent to a great extent on advertising patronage from the business world generally. The elements of solvency, stability and permanency would, as a matter of common knowledge, as it appears to us, be factors which would to a greater or less degree influence the advertising public in extending patronage and placing advertising contracts; but all the factors entering into and inducing contracts for advertising and securing the confidence of advertisers, it seems equally clear, are matters peculiarly within the knowledge of those having experience in and special information concerning the management and conduct of the business of an extensive modern newspaper publication, whose testimony on the subject would be of special value, tending materially to assist a jury in determining the nature and extent of the damages sustained by reason of the publication of a derogatory article of the kind complained of. We observe no satisfactory reason, and feel that no occasion exists for a revision of the views heretofore expressed on the two questions mentioned.

There appears to us no very serious or doubtful point

arising in the case on the record presented calling for a modification of the decision first arrived at, aside from the question of the legal effect on the verdict of the jury of certain evidence held in the opinion to be incompetent, but not prejudicial. In the fourteenth paragraph of the syllabus it is held: "The admission of incompetent evidence is not reversible error, if the fact which it tends to prove is otherwise conclusively established." The point stated in the syllabus was occasioned by the admission in evidence of the testimony of Mr. Hitchcock, the manager of the World Publishing Company, plaintiff, as to the falling off or decrease immediately succeeding and to the time of trial in the lower court, of the advertising patronage of the plaintiff company, the figures testified to being the "footings" of the books of the company for several months succeeding the publication complained of, as compared with the same period immediately preceding such publication. The books of the company showing the business of which the witness testified were not introduced in evidence, brought into court, or the failure to produce them explained in any way or accounted for. They were, it appears, within the jurisdiction of the court and convenient to the place of trial. The evidence of the witness, being secondary, was therefore held by us on the former hearing to be incompetent; the books themselves being the best evidence. We also held that while the ruling was erroneous it was not prejudicial, and therefore afforded no sufficient reason for reversing the judgment. Our holding was placed on the ground that Mr. Hitchcock was familiar with the business of the plaintiff company and knew from sources independent of the books the amount of its receipts and expenditures; that his testimony from an abstract made up from the books was more for the purpose of perfect accuracy. He testified: "I know the volume of business transacted by the company, and I know it from constant management of the business and control of it, and also from constant inspection of the books which record the transactions." It is

said: "Our view of the matter is that the credibility and worth of the evidence does not depend alone upon the books of account, or the memoranda used by the witness, but also upon his independent knowledge of the facts to which he testified." It is this feature of the case that seems to require a more exhaustive consideration and analysis of the evidence in relation thereto than heretofore given. The right to a recovery of substantial damages for the wrongful publication of the libelous article was relied on by the plaintiff principally on the proposition that it suffered a material loss of advertising patronage as a result of and because of such publication; that advertisers with whom it had held time contracts for advertising for different periods, at the expiration of the contracts then in force ceased to renew, and others were prevented from entering into any new advertising arrangements, all because of and as a direct result of the publication of the article made the foundation of the suit. To sustain its cause of action, the plaintiff offered in evidence testimony of the nature, extent and value of the business it was and had been doing for several years prior thereto, and entered into comparisons as to the general increase of the business from year to year until the time of the publication; and that after the article was published the business ceased to increase, but remained stationary. Evidence was also offered showing or tending to show that the advertising branch of the business had sustained a marked loss or decline in the amount of advertising done the succeeding ten months compared with the same period preceding as a result of the wrongful publication. In line with the evidence of the character and for the purpose mentioned, there was offered and admitted in evidence a comparative table made up from the books of the plaintiff company, showing the comparative receipts of cash for advertising purposes for the first five months of the years 1895 and 1896, the libelous publication having been made in October, 1895. On motion of the defendant the statement thus prepared and introduced in evidence was stricken out and

withdrawn from the consideration of the jury as being incompetent, and not the best evidence. The witness, Mr. Hitchcock, who had been testifying regarding the subject, was also asked, regarding the same matter, other questions, to which answers were given as follows:

Q. Since the recess of the court, have you prepared a computation, Mr. Hitchcock?

A. Yes, sir.

Q. From that computation are you able to state whether or not the business fell off in the twelve months following October 3, 1895?

A. Yes, sir.

Q. How much did the business fall off during that time?

The witness was here cross-examined by opposing counsel, by which it was shown that the figures to which the witness was testifying were taken from the books of the company—the advertising register,— and an objection on that ground was interposed which was overruled. The witness was then asked:

Q. How much did the business fall off in that time?

A. It fell off $6,735. I am now referring to the earning from commercial advertising.

It is this evidence which it is earnestly contended by counsel for the defendant was admitted erroneously, and to the defendant's prejudice. There is, we think, as held in the former opinion, no escaping the conclusion that the evidence is incompetent, and the question is resolved to the one proposition of whether its admission, when considered in connection with the other evidence in the case, worked a prejudice to the rights of the defendant. A critical analysis of the evidence discloses that with the evidence contained in the comparative statement heretofore referred to which was withdrawn from the jury and the incompetent testimony under consideration as to the loss of advertising patronage eliminated from the case, there is no evidence of a falling off of advertising business or any other loss or diminution of the plaintiff's business,

which the jury might be warranted in attributing to the publication of the libelous article, except in a negative sense; that is, it is in evidence that the business had been steadily increasing for several years on an average of about ten per cent. a year, until at the time the article was published, when plaintiff was doing an annual business of about $180,000 to $190,000. After the publication of the libel the growth or increase of the business was checked, and for the succeeding ten months the volume of business was substantially the same as for a similar period prior thereto. In other words, the business, after the publication, ceased to grow, but maintained itself in the position it had attained at that time. Mr. Hitchcock, who was familiar with the business in its main features, also testified that the growth and expansion of the business had steadily and continuously increased for several years preceding in about the same average per cent., and that at the time referred to it was a profitable enterprise, doing a paying business, the receipts of which exceeded its expenditures, and that in all respects it was a progressive, going concern. The testimony of the same witness shows that in circulation the paper had, after as before the time of the publication of the libelous article, greatly increased, and continued in that respect to thrive without apparently any baneful effect from the derogatory statements of its business rival. Evidence was also adduced showing that in the business or advertisement department from a special source a large amount of advertising came to the plaintiff because of its designation as the paper in which to publish certain legal notices required of applicants for license to sell intoxicating liquors under the laws of the state; that the receipts from this character of advertising were near the sum of $2,500, and to that extent lessened, apparently, the natural and inevitable loss which it is claimed resulted from the wrong actions of the defendant. The above and foregoing covers substantially all the evidence introduced for the purpose of proving the pecuniary loss sustained by the plaintiff

as the result of the libelous publication. The verdict of the jury finding the amount of damages sustained was in response to and rested upon evidence including that held incompetent, of which the foregoing is a fair epitome.

The plaintiff grounded its right to recover for the libel sued on almost entirely on the injury sustained and damage done to its commercial or advertising business. No damage was claimed to have been suffered by reason of loss of subscribers or decrease in circulation. That branch of the business apparently had continued to increase in a satisfactory manner. The entire business according to Mr. Hitchcock's testimony was maintained at its customary level, and without decrease, solely because the circulation increased at a rapid and satisfactory rate. Inferentially, had it not been for the continued growth in the circulation department, an actual loss and diminishing of the gross receipts would have been the result. The relative importance of the commercial or advertising and circulation departments does not appear from the evidence; neither does it appear what proportion of the business done succeeding the publication was what might be denominated new business occasioned by the expansion in the subscription or circulation department. It appears reasonably clear from the competent evidence in the case that the business of the plaintiff was materially affected by the publication of the libel complained of, but there is no evidence tending to show with any degree of certainty any actual loss sustained in any department of plaintiff's business aside from the incompetent evidence as to the loss in commercial advertising. The only legitimate conclusion fairly inferable from the competent evidence is that, while the business had been gradually expanding from year to year at an average per cent. of increase of about ten per cent. until it did an annual business in volume of about $180,000 to $190,000, and that after the publication of the article complained of its growth was retarded or checked and remained practically stationary from that time to the time of the trial. While the jury

were perhaps justified from the evidence in returning substantial damages for the loss sustained in commercial advertising, eliminating entirely the incompetent evidence, the amount thereof is more or less problematical, and must be left to the good judgment and sound discretion of the jury. The damages returned by the verdict of the jury, or the lesser amount as fixed by the filing of a remittitur, can hardly be said to be conclusively established by the competent evidence. It is regarding a matter about which different minds might very reasonably, and probably would, differ to a considerable extent. The incompetent evidence was allowed to go before the jury as worthy of the same consideration and entitled to the same weight as evidence unquestionably admissible. On the theory of damages suffered by plaintiff on which the case was tried and under the evidence the jury were specially and particularly interested in any evidence from which an intelligent judgment could be formed as to the damage the plaintiff suffered by reason of loss in advertising patronage. Any evidence before them throwing light on the question would, in all reasonable probability, be seized upon for the purpose of returning a satisfactory answer to the inquiry and arriving at a correct verdict. Counsel for plaintiff, realizing the importance of evidence of this charcter, sought in the first instance to introduce a comparative table showing the decrease following the libel of this branch of plaintiff's business, and subsequently showing exactly the loss in such receipts for a certain period of time after the publication of the libel compared with the same period prior thereto. This evidence was based on an examination of the books of the company showing the receipts from advertising sources for the period covered by the evidence. No other evidence was introduced from which a loss in any particular sum could be inferred. The witness appears to be well informed as to the general business of which he was the general manager and principal proprietor, and as to the volume of business could speak with almost the same ac-

curacy as the books of the concern themselves. But as to the different branches of the business—the circulation and advertising departments, and the receipts and expenditures of each—he was not so well informed, and was compelled to fall back upon an examination of the books for the details testified to regarding such matters. The importance of the evidence is made manifest and emphasized by the contention of counsel to the effect that the books were so numerous and voluminous that testimony of one who had examined them, as to the result of such examination, was admissible without the introduction of the books. This seems to have been the view entertained by the trial court in admitting the testimony under consideration. In the former opinion, however, this view of the law was held erroneous, and numerous well-considered cases cited in support thereof, and of the correctness of the ruling there exists no serious doubt.

An examination of the authorities as to the admission of incompetent evidence establishes the rule to be that, if such evidence may have entered into the deliberations of the jury, and affected the result as shown by the verdict, the error will be regarded as prejudicial, requiring a reversal of the case. Or, stated in another way, when incompetent evidence has been admitted, it must affirmatively appear from the record that no prejudice to the adverse party resulted therefrom. Says Judge COBB, in *Harrison v. Baker,* 15 Nebr., 45: "While we may not be able to see what particular effect this testimony had upon the jury, it was well calculated to divert their minds from the true issue involved in the case, and it was the right of the defendant to have his case go before the jury without being encumbered with illegal or irrelevant matter." To the same effect is *Simpson v. Armstrong,* 20 Nebr., 512; *Darner v. Daggett,* 35 Nebr., 695. In speaking of the principles applicable to the admission of incompetent evidence the court of appeals of New York (*Coleman v. People,* 58 N. Y., 561) expresses itself as follows: "The rule undoubtedly is, that when a fact is conclusively proved,

by competent evidence, so that the court can see that no prejudice or injury could possibly have resulted from the admission of incompetent evidence to prove the same fact, its admission will not be cause for interfering with the result or reversing a judgment. * * * The true rule and the only rule that can be sustained upon principle is, that the intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious"; citing *Vandevoort v. Gould,* 36 N. Y., 639, and *People v. Gonzalez,* 35 N. Y., 49. The supreme court of Iowa, in speaking of the same subject in the case of *George v. K. & D. M. R. Co.,* 53 Ia., 503, 505, gives expression to the rule in the following language: "We can not but conclude the evidence, or probability, is greater that the jury were influenced by the improper evidence, than that they were not. But whether this be so or not, it is entirely clear that it does not appear the illegal evidence was not prejudicial. When such evidence is admitted, which bears upon the issue and questions to be considered by the jury, prejudice must result therefrom unless it can be satisfactorily shown that such was not the case, and this should affirmatively, not negatively, appear. In other words the court must be able to say that it appears no prejudice has been caused by the erroneous ruling, whatever it may be. This we can not say in this case, and, therefore, the result is the judgment below must be reversed."

The courts are practically of one mind on the question, and it would serve no useful purpose to multiply authorities. In the case at bar there is probably no contention on the part of any as to the soundness of the rule we have spoken of with reference to the admission of incompetent evidence. The only difficulty we encounter is in making a proper application of the rule under the record before us. The incompetent evidence was on a vital point in the case. It was pertaining to and had reference to that

branch of the plaintiff's business which it was claimed was especially impaired by the publication of the libel on which the action is founded. All the evidence tending to prove pecuniary loss as a result of the publication was directed to the loss and diminution of the business pertaining to commercial advertising. The damage alleged to have been suffered by plaintiff was because of loss in this department. All the evidence tending to prove damage in this regard was doubtless urged upon the jury as the basis for a verdict for damages in a substantial sum as the natural and approximate result of the libelous publication. The loss in advertising patronage, as ascertained from the books of the plaintiff, was given with precision and in such manner as to impress the jury with the truthfulness of the statement. No other evidence was before them showing any loss except such inferences as might be warranted from the evidence tending to prove that after the publication the business ceased to increase as it had before; that it remained stationary, the volume being practically the same as before the publication. The testimony of the loss of advertising, being secondary evidence, was, as was held in the first opinion, incompetent. A thorough and critical examination of the record and analysis of the evidence irresistibly leads to the conclusion that it not only does not appear therefrom that the incompetent evidence may not have influenced the verdict, and received weight and consideration from the jury in their deliberations, or that it had no harmful effect in arriving at their estimate of the damages sustained, but, on the contrary, in all reasonable probability this evidence alone was the inducement and principal factor which resulted in the verdict returned. It was upon the incompetent evidence that the jury in all probability acted in fixing the amount which the plaintiff ought to recover. We are unable to say that the amount of damages suffered by plaintiff for which judgment has been rendered is conclusively established by the other evidence in the case. We do not say that upon the evidence, eliminating that

which is incompetent, a verdict might not be sustained, but from a careful inspection of the record we are driven to the conclusion that the incompetent evidence was in all probability an important and overshadowing consideration in the deliberation of the jury, and materially entered into and affected the verdict by them returned. The other evidence bearing on the same point not being of a conclusive nature, and not determining with any degree of certainty any specified sum as the amount of damages sustained, the question is an open one for the jury, and it is for them, in the exercise of sound judgment and discretion, within the limits of the evidence, to allow such damages as they believe will fairly compensate plaintiff for the pecuniary loss sustained. What sum the jury would have fixed in the absence of the incompetent evidence we can not say. Certainly, we are not warranted in saying that it would have been the same sum had the incompetent evidence not been admitted. It logically and necessarily follows that the judgment, by the application of the principles governing the admission of incompetent evidence heretofore adverted to, can not be upheld.

It is contended by counsel for plaintiff that no objection was interposed to the question by which the incompetent evidence was elicited, and therefore defendant is not in a position to predicate error on the admission of the same. The record discloses that when the question was asked, as heretofore quoted, defendant's counsel examined the witness as to his source of knowledge as to the amount the advertising had fallen off, and showed by such examination that the witness was testifying to figures or "footings" obtained by him from the advertising register and from a private memorandum which he kept for his individual use, which was also made up and taken from the same book, which contained an account of the monthly receipts for advertising of all kinds, both before and after the publication of the libel, the difference being testified to as the loss from commercial or advertising patronage. An objection was then interposed on the

ground that the testimony was incompetent, and not the best evidence, and because the books, while in the jurisdiction, and convenient to the court, were not brought into court, and introduced as the best evidence of their own contents. The objection was overruled, and the question repeated and answered without further objection. We think the answer comes clearly within the objection and the exception to the ruling thereon. The question was asked, witness cross-examined regarding the source of his information, and objection to the question interposed, an adverse ruling had, and exception taken. The question was repeated for the benefit of the witness, and for the purpose of obtaining an answer to the question objected to, after a ruling had been obtained on the objection. It would not only have been a useless, but a needless interruption in the trial of the case to renew the objection to the same question immediately after the ruling and before any other testimony was taken. It seems to us entirely clear that the objection was interposed and a ruling had regarding the admissibility of the very evidence testified to by the witness after the question was repeated. There is nothing which would warrant us in saying that counsel had changed his mind regarding the evidence, and did not desire to further object. He had objected to the extent of his ability. He had noted his exception. He did all that he could to preserve his record and present the ruling complained of to a reviewing court, and anything further would have been needlessly encumbering the record. The objection interposed is sufficient to present the ruling thereon and the admissibility of the evidence for review. *Gilpin v. Gilpin,* 12 Colo., 504; *Graves v. People,* 18 Colo., 170; *Sharon v. Sharon,* 79 Cal., 674; *Dilleber v. Home Life Ins. Co.,* 69 N. Y., 256, 260; *Carlson v. Winterson,* 147 N. Y., 652, 656.

The order of affirmance heretofore entered is vacated, the judgment reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

SULLIVAN, J., dissenting.

I have no doubt at all about the correctness of the conclusion reached when the case was first submitted. If the undisputed testimony of Mr. Hitchcock, with respect to his knowledge of the plaintiff's business, is to be taken as true, then the approximate loss of commercial advertising sustained by the plaintiff in the year following the publication of the libel, is conclusively established by competent evidence. I see no reason to suppose that the witness did not have the knowledge which he professed to have. Neither do I discover any reason for holding that the loss of advertising patronage should have been proved with precision and exactitude. Rejecting entirely the testimony, to the extent that it is based on the books, and there remains uncontradicted evidence of the approximate amount of the plaintiff's loss.

ELISHA P. REYNOLDS, JR., V. FIRST NATIONAL BANK OF WYMORE.

FILED NOVEMBER 7, 1901. No. 10,308.

1. **Ultra Vires**: QUÆRE. Whether the contract pleaded in the petition is *ultra vires* as to the defendant bank, *quære*.

2. **Statute of Frauds**. Any agreement which by its terms is not to be performed within one year from the making thereof is void, unless the same or a memorandum thereof be in writing, and subscribed by the party to be charged thereby. Compiled Statutes, 1901, ch. 32, sec. 8.

———. Such a contract, to be void, must be one that by its terms is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time. *Powder River Live-Stock Co. v. Lamb*, 38 Nebr., 339.

4. ———. When by specific terms of the contract, or where it appears that it was not the intention of the parties that it should be performed within one year from the time of its making, the contract comes within the provisions of the statute and is void.

5. ———. The contract pleaded in plaintiff's petition *held* to come within the operation of the statute, and is therefore unenforceable.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Hazlett & Jack, for plaintiff in error.

Griggs, Rinaker & Bibb and *A. D. McCandless, contra.*

HOLCOMB, J.

From a ruling of the trial court sustaining a demurrer to the amended petition of the plaintiff and entry of judgment of dismissal of this action, he prosecutes error proceedings in this court. The petition of the plaintiff, so far as it is necessary to refer in the consideration of the points presented to us for decision, alleges in substance, omitting legal verbiage, that one Dolan was seeking to engage in the retail liquor business, and being largely indebted to the defendant bank it was desirous of helping him to engage in such business in order that he might have a good and profitable business and thereby be enabled to make money and pay off his indebtedness to said bank; that for the reason mentioned the bank assisted Dolan to obtain a bond in order that he might obtain a liquor license, which was necessary in order to engage in the retail liquor business; and that on or about April 10, 1890, the said bank, by its managing officer, requested and procured the plaintiff to sign the said liquor bond, representing to him that Dolan was largely indebted to the bank and was to assume large indebtedness to it and that it was to the interest of the bank to help Dolan procure a license and to help him obtain a bond in order that he might conduct the business, make money, and pay off the indebtedness which he was owing the bank, and that the bank at that time, by its managing officer, verbally promised the plaintiff and orally agreed with him that if he would sign the said liquor bond with the said Dolan, the bank would

hold him harmless by reason of said signing, and then and there undertook to the said plaintiff to hold him harmless by reason of the signing by the plaintiff of the bond of the said Dolan; that said request and agreement was made by the bank in the usual course of business and as a means of collecting a debt owing it by Dolan which it would otherwise have been unable to collect, and said agreement and promise was a direct promise to pay plaintiff, unconditionally, whatever moneys plaintiff should be compelled to pay and expend by reason of signing said bond, and was made on the bank's own behalf; that by reason of the said agreement the plaintiff signed the said liquor bond, which was filed and approved on or about the 12th day of April, 1890, and a liquor license was thereupon issued to the said Dolan to conduct a retail liquor business for the period of one year, and that he made payments from moneys realized from said business to the bank upon the said debt owing by him to it as aforesaid; that in August, 1891, suit was instituted for damages against the said Dolan and the sureties on his bond; and that the plaintiff was compelled to and did incur and expend for traveling and incidental expenses, court costs and attorneys' fees in and about the litigation, and in defending against the same, the sum sued for, which, it is alleged, by reason of the contract mentioned, the defendant bank is liable for, and for which judgment is asked against it.

Different propositions are presented and argued by counsel for the respective parties for and against the sufficiency of the petition, the principal ones being: (*a*) that the contract is *ultra vires* and void as to the bank and therefore unenforceable; (*b*) that it is void by reason of the statute of frauds, in that it is verbal and not to be performed within one year; and (*c*) because it is a special promise to answer for the debt, default, or misdoings of another and is not in writing.

It is not incumbent on us to discuss and consider the three propositions mentioned if any one is regarded as an

insurmountable obstacle to plaintiff's recovery on the facts alleged in the petition.

Whether or not the alleged contract is *ultra vires*, and non-enforceable for that reason, under the facts pleaded, may not be entirely free from doubt, and yet on first impression we are disposed to say it is. We do not, however, in our view of the conclusion which must be reached on the other propositions advanced, deem it best to enter into a discussion of this phase of the case, and therefore, without expressing a positive opinion, pass on to the second question presented, regarding which we think there can exist no substantial grounds for difference of opinion.

If the agreement was not to be performed within one year from the date of its making, this must be held to be decisive as to the proper disposition of the case on the demurrer to the petition. By section 8 of the statute of frauds (Compiled Statutes, 1901, ch. 32) it is provided that any agreement which by its terms is not to be performed within one year from the making thereof shall be void unless the same or a memorandum thereof be in writing and subscribed by the party to be charged therewith. The plaintiff argues that the agreement on which he grounds his right to a recovery is not within the inhibition of the statute; that the license of the principal on the bond to sell intoxicating liquors was for but the period of one year and that the obligation of the defendant bank to hold the surety on the liquor license bond harmless, and to be performed by it, could by the action of the principal possibly, and even probably, accrue and be discharged within a year from the time of making the contract. Counsel invokes the rule, which is well sanctioned by the decisions of the courts, and generally held to by the text-writers, that an agreement is not to be declared void, as coming within the provisions of the statute, because not to be performed within a year from the making thereof, if the performance of the contract depends upon a contingency which may happen within the year, although in fact it does not happen until after the

expiration of the year. On this same phase of the subject this court has spoken in a well considered case by its present chief justice, and we can not do better than to reiterate the rule therein announced, as a working basis for what may hereafter be said. In *Powder River Live-Stock Co. v. Lamb,* 38 Nebr., 339, it is held that such a contract to be void must be one that by its terms is not to be performed within one year from the making thereof, and that the statute does not refer to such contracts as may possibly or probably not be performed within that time. Says the author: "The statute does not include a verbal agreement which may possibly or probably not be performed within a year, nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period. When a contract, not in writing, by its terms, or by any fair and reasonable construction of its provisions, is capable of being performed within a year, it is not within the statute." And further on: "On the contrary, the doctrine established by the adjudications of this country is that, in order to bring a case within the operation of the statute of frauds, there must be an express and specific stipulation in the contract that it is not to be performed within the year, or it must appear therefrom that it was not the intention of the parties the agreement should be performed within that period"; citing *Treat v. Hiles,* 32 N. W. Rep. [Wis.], 517; *Baker v. Lauterback,* 11 Atl. Rep. [Md.], 703; *Aiken v. Nogle,* 47 Kan., 96; *Durham v. Hiatt,* 127 Ind., 514; *Kent v. Kent,* 62 N. Y., 560; *Barton v. Gray,* 57 Mich., 622; *Horner v. Frazier,* 4 Atl. Rep. [Md.], 133; *Smalley v. Greene,* 3 N. W. Rep. [Ia.], 78. Viewing the question in the light of what has just been quoted and the authorities referred to, can it be said that it was the intention of the parties that the contract pleaded in plaintiff's petition should be performed within one year from the time of its making, or that it was probable or possible that upon the happening of some contingency within that time it could be fully executed? The agreement was made

on the 10th day of April. The license bond upon which the plaintiff was surety, and for the consequences of signing which he was to be held harmless, was to continue in force for at least one year from the 12th day of April following. It is unnecessary for us to consider what the legal effect on the agreement is, from the fact that the bond was a valid obligation resting against the surety for any liability of the principal for any act done during the year for a period of five years thereafter, or during the running of the statute of limitations. We may assume that the agreement could be fully performed within the period covered and included in the time for which the license to sell intoxicating liquors was to run; *i. e.*, one year from the date of the issuance of the same. The agreement was to save the plaintiff harmless by reason of his having signed the bond which was required to be given as a condition precedent to obtaining a license. Such an agreement could not in the nature of things be performed until the period covered by the bond had fully elapsed. That was a year from the 12th day of April. The agreement was made on the 10th of April. The shortest possible period would be a year and two days. This time would be in contravention of the statute as much so as though it were two or five years. An hour more than the time specified is in law as fatal to the contract as though it were two, five, or a hundred years. As we understand counsel for plaintiff in error, the position is taken that possibly the only act of the principal on the bond for which a liability under its provisions could attach, might be committed in less time than one year from the time of making the contract, and therefore the agreement is valid under the rule spoken of. This contention, possibly, would be tenable if upon the happening of such act all further liability on the bond would cease, and the contract of indemnity be fully performed by saving the plaintiff harmless because of such liability thus created. But the agreement was to save him harmless for the entire period covered by the bond; and for any breach thereof, up to

and including the last minute for which the license was granted, the surety on the bond would be liable, and the defendant likewise, on its verbal agreement to save him harmless, were it not for the statute of frauds. It is expressly stipulated that the contract is not to be performed in a year. The defendant bank's liability by the specific agreement made is not to come to an end until the expiration of a year from the time the license was granted, and the bond accepted and approved, to cover and include the same period of time. It is, as it seems to us, quite clear that it was not the intention of the parties that the contract should be performed within one year from the time of its making. In no event, according to its terms, could it cease or be terminated without a violation of its terms, instead of a compliance therewith, for more than one year after it was entered into. The bank can not perform its agreement to hold the plaintiff harmless, except that its obligation to that end continue and remain in full force until the expiration of the full year for which the liquor license was granted. Its obligation is not discharged, nor the contract performed, until when at the end of that period it has responded to every legal demand arising against the plaintiff by reason of his suretyship; and the fact that a cause of action on the bond may arise the first month, or the last minute of the last month, can not change the principle applicable in determining the time for the complete performance of the contract of the defendant bank pleaded in the petition. It follows, therefore, that the demurrer to the petition was well taken, and no error was committed in sustaining it.

The judgment of dismissal is

AFFIRMED.

E. W. WORTHEN V. COUNTY OF JOHNSON.

FILED NOVEMBER 7, 1901. No. 10,458.

1. **Criminal Prosecution:** IN NOMINE REPUBLICÆ. All criminal prosecutions must be by and carried on in the name of the state of Nebraska. Constitution, art. 6, sec. 24.
2. **Witness's Fees:** LIABILITY OF COUNTY. The liability of a county for the per diem and mileage of defendant's witnesses in a prosecution for a felony, even though an acquittal follows, must arise by some express provisions of the statute, and not by implication.
3. ———: ———: INDICTMENT FOR FELONY: CODE. Prior to the amendment in 1885 of section 461 of the Criminal Code, a county was not liable for defendant's witness costs where he is indicted for a felony. *Hewerkle v. Gage County*, 14 Neb., 18.
4. ———: ———: ———. Under the provisions of section 461, as amended, a county is liable for the per diem and mileage of witnesses for the defendant in prosecutions for a felony, when the defendant has been convicted and is unable to pay such fees, or where he is acquitted, only when there has been filed in the case the affidavits required by that section, and an order of court entered that such witnesses, not exceeding the number limited, be summoned, and paid their witness fees from the county treasurer.
5. **Petition.** Petition *held* not to state a cause of action.

ERROR from the district court for Johnson county. Tried below before STULL, J. *Affirmed.*

L. C. Chapman, for plaintiff in error.

M. B. C. True, contra.

HOLCOMB, J.

The plaintiff in error was a witness for the defense in a criminal prosecution wherein the defendant in the criminal action was charged with a crime amounting to a felony. The case was tried in the district court of Pawnee county on a change of venue from Johnson county. On the trial of the criminal charge, the defendant was acquitted. The costs made in the case, including plaintiff's

claim for witness fees were properly certified by the clerk of the district court of Johnson county, wherein the crime was alleged to have been committed and the prosecution begun, to the board of county commissioners. That body refused to allow plaintiff in error his claim and rejected the same. An appeal from the action taken was duly perfected to the district court where a petition by the plaintiff was filed, which was demurred to and the demurrer was sustained. From the ruling of the trial court sustaining the demurrer to his petition the plaintiff prosecutes error.

The petition seems to be framed on the theory that Johnson county, the defendant in error, was plaintiff, filed the information and prosecuted in its name the defendant in the criminal prosecution mentioned, and that on the verdict of acquittal a judgment was rendered against the county for costs. If such were the case, that proceeding and the judgment rendered therein would be a nullity binding upon none, since all criminal prosecutions must be by and carried on in the name of the state of Nebraska. Constitution, art. 6, sec. 24. We are disposed, however, to overlook the weakness of the petition in this regard, and consider the matters presented as though the criminal prosecution was in all respects regular, as we assume it was, and that the acquittal of the defendant left the question of liability of the county for the fees of defendant's witnesses made by him and on his behalf to be determined on other considerations. The sufficiency of the petition is challenged on different grounds, one of which only, in our view of the case, is it advisable to consider. We are cited by counsel to several sections of the Civil Code, and some authorities construing such sections, in support of the position taken by the plaintiff in error as to the liability of the county for the defendant's costs in the criminal action. In our judgment, none of these citations are at all applicable to the question of the sufficiency of the petition, or the liability of the county under the facts pleaded, and they will not, therefore, be considered.

The question presented is whether the county is obligated and should be held responsible for the payment of the per diem and mileage due to the defendant's witnesses in a criminal prosecution in which an acquittal followed, and this must be found, if at all, in the Criminal Code. Neither the state or county can be held liable for such costs except by force of statutory provisions. The liability of the county for payment of defendant's witness fees and costs in criminal prosecutions arises only by virtue of legislative enactment. It can not arise by implication, but must be by express statutory provision. *Dodge County v. Gregg,* 14 Nebr., 305. Our attention is called to section 537 of the Criminal Code which provides: "Upon the discharge or conviction of the defendant in any case of felony in the district court, it shall be lawful for the clerk of such court to file in the office of the county clerk a bill of the costs not previously allowed by the county commissioners, whereupon the same shall be examined into, audited, and allowed, and paid in the manner specified in the last preceding section," etc. It is claimed this section establishes a liability on the county for such costs. We do not so regard it. The object of the section was not to fix upon the county liability for any particular class of costs but to provide a means for the payment of such costs as the county was legally liable for. The preceding section to which reference is made relates to the manner of payment of certain fees and costs in criminal cases on preliminary examination before magistrates. This last mentioned section has been thoroughly considered and construed in the case of *Boggs v. Washington County,* 10 Nebr., 297; also *Dodge County v. Gregg, supra.* It is also provided by section 541 that the fees of all witnesses in criminal cases in the district court shall be paid by the county where the indictment is found; but this does not have the effect of enlarging the liability of the county for a defendant's witnesses' fees in case of an acquittal, but only locates the county responsible for such fees as it may legally be required to pay. These several sections have formed a part

of the Criminal Code almost ever since its adoption. The county's responsibility for costs in criminal cases made by witnesses for the defendant has heretofore been before the court for consideration, and it is held, as we understand the force of the decision, not to exist. With these sections then existing and in force as a part of the Criminal Code, it was decided in 1883, in the case of *Hewerkle v. Gage County,* 14 Nebr., 18, that the county is not liable for defendant's witness costs where he is indicted for a felony. Says COBB, J., who wrote the opinion of the court: "Again, if it be conceded that it was the intention of the framers of the constitution to make it the duty of the legislature to provide for the payment of the costs of the witnesses of all persons indicted for felonies, it will also be obvious that until that duty is discharged by the legislature, the right thereto on the part of the citizen remains suspended. It can not be claimed to be one of those rights which vindicate themselves and can be enjoyed without further grant or limitation by the law-making power. The writer can not conceive that it could have been the intention of the experienced men who framed the constitution, to place within the uncontrolled hand of every malefactor the power to inundate the streets of the county seat, where he is about to be tried for crime, with his friends from the four corners of the state under the pay of the county, upon pretense that they are his witnesses." In view of the construction placed on the different sections referred to, the legislation which immediately followed the decision in the case of *Hewerkle v. Gage County, supra,* should, it would seem, put at rest all possible doubt regarding the subject. The legislature of 1885 amended section 461 as it then existed and provided specially that any person accused of crime amounting to a felony shall have compulsory process for witnesses, who shall be paid their mileage and per diem as shall be allowed by law to witnesses for the state, and in case the accused is convicted and unable to pay such fees, or in case he is acquitted, such mileage and per diem shall be paid out of the county treasury; provided,

says the statute, that in no case shall the fees of any such witnesses be so paid unless before the trial the accused person shall make and file his affidavit, supported by the affidavit of his counsel, stating the names of the witnesses, and that he has been advised by his counsel that their testimony is material, whereupon the court or judge shall make an order directing that such witnesses, not exceeding fifteen in number, shall be paid out of the county treasury. This section is the last expression of the legislature on the subject. It was evidently to provide for that which was held not to exist in the case last cited, to-wit, the liability of the county for witness fees of a defendant in a criminal case amounting to a felony, where he was convicted and unable to pay such fees, and also when acquitted. The statute is not ambiguous nor uncertain as to its meaning. It admits of but one construction, and that is that in order to render the county liable for defendant's witness fees, the affidavits mentioned must be made and filed in the case, and an order of the district court entered directing that such witnesses be summoned at the expense of the county. The limitation as to number was in all probability to prevent the very condition of things suggested by Judge COBB in the excerpt of the opinion heretofore set forth. The petition in the case at bar utterly fails to show a compliance with the requirements of the statute with reference to the affidavits and order of court as to the witnesses for the defendant in the criminal action mentioned, and it for that reason fails to state a cause of action.

The ruling of the trial court is right, should be, and is,

AFFIRMED.

WILLIAM V. A. DODDS ET AL. V. MCCORMICK HARVESTING MACHINE COMPANY.

FILED NOVEMBER 7, 1901. No. 10,479.

1. **Petition on Promissory Note:** COPY: ALLEGATION INFERENTIAL SUFFICIENT. A petition declaring on a promissory note which is copied therein, and from the allegations of which it may be inferred that the sum alleged to be due was due from the adverse party to the plaintiff, states a cause of action, although it is not alleged in direct terms that the sum claimed is due from the adverse party to the plaintiff.

2. **Usury:** MISTAKEN COMPUTATION. When in the computation of interest a mistake is made, and more than ten per cent. is charged, the contract will not for that reason be declared usurious.

3. ———: CONTRACT. Before a contract may be declared usurious, there must be an agreement between the parties to charge and receive a greater rate of interest than that allowed by law.

4. **Withdrawal of Question from Jury Proper.** Action of trial court in withdrawing from the jury the question of usury held proper.

5. **Instruction Erroneous Without Prejudice.** An instruction, even though erroneous, is without prejudice and no ground of reversal, where the party complaining could in no view of the case recover on the issue covered by such instruction.

6. **Recovery for Breach of Warranty.** A recovery on an alleged breach of warranty, *held*, could not be had under the evidence in the case.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Samuel Rinaker and *R. S. Bibb*, for plaintiffs in error.

Wilson & Brown and *S. D. Killen, contra.*

HOLCOMB, J.

Verdict and judgment went against the defendant in the trial court, and he brings the cause here by proceedings in error. The petition is assailed for the first time in this court as failing to state a cause of action and being insufficient to support the judgment rendered. The cause

of action is founded on a promissory note which is copied in the petition. Its execution and delivery by the defendant to the plaintiff is alleged, and also that no part of the note has been paid, and that there was due thereon the sum for which the note was given with interest from the date thereof at the stipulated rate. Because it is not alleged that the sum claimed is due from the defendants to the plaintiff, the petition, it is argued, is fatally defective. In *Gage v. Roberts,* 12 Nebr., 276, it is held that a petition declaring on a note, as in the case at bar, must allege that there is due thereon from the adverse party to the plaintiff a specified sum, unless these facts may be inferred from others pleaded. The rule was reaffirmed in *Spellman v. Frank,* 18 Nebr., 110. Unless, then, the allegation which is wanting in the petition in the case at bar may be inferred from other facts pleaded, the petition must be held bad. It is not alleged in direct terms that the sum claimed is due from the defendants to the plaintiff. But the note itself is pleaded, in which, according to its terms, the defendants, as makers, promised unconditionally to pay the plaintiff, as payee, the sum claimed in the petition. It is also stated in the petition that the instrument was executed by the defendants in favor of the plaintiff; that it was delivered by the defendants to the plaintiff; that no part of the note had been paid and that there is due thereon the sum sued for.

It is altogether warrantable to infer from the pleading as thus drawn that the amount claimed to be due on the instrument was due from the makers, who are the defendants and the adverse parties to the action. The note having been, as alleged, executed in favor of and delivered to the plaintiff, the logical and reasonable inference is that whatever sum is alleged to be due thereon is due to the plaintiff, as payee, to whom it is alleged the instrument was delivered. There is no presumption that the note has passed out of the plaintiff's hands or that it has been transferred to some third party. On the other hand, when it is alleged that the note was executed and delivered to

the plaintiff, the presumption is it was the owner at the time of delivery, and has continued as such to the time of bringing the action. If our views are correct in this regard, we think it follows as a necessary conclusion that the facts which it is contended are necessary to constitute a good petition and which are not alleged in direct terms, may properly be inferred from the other facts pleaded; and, under the general rule prevailing as to construing pleadings liberally when attacked as this one is, the petition will be held to state a cause of action.

In the answer the defendants pleaded that the contract on which plaintiff grounded its action was tainted with the vice of usury. The trial court, by an instruction, withdrew the question from the jury and complaint is made because thereof. The note sued on was a renewal of a prior note given for a machine purchased from the plaintiff. At the time of the renewal of the first note, in the computation of interest a mistake appears to have been made of the sum of $1.44. There is an utter lack of evidence to justify the conclusion that the parties intended to or did enter into a usurious contract. The very essence of a contract usurious in character is the agreement to take or receive and to pay a greater rate of interest than that allowed by law. Treating the renewed note as a contract for the loan or for the forbearance of money, and yet the evidence falls far short of proving an agreement between the parties to charge and receive a usurious rate of interest. Such a mistake under the most rudimentary principles of justice, could not and should not be converted into an unlawful contract. 27 Am. & Eng. Ency. Law, 920, 970, and authorities therein cited; *Johnson v. Shattuck,* 53 S. W. Rep. [Ark.], 888; *Rushing v. Willingham,* 31 S. E. Rep. [Ga.], 154. The trial court, in our judgment, properly withdrew the question of usury from the jury.

It is next contended that the court erred in its third instruction to the jury, in which, in speaking of the law in respect of an alleged warranty of the machine for which the note was given and a breach thereof, it was stated:

"You will next inquire whether or not there was a breach of said warranty and as to this question the court instructs you that your inquiry should be whether at the time the machine was purchased, and at the time when it was put to work at the work for which such machines are made, or within a reasonable time thereafter it failed to fulfill the conditions of the warranty, and the burden of proof of the warranty and the breach thereof is upon the defendant." The instruction it is contended is faulty, because, as stated by counsel, it told the jury that "under the law the defendant must find out in a reasonable length of time that the machine did not fulfill the warranty." Without deciding the question, we are of the opinion that conceding the instruction to be erroneous, as claimed, it is error without prejudice. It is alleged that the harvester, which was a second-hand machine, was verbally warranted "to be first class in every respect and to do the work for which the same was sold," and that it was worthless. The defendant testified that he used it for two seasons and that it gave reasonable satisfaction. The third season, it is testified, the grain was heavier and the machine failed to do satisfactory work in binding the bundles of wheat as it was being harvested. He also says the machine was worthless to him. It is, however, conclusively shown that if there existed in fact any breach of the alleged warranty it was only with respect to some of the machinery by which bundles were tied, and that in other respects no breach of the warranty is attempted to be shown. There is also no evidence upon which a jury could predicate a verdict as to the amount of damage, if any, in respect of the defective machinery spoken of. The defendant's testimony that the machine was worthless to him, in the face of the overwhelming evidence that it was substantially as warranted, save possibly the defective machinery for tying bundles, furnishes no guide by which a jury could estimate the damages sustained. The replacing of the defective machinery, if it were so, could have been had, in all probability, at a very small expense; and yet there is no evidence

to show what this item of expense would be, or what was the depreciation in the value of the machine by reason of such defect, if existing. In no view of the case could the jury have returned a verdict under the evidence on this issue in favor of the defendant, and hence no error could have been committed by the instruction complained of, *McCormick Harvesting Machine Co. v. Martin,* 32 Nebr., 723; *Osborne & Co. v. Huntington,* 33 N. W. Rep. [Minn.], 789; *Osborne & Co. v. Carpenter,* 34 N. W. Rep. [Minn.], 163.

We observe no prejudicial error in the record, and for the reasons stated the judgment of the trial court should be

AFFIRMED.

JOSEPH GOLDSMITH, APPELLEE, V. CATHARINE WRIGHT, APPELLANT, ET AL.

FILED NOVEMBER 7, 1901. No. 10,524.

Confirmation: APPRAISAL: VALUE: CONFLICTING EVIDENCE. Mere difference of opinion, fairly balanced, as to the value of real estate appraised and sold in foreclosure proceedings, is not a good ground of objection to confirmation.

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

I. R. Andrews, for appellant.

J. J. O'Connor, contra.

HOLCOMB, J.

Appellant complains of an appraisement of real property made in foreclosure proceedings under an order of sale issued therein, and the confirmation of sale made on such appraisement. It is contended that the property was appraised so much below its true value as to raise the presumption of a fraudulent appraisement. Two wit-

nesses made affidavit that in their opinion the property was worth $4,500, and one that it was of the value of $4,600. Two witnesses and three appraisers place its value at $3,000. We do not think it can be inferred from evidence of the kind and character indicated that the appraisement was so low as to suggest or operate as a fraud on the rights of the appellant, or that the trial court committed error in overruling objections to the confirmation of sale because of the appraisement so made.

The order appealed from is accordingly

AFFIRMED.

MRS. S. C. HATCH, APPELLANT, V. NELS SHOLD ET AL., APPELLEES.

FILED NOVEMBER 7, 1901. No. 10,546.

1. **Mortgage:** TITLE IN MORTGAGOR PENDING CONFIRMATION. The legal title of mortgaged real property remains in the mortgagor pending the confirmation of a sale thereof made under a decree of foreclosure of the real estate mortgage.

2. **Payments Before Confirmation Accrue to Mortgagor's Benefit.** All payments made on the decree prior to confirmation accrue to the benefit of the mortgagor, and the excess of the sum for which the premises sold, after deducting costs and the amount of such decree, with interest, less the payments made thereon, should be paid to the mortgagor.

APPEAL from the district court for Dawes county. Heard below before WESTOVER, J. *Affirmed.*

Albert W. Crites, for appellant.

G. A. Eckles and *Allen G. Fisher, contra.*

HOLCOMB, J.

After a decree of foreclosure of a real estate mortgage had been rendered, and the property bid in by a trustee of the plaintiff under an order of sale issued in pursuance thereof, but before the confirmation of sale, it appears that a fire damaged the building on the mortgaged prem-

ises on which insurance was carried. After some negotiations the mortgagor repaired the building thus damaged, bringing it to as good state as before the fire, and the insurance money was applied on the decree under which the property had been sold. Acknowledgment of the payment was made in the following manner and form:

"CHADRON, NEBR., November 14, 1898.

"Received of N. Shold per G. T. H. Babcock the sum of one hundred eighty-five and 75-100 dollars to apply on decree of foreclosure Hatch v. Shold,"—signed by the plaintiff by her attorney.

On application for confirmation of sale, and at the time thereof, the trial court entered an order directing the payment to the defendant mortgagor the excess of the proceeds of the sale, after deducting costs and the amount of the decree, with interest, less the payment above mentioned. From this order the plaintiff appeals, insisting the payment should not have been deducted from the amount of the face of the decree, with interest. This contention is certainly most inequitable. The purchaser on confirmation obtained title to all the property that he had bid in, and as valuable as it was when the bid was made at sheriff's sale. He was not asking to have the sale set aside for any reason, but prayed its confirmation on the terms of sale at which he had bid the property in. We can conceive of no rule by which the plaintiff could ask to have paid her in satisfaction of her decree more than was due when it was satisfied. Suppose the purchaser had been some third party and the decree had before confirmation been satisfied to the extent of one-half of the amount due; would the plaintiff be in a position to rightly claim of the proceeds of the sale the full amount of her decree? We think not. We are not favored with any brief by the appellee. The appellant takes the position that the mortgagor after the sale had only the bare right to redeem the premises from the sale, and no other right, interest or title in the land whatever, and that the payment can only be regarded as an attempt to redeem, which

having failed because the full amount due was not forthcoming, he has altogether lost the payment thus made. But the rule is, as we understand the law and the force of prior decisions, that the legal title to the mortgaged property remains in the mortgagor and is not divested until confirmation of sale,—possibly not until the officer making the sale has after confirmation executed and delivered a deed to the property in pursuance of the order of confirmation. Conversely, the mortgagee has during such time only a lien for the amount due him, which may, before its satisfaction, by sale or otherwise, be divested by payment of the amount due, in whole or in part. Until confirmation of sale, the mortgagor's equity of redemption is not cut off, and his legal title to the property gives him a valuable interest therein, and a right of action to protect that interest, subject only to the superior lien of the mortgagee for the amount due on the incumbrance. The plaintiff at the time of confirmation has no right to demand of the proceeds of the sale of the mortgaged property more than a sum sufficient to pay the amount then due on the decree. This, it occurs to us, is what she attempted to do in this case, and the court ruled equitably and rightly in refusing the demand. The purchaser has no cause of complaint, because he has received all that he bargained for when he made the bid for the property, which was accepted. No question is presented in the case at bar as to the rights of parties when property has been depreciated in value by fire between a sale thereof and the time of confirmation, nor the proper application of insurance money where the property is insured and loss occurs under the circumstances last mentioned. In this case the damage was repaired at the expense of the mortgagor, and the payment made and applied on the decree was as though no loss had occurred, and as though made by the mortgagor from his personal funds.

The order appealed from should be, and is,

AFFIRMED.

STATE OF NEBRASKA, EX REL. JAMES P. CONNOLLY, V. D. M. HAVERLY, COUNTY CLERK OF DOUGLAS COUNTY.

FILED NOVEMBER 7, 1901. No. 12,322.

1. **County Commissioner's District: ALTERATION OF BOUNDARY: JURISDICTION OF BOARD: TIME LIMIT.** The board of county commissioners in counties having over 125,000 population is empowered by section 54, article 1, chapter 18, Compiled Statutes, 1901, to alter the boundary lines of the different commissioner districts of such county, for the purpose of adjusting such districts to changing population, not oftener than once in three years.

2. ———: ———: **ALTERATION PROSPECTIVE, AND DOES NOT OPERATE AS OUSTER.** Such alterations of district boundary lines when made are prospective in character, and do not have the effect of depriving a county commissioner then holding office from exercising the duties thereof for the full term for which such officer was elected, even though by the change of boundary lines such officer's residence is without the boundary lines of the district from which he was elected.

3. **Residence of Commissioner Outside of Limit.** By such an alteration of boundary lines an officer becoming a resident of another commissioner district does not thereby succeed to and hold the office of commissioner from such other district after the expiration of the incumbent's regular term of office.

4. **Mandamus to Compel Officer to Call Election Does Not Adjudicate Title to Office.** In mandamus proceedings to compel a county officer to call an election in one commissioner district, a determination that a vacancy existed in such district, because the commissioner elected therefrom had, by a change of boundary lines, become a resident of another district, is not an adjudication that such commissioner would succeed the regular incumbent from such other district upon the expiration of the latter's term of office, nor that no vacancy would exist in such other district by reason of the expiration of the incumbent's regular term, to be filled at the succeeding general election.

5. **Title to Office Can Not Be Tried in Mandamus.** The title to an office can not be tried and determined in an application for a writ of mandamus. *State v. Plambeck*, 36 Nebr., 401.

6. **Finding at Chambers Must Be Founded on Issues.** The judgment or final order of a court or of a judge sitting at chambers must be founded upon and within the issues made by the pleadings.

7. **Writ of Mandamus.** A peremptory writ of mandamus must in all essential respects conform to the alternative writ.

APPLICATION for a writ of mandamus to compel the respondent, as county clerk of Douglas county, to place on the official ballots the name of the relator as a candidate for the office of county commissioner. *Writ allowed.* NORVAL, C. J., dissents.

Smyth & Smith, for relator.

F. A. Brogan, Nelson C. Pratt and *Harrison C. Brome, contra.*

HOLCOMB, J.

The relator by mandamus proceedings seeks to compel the respondent, as county clerk, to place his name on the official ballots as a candidate of the democratic and people's independent parties for the office of county commissioner of the second commissioner district of Douglas county. Douglas county has over 125,000 population and is and has been for several years divided into five commissioner districts under the law applicable to such counties. Compiled Statutes, 1901, ch. 18, art. 1, sec. 54. In June of the present year, the board of county commissioners by resolution duly adopted, changed and altered the boundary lines of the several commissioner districts for the purpose, as claimed, of more equitably adjusting the districts so as to conform to changes in population of the county since the formation of the several districts theretofore existing. It is practically conceded that the changes thus made in the boundary lines of the districts as then existing were a valid exercise of the power conferred on the board of county commissioners by the legislature, which under certain conditions authorizes action in relation to such matters. The power is, we think, clearly conferred—if not expressly, by unmistakable implication—in the section referred to, wherein is found provision for the districting of a county into five commissioner districts, and for the election of commissioners therefrom. And it is also provided that such districts "shall consist

of two (2) or more voting precincts, comprising compact and contiguous territory and embracing as near as may be possible, an equal division of the population of the county, and not subject to alteration oftener than once in three (3) years." The section cited and those immediately connected therewith provide further that the commissioners elected from the different districts shall have the qualifications of electors, and shall be elected in their respective districts at the annual general election and shall hold their office for three years, and until their successors are elected and qualified. By reason of provisions as to the length of office of the several commissioners when first elected after the act has become operative in any county, the terms of the five commissioners do not expire in the same year, and at each general election thereafter one or two of the five members constituting the board are to be elected for a term of three years, beginning in January following. It is not required of us, for the purpose of this case, to refer to or consider the action of the county board in changing the lines of but two of the commissioner districts of Douglas county, and the effect of such change on the members of the county board elected therefrom, as this will cover all matters involved in the controversy.

The direct question involved is whether it is legal and proper at the general election this year to elect a successor to the relator, James P. Connolly, whose term expires in January following. The relator is at present holding and filling the office of county commissioner, having been elected thereto from commissioner district number 2, in which he has been at all times and now is residing, and is a candidate for re-election. One Harte is also a member of the board of county commissioners, having been elected from commissioner district number 1, and was elected at the last general election for a term of three years, beginning January, 1901, or until January, 1904. Prior to the alteration of the boundary lines of the several districts made by the commissioners in June last,

which has been heretofore mentioned, the First commissioner district, from which Harte was elected, comprised the Second, Fourth and Seventh wards of the city of Omaha, while the Second district, from which Connolly was elected, included the Third, Eighth and Ninth wards of the city. By the change of boundary lines made by the commissioners, ward number 2, in which Harte resided, was dropped from the First district, and ward number 8 included within the new boundary lines, so that by the change of lines thus made, new commissioner district number 1 includes in its boundaries the Fourth, Seventh and Eighth wards. The boundary lines of the Second commissioner district were altered so as to include within the new district the First, Second and Third wards. It will be noticed that by the new alignment the Second ward, in the First district, is transferred to the Second district, and in lieu thereof the Eighth ward is transferred from the Second to the First district; that the Ninth ward is eliminated from the Second district, and the First ward included therein. Both Connolly, who resides in the Third ward, and Harte, in the Second, it will be seen, are now residents of the territory included within the boundaries of the new Second commissioner district. If we understand counsel aright, it is agreed on all sides that the act of the county commissioners in altering the boundary lines of the several districts by the adoption of the resolution referred to was a legitimate exercise of authority conferred on that body by the legislature. It is also agreed, and the argument on both sides is predicated on the theory, that by such rearrangement and change of boundary lines none of the commissioners then holding office could by such action be deprived of their office, or legislated therefrom, for and during the term for which they respectively were elected. It is argued, and we are disposed to think correctly, that the resolution changing the boundary lines was prospective in its operation and effect, and because thereof operative only at the expiration of the several terms of office of the dif-

ferent county commissioners then constituting the board. It is true that respondent's counsel argue that unless the act of altering the boundary lines can be construed in such a way as to give the new First district the right to elect a commissioner whose term is to begin when Connolly's ceases, and permit Harte, for the remainder of his term, to represent the new Second district, that the resolution of the county board ought to be declared invalid, because it is depriving the First district of representation on the board, and is, therefore, contrary to the spirit of the statute authorizing alterations, when considered with other provisions for representation on the board by districts. But it is contended that Harte, ever since the passage of the resolution changing the boundary lines, is representing, and will, until the expiration of Connolly's term of office, continue to represent, the district from and by which he was elected, or, in other words, that he is filling and will continue to fill the office, and perform the duties thereof, to which he was elected, notwithstanding the change in boundary lines, until an opportunity arises, when, presto! change! he is to become the commissioner for and from the Second district, and a new commissioner will succeed him in the office to which he was elected before his term to that office has expired. That is, it is argued that until there is a vacancy in some other district in which he resides, by the change of boundary lines, Harte occupies the office and represents the district by and from which he was elected, but, when a vacancy arises in the new district to which he has thus been transferred, he then ceases to fill the office to which he was elected, and becomes a commissioner from the Second district to succeed Connolly, whose regular term has expired. Having taken the position that, notwithstanding the change of boundaries, Harte continues to represent the district from which he was elected, and conceding that he can not by reason of a change in boundaries be deprived of his office, we think the only logical conclusion which can result from the attitude assumed

is that Harte holds the office of commissioner from the First district, and may hold and enjoy the emoluments of that office and perform the duties thereof for the term for which elected, unless a vacancy occurs in some of the modes provided by statute. To illustrate our position: If Harte's term of office had begun one year earlier than it did, and Connolly's one year later,—not an improbable condition of affairs,—all are agreed that, notwithstanding the change of boundary lines, each may of right continue in the office to which respectively elected, and representing the district from which elected until the expiration of his term, notwithstanding they were both residing in the same district under the new formation. Their successors would each have been chosen at the same general election, and no question would have arisen such as we are now called upon to decide. Holding that Harte can not be legislated out of office, and that at the expiration of Connolly's term he becomes his successor for the remainder of the term to which he was elected, may, as a matter of expediency, be entitled to consideration; but certainly there can be no logical process of reasoning engaged in, or sound rule of law given, which would justify such a conclusion. Harte has either been legislated out of the office to which he was elected, by the action of the county board, if valid, or he has the lawful right and authority to hold the office and exercise its functions until the expiration of the term for which he was elected. If a vacancy in the office results from the changes in boundary lines of the district, that vacancy exists at the time of passage and taking effect of the ordinance, or it does not exist until the term expires. It will not do, as it seems to us, to say that he fills the office for a portion of the time after the alteration is made, and is then transferred to another office, to which he was not elected, and a vacancy thereupon arises in the district from which he was elected. We opine that the county commissioners can not legislate him into another office, any more than they can legislate him out of the office to which he was elected. The

two offices are distinct, and a vacancy in either, by the expiration of the regular term, or from any other cause recognized by statute, is to be filled in the manner provided by law, and not by a transfer from one office to the other The statute provides what circumstances shall cause a vacancy in the office of county commissioner, and nowhere does it appear that the circumstances we are now dealing with shall operate as a vacation of the office to which a person has been duly elected. Section 101, chapter 26, providing what events shall cause a vacancy in any civil office, among other things, in subdivision 5 declares that a vacancy shall exist when the incumbent ceases "to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to [be] exercised, or for which he may have been elected." In this case the change of boundary lines, with no change of residence, can not, we think, be said to be a change of residence, within the meaning of the statute. It contemplates a removal by the incumbent from the territory or district from which he was elected. In this case there has been no removal, and each of the two commissioners mentioned are, and have continued to be, residents of the district from which they respectively were elected. Harte is no less qualified to represent the district from which he was elected by the change of boundary lines, and the same may be said of Connolly. Harte's membership on the county board is not affected by a change in boundary lines. The law has provided that, for the purpose of an election, commissioner districts are to be formed, and commissioners elected therefrom, who shall hold their office for three years; and it would seem that, with no change of residence, every purpose of the statute is fully subserved by his performing the duties of his office for the term to which he was elected, regardless of change in boundaries of the district. It is probably true that the effect of these changes in boundary lines is to give some of the voting precincts or wards an opportunity to vote for a commissioner earlier than would

be the case under the old alignment, while others could not vote until after such time; and yet this is inevitable under any alteration of lines which is conceivable. The effect operates both ways, and of necessity exists under any possible plan by which boundary lines may be changed to conform to a changing and increasing population when commissioners for different districts are not elected in the same year.

The argument of the right of representation, when applied to voting precincts and wards, is misleading and confusing, in that under the law the representation on the county board is from a territory defined as a commissioner district, from which a commissioner is elected at stated periods, who fills the office to which elected for the time provided by law as a county commissioner from such district, and not from a ward or voting precinct therein.

In support of contention of counsel for respondent that Harte succeeds to the office now filled by Connolly at the expiration of the latter's term of office, and consequently no election for county commissioner should be held in that district at the general election this year, we are cited to the case of *Foltz v. Board of Commissioners,* 50 Ind., 562, decided by the supreme court of that state in 1875. That opinion gives, we think, indirect support to the views of counsel for the respondent. The question there arose as to when the term of office of a commissioner began who was elected after a county had been redistricted into new commissioner districts. The beginning of the term of the office of the commissioner whose office was in controversy was somewhat similar to what would be the case if a successor to Harte was elected at the present election, and his right to the office as the successor of Harte in the First district was in question. In that case Swann, who may be said occupied a position similar to that of Harte, was held not to be the commissioner of new district number 2; he having before the redistricting been a commissioner from old district number 2, a portion of which was included in new district 3. Says the

court: "Swann was not the commissioner for that district, [new district number 2] for he resided in new district number 3, and if his functions as commissioner continued after the new districting (a point which we do not decide, no question having been made in reference to it), he must have been the commissioner for the last named district. It was therefore competent at that election to elect a commissioner for new district number 2." It is to be noted that in the case above referred to there was a new districting of the county, all the old districts having lost entirely their identity. In that case old district number 3 was in the south part of the county, while new district number 3 was in the north part, and in no way connected with the territory included in the old district. Both the number and the territory included in the old districts were changed so as to be almost, if not entirely, incapable of identification. Taking the identity of the territory, rather than the number attached to the new districts, as they were completely changed, and Swann may be, and probably was, regarded as representing new district number 3, carved partially from old district number 2, while his colleague, whose term had expired, could very appropriately be said to be the commissioner from new district number 2, that being the one in dispute. In this view, the opinion is in harmony with the authorities we shall hereafter refer to. In the case at bar the districts have not lost their identity. The statute provides only for alteration of boundary lines, not the formation of new and independent districts. In no view of the case can it be said, nor is it contended, that Connolly is now, or has been, holding the office of commissioner from either the old or new district number 1; hence the term of office of commissioner from that district has not expired by the expiration of Connolly's term of office. But, if the opinion goes to the extent of holding to the rule contended for by respondent's counsel, it is clearly in conflict with the great weight of authority on the subject, and, in our judgment, not well reasoned, and therefore should not be fol-

lowed. We have several cases from other courts, to which our attention has been called, as to the effect of a change or alteration of boundary lines of districts from which officers have been elected before the expiration of their terms of office. The reasoning of these cases and the conclusions reached appear to us as sound and logical, and to be decisive of the question here in controversy.

In *Brungardt v. Leiker*, 42 Kan., 206, it is stated in the syllabus: "The office of a member of the board of county commissioners elected for three years is not vacated by a change in the boundaries of the commissioner districts, when the member continues to reside in the district for which he was elected, although by the change he was placed in another district." Says the author of the opinion, after stating the facts and referring to statutory and constitutional provisions relating to the subject, and enumerating the events which will cause a vacancy, all of which apply in the case at bar by reason of similar provisions in this state: "No one of these events has happened, but there has been an attempt to legislate him out of office by the other two commissioners, by a change in the districts. The county commissioners are authorized by statute to change the districts at least once in three years, so as to adjust them to the changing conditions and locations of the population of the county, (Comp. Laws of 1885, ch. 25, sec. 11,) but this provision must be construed so as to harmonize with that provision of the constitution that makes the term of county commissioners three years. The change in the districts, then, can only take effect, so far as the election of a county commissioner is concerned, at the expiration of the three years from the time from which the member was elected from the changed territory. Leiker's term of office will not expire until the second Monday in January, 1890."

In *State v. Nelson*, 34 Pac. Rep. [Wash.], 562, the supreme court holds that by changing boundary lines of a road district, so that the overseer was not a resident of the district from which he was elected after the change,

he could not thereby be deprived of his office, but for the purpose of electing a successor the act changing the boundary lines was prospective only. Says the court: "In holding as we do, that the commissioners have authority to make changes in road districts under the act in question, but that such changes are prospective, as affecting the office of road overseer, the letter and spirit of the constitution are fully maintained and force is given as well to the act of the legislature." On the same subject says the supreme court of Minnesota: "In our opinion, an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of commissioners, and in no way affects the right to the office of those previously elected. There is nothing in the language of the statute to indicate that a redistricting is intended to have any retrospective operation. On the contrary, the language of section 94 favors the opposite view. The commissioner, it says, 'shall, at the time of his election, be a resident of said district, and shall reside therein during his continuance in office.' What this last clause has reference to is an actual change of residence, and not a change of district boundaries. The division of a county into districts is merely for election purposes. The duties of commissioners are not local, or to be performed in only a particular part of the county. On the contrary, they are merely members of an entire board, which acts as such for the entire county." *Norwood v. Holden,* 45 Minn., 316. See, also, *State v. Board of Supervisors,* 21 Wis., 443, 448.

The purport of, and conclusion to be drawn from all these decisions, is that, in redistricting or changing boundary lines of districts from which commissioners are elected, such acts are for election purposes only, prospective in their nature, and can in nowise affect the terms of office of those who have been regularly elected for a term of years, while residing in the district, and who of right may continue to hold such office and exercise the duties thereof until the expiration of the term for which

elected. These views in nowise violate the rights of any, and preserve to all officers who have been regularly elected the right to exercise the duties of the office for the full term, and give to statutory provisions for such changes full scope and effect, without violence to other provisions relating to the same same subject. Applying the rule to the case at bar, the successor of Connolly as commissioner from the Second district, whose term will expire in January next, should be chosen at the present general election.

It is also contended by the respondent that in an action of mandamus begun in the district court of Douglas county by the state, on the relation of one Victor Rosewater, against the respondent herein, to require him, as county clerk, to include in his call for an election the office of commissioner to fill vacancy from the First district, as constituted by the change of boundary lines, and to print on the official ballots the name of the republican candidate for that office, the same question heretofore considered was presented by the issues in that case, considered and determined by the district court, and therefore has become *res adjudicata,* and that the relator is estopped in this action from its prosecution, and from obtaining the relief applied for. By the issues raised in the case referred to, by the alternative writ and the return thereto, the question presented for adjudication was whether a vacancy existed in the new First commissioner district, to fill which candidates should be voted for by the electors thereof at the present general election. The relator, by his affidavit and the alternative writ issued thereon, claimed and alleged that, by reason of the change in boundary lines to which we have heretofore referred, Harte became a non-resident of the commissioner district from which he was elected, and that a vacancy existed, which should be filled at the coming general election. The question of whether there was in fact a vacancy in the First commissioner district was the only one presented, and the only question that could be decided under the

issues raised; and this could and did go no further than to determine that the names of candidates nominated for the supposed vacancy should be placed on the official ballots to be voted for at the general election to follow. Harte, the incumbent then filling the office as commissioner from that district, was not a party to the action; and, of course, his right to hold the office to which he had been elected, was not and could not be determined by the proceedings therein had. This fact alone should, it would seem, dispose of the defense of *res adjudicata* interposed in the case at bar. If, as we assume can not successfully be disputed, Harte's right to hold the office to which he was elected was not and could not be adjudicated in that proceeding, it will hardly be contended that his right to hold another office, or as the successor of Connolly after the expiration of his term, was a proper subject of adjudication under the issues therein tried. The rule is settled beyond dispute or cavil, that the right to hold the office, or the title thereto, can not be tried or determined by proceedings in mandamus. In *State v. Plambeck,* 36 Nebr., 401, it is held that: "The title to an office can not be tried and determined on an application for a writ of mandamus." Says the present Chief Justice who wrote the opinion of the court: "There can be no doubt that the claims of the respective parties to the office in question can not be adjudicated in this proceeding, since it is well established by frequent decisions of this and other courts that the title to an office can not be tried and determined on an application for a writ of mandamus. The proper remedy to try such question is by quo warranto"; citing *State v. Palmer,* 10 Nebr., 203; *State v. Jaynes,* 19 Nebr., 164; *People v. Goetting,* 30 N. E. Rep. [N. Y.], 968. To the same effect is *Kokes v. State,* 55 Nebr., 691, 695.

The direct issue presented by the alternative writ and the answer thereto, and the only issue that was before the court for adjudication was that by reason of the change in boundary lines, Harte, who had been elected

as commissioner from district number 1, resided in new district number 2, and that no commissioner then represented district number 1; the material allegation with respect thereto being: "That the commissioner districts of Douglas county, Nebraska, exist as in the resolution heretofore set forth and that district number one in said county consists of the Fourth, Seventh, and Eighth wards of the city of Omaha as the boundaries of said wards are now established, and that at the present time and at no time since the establishment of said district has said district been represented on the board of county commissioners." This was the pleading, with the denial thereof, which determined the issue therein to be tried. The application was based primarily on the idea that a change of boundaries, forming a new district, within whose boundaries the commissioner elected from that district as it originally stood did not reside, created a vacancy, and an election should be had to fill the same. The trial judge on the issues found in favor of the relator. It was also found specially that "Said Commissioner Harte resides in the commissioner district comprising the First, Second and Third wards of the city of Omaha, known and numbered under the redistricting of said county into commissioner districts, as 'Commissioner district number two.' I find that, after the going into effect of the redistricting said Douglas county into commissioner districts, said commissioner Harte will represent said commissioner district number two, comprising the First, Second and Third wards of the said city of Omaha, Nebraska." The finding by the judge hearing the case sitting at chambers that Harte, by reason of the change in boundary lines, was residing in the new Second district, and would hold office as commissioner from that district after the going into effect of the act of redistricting, and because thereof a vacancy existed in the First district, which should be filled at this general election, did not, we apprehend, determine the commissionership of the Second district, or the succession in the office then held by Con-

nolly. It was no more than a finding that Harte did not reside in new commissioner district number 1, and therefore a vacancy existed therein. The trial judge may have been, and probably was, of the opinion from the conclusion reached, that the board of county commissioners by changing boundary lines could create a vacancy in the office of one of the commissioner districts, which should be filled as in case of vacancies provided for by statute. The judge hearing the application for a mandamus was not called upon, nor was it within his province, under the issues, and with the parties before him, to try and determine the status of the office of the Second commissioner district, or whether an election should be called to elect a successor to Connolly. That question was not before him, and the finding he made with reference to Harte's right to hold office as a commissioner from the Second district, as the successor of Connolly, after the latter's term expired, can only be regarded as argumentative, and in support of the conclusion reached regarding the question under consideration. Neither Harte's right to hold office as the successor of Connolly, nor the relator's right, or that of any other person, to stand as a candidate for election to succeed Connolly, was within the issues, or involved in the question to be decided by the application of Rosewater to have the respondent mandamused to place on the ballots the names of candidates to fill the alleged vacancy in the First district; nor, as we have said, was Harte's right to hold the office to which he was elected, determined in that proceeding. It is fundamental that a judgment or final order made in the trial of a case must be founded upon and within the issues as made by the pleadings. Says SULLIVAN, J., in *State v. Dickinson,* 59 Nebr., 753, 758: "It is a rule everywhere recognized by courts administering our system of jurisprudence that the relief awarded by a court must respond to the issues—must be within the case made by the pleadings"; citing *Kitchen Bros. Hotel Co. v. Hammond,* 30 Nebr., 618; *Whitney v. Levon,* 34 Nebr., 443; *Lincoln Nat. Bank v.*

Virgin, 36 Nebr., 735; *Rockford Watch Co. v. Manifold,* 36 Nebr., 801; *Ross v. Sumner,* 57 Nebr., 588. In regard to the same subject it is observed by the supreme court of New Jersey in *Munday v. Vail,* 34 N. J. Law, 418: "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities." See, also, *Laflin v. State,* 49 Nebr., 614, wherein it is held that the peremptory writ of mandamus must conform strictly to the alternative writ. We therefore arrive at the conclusion that the thing adjudicated in the district court, and the only thing that could be determined under the issues therein presented, was that a vacancy existed in the new First commissioner district, because of the readjustment of the boundary lines of the several districts as before existing, by which the commissioner elected by and from that district became a resident of another district, and that an election should be had to fill such vacancy, and the order was accordingly issued requiring the respondent to call such election. Whether the commissioner elected from that district became entitled to succeed the relator, Connolly, or was legislated out of office, were matters only for consideration in determining whether a vacancy existed; and the finding in respect thereof was no more than a reason given for the conclusion reached, and whether right or wrong, did not enter into and become a part of the question adjudicated. It is frequently held that whether a court gives a right or wrong reason for the conclusion reached, such reason can not determine the correctness of the decision rendered, as the controlling factor is, whether the conclusion

reached is right, and not whether the process of reasoning leading to such conclusion was in all respects proper. The plea of *res adjudicata* can not, therefore, be sustained.

From what has been said it follows that the relator is entitled to a peremptory writ of mandamus as prayed, and the same is accordingly directed to issue.

PEREMPTORY WRIT ALLOWED.

NORVAL, C. J., dissenting.

WESTERN TRAVELERS ACCIDENT ASSOCIATION V. ORVILLE J. TAYLOR ET AL.

FILED NOVEMBER 7, 1901. No. 10,203.

Commissioner's opinion, Department No. 1.

1. **Suit Against Domestic Corporation:** CODE: PROPER FORUM. Section 55 of the Code authorizes a domestic incorporated insurance company to be sued (*a*) in the county where its principal place of business is fixed by its charter, although its actual business is carried on and its officers reside in some other county; (*b*) in the county where it is situated, and it is situated in any county where it has and maintains a place of business, and servants, employees, or agents engaged in conducting and carrying on the business for which it exists; (*c*) in any county where the cause of action, or some part thereof, arose.

2. ——: ——. Under section 60 of the Code, all actions not provided for by preceding special provisions, must be brought in the county where the defendant, or some one of the defendants, resides, or may be summoned; and that section does not authorize an action to be brought against a domestic incorporated insurance company in a county not authorized by section 55.

3. **Purpose of Statute:** The purpose of section 73 of the Code is to provide the manner in which summons may be served upon a corporation, and it does not enlarge the number of jurisdictions in which suit may be brought.

4. **Statute:** CONSTRUCTION. Where one construction leaves a portion of a statute meaningless and nugatory, and another construction gives to the entire statute an intelligible and consistent meaning, the latter will ordinarily be adopted.

5. **Presence of Officer Does Not Confer Jurisdiction.** A domestic corporation may be sued only in the places provided by law, and the temporary presence of one or more of the officers of such corporation in another jurisdiction does not authorize the corporation to be sued there.

6. **Statutory Provision Exclusive.** When the legislature provides the county in which a domestic corporation may be sued, such provision is exclusive.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Reversed.* NORVAL, C. J., *dissenting.*

W. A. Prince and *O'Neill & Gilbert,* for plaintiff in error:

Defendant is a mutual insurance company, organized under the laws of the state of Nebraska and located at Grand Island. The cause of action did not arise in this state; for the injury complained of was not received in Douglas county, Nebraska, but in Bryan county, Iowa. The only jurisdiction acquired was by service of summons on the secretary while temporarily in Douglas county. This court has frequently held that the question of jurisdiction might be raised either by special appearance or by answer. It was raised in both ways in the county court and by answer in the district court. There is no contention of fact on the question of jurisdiction.

The first question to be considered is whether or not the courts of Douglas county acquired jurisdiction over a domestic insurance company by service of summons upon its secretary while he was temporarily within its jurisdiction.

The following points are material:

1. The defendant is a mutual insurance company and domestic corporation;

2. The company has no agency in Omaha and no place of business there;

3. The cause of action did not accrue in Douglas county or in the state of Nebraska;

4. The pretended service was made upon the secretary of the company when only temporarily within the jurisdiction of the court for the purpose of effecting a settlement of the matter in controversy.

There is a great difference between an agency and an agent. An agency represents the company itself—is in fact the company located at the agency. An agent may be temporarily in the county, but does not carry the company with him. The company's certificate was not issued in Douglas county. No premium was ever paid there. All the business was transacted in Hall county. By no logic could the secretary carry the corporation into Douglas county by his temporary presence there. *Bankers Life Ins. Co. v. Robbins,* 53 Nebr., 47; *Fitzgerald & Mallory Construction Co. v. Fitzgerald,* 137 U. S., 98.

It is difficult to find cases in point as to domestic corporations. The cases generally refer to foreign corporations. But the principle is the same. Black, Judgments, sec. 910; *M'Queen v. Middleton Mfg. Co.,* 16 Johns. [N. Y.], 5, 7; *Brewster v. Michigan C. R. Co.,* 5 How. Pr. [N. Y.], 183.

Section 55 of the Code prescribes that a cause of action may be brought against a corporation in the county where it is situated, or, if an insurance company, where the cause of action arose. Section 73 of the Code clearly refers to causes where the cause of action is brought in the county where the corporation is situated. Section 74 refers to causes where the company has an agency in the county where the suit is brought.

Brome & Burnett and *Shull & Farnsworth, contra:*

At common law, the only manner in which a corporation could be subjected to the jurisdiction of the court was by distraint of its property; hence, statutes providing service by summons are in derogation or modification of the common law. In construing such statutes, the rule

of the common law that statutes in derogation thereof are to be strictly construed, has no application to the Code. Its provisions and all proceedings under it are to be liberally construed with a view to performing its object and to assist the parties in obtaining justice. Code of Civil Procedure, sec. 1.

It follows that as to a provision of the Code of Civil Procedure that is capable of two constructions, one of which sustains the jurisdiction of the court, and one which ousts it from jurisdiction, the former should be adopted.

KIRKPATRICK, C.

This is an action brought by defendant in error in the county court of Douglas county to recover of plaintiff in error $514.28 on an accident insurance certificate issued by plaintiff in error. It appears from the record that plaintiff in error is an insurance company incorporated under the laws of this state, its location and place of business being at Grand Island, Hall county; that it issued a certificate to one Henry C. Cook, who was injured by an accident at Sheldon, Bryan county, Iowa, which he claims resulted in his total disability from May 10 to October 1, 1895, to his damage in the sum of $514.28; that the amount due him on his certificate had been assigned to defendant in error. It appears that Arthur L. Sheetz was secretary of plaintiff in error, and came to Omaha on behalf of the company for the purpose of trying to effect a settlement of the claim upon which suit is brought. The parties failed to reach an agreement, and while the secretary remained in Douglas county this action was instituted and a summons was duly issued and served upon him. The company made a special appearance in the county court, pleading that it had no agent in Douglas county; that it was not engaged in business therein; that its business had at all times been carried on at Grand Island, and that it was situated only in Hall county and not in Douglas county, and never had any place of business in Douglas county, or employees or agents engaged

in carrying on its business there, and had none at the time of service of summons; that the service was made upon Arthur L. Sheetz, secretary of the company, while temporarily in Douglas county, and that the pretended cause of action arose in Iowa and not in Nebraska, and that the Douglas county court had no jurisdiction. This special appearance was overruled, and plaintiff in error answered, pleading want of jurisdiction of the county court upon the same grounds relied upon in its special appearance. The answer, as additional defenses, pleaded that the by-laws of the company contained a provision that suit could not be brought within ninety days from the receipt by the company of proofs of loss; that proofs of loss had not been made ninety days prior to the commencement of the action, and that the same was prematurely brought; and that garnishment proceedings had been brought against it in Hall county. Trial was had, which resulted in a judgment against plaintiff in error. The cause was taken on appeal to the district court, where trial was had upon the same issues, which again resulted in a judgment against the company, to reverse which the case is brought to this court.

Briefly stated, the contention of plaintiff in error is, first, that neither the county nor district court of Douglas county had jurisdiction, because service upon Arthur L. Sheetz, secretary of the company, while temporarily in Douglas county engaged in looking after business for the company, was not service upon the company; second, that the by-laws of the company, by which Henry C. Cook was bound, contained a provision that suit could not be brought until ninety days had elapsed after proof of loss was received by the company, that ninety days had not elapsed, and therefore the suit was prematurely brought. There seems to have been no dispute that plaintiff in error is a domestic incorporated insurance company, with its principal place of business at Grand Island; that Arthur L. Sheetz was its secretary and general managing agent, and that he was temporarily in Douglas county attempt-

ing to make a settlement for the damages sustained by Cook on account of the accident which had occurred in the state of Iowa; that the company had no agent or place of business in Douglas county, and that the summons in this case was served upon the said Sheetz while he was temporarily in Douglas county transacting business for the company. The question is, therefore, squarely presented by the record whether an action can be instituted against a domestic incorporated insurance company in a county where it has no agent or place of business, or where no part of the cause of action arose, and jurisdiction be obtained by service of summons upon one of the chief officers of the company while temporarily in the county where the action is brought transacting business for the corporation.

The principle is elementary that domestic corporations, being purely creatures of the statute, can only be used and jurisdiction obtained over them in the manner provided by statute. Such statutes enter into and become a part of their franchises, and it would be unjust to extend the statutes giving jurisdiction over such corporations beyond the fair and reasonable intendment of the legislature. 6 Thompson, Corporations, sec. 7540. In order to obtain a clear understanding of the principle involved in this case, it is also necessary to keep in mind the distinction between that part of the Code providing where actions may be brought and that part providing the manner in which service of summons may be had. The determination of the principal questions requires a consideration of various statutory provisions, and those of a controlling nature will, for convenience, be set out. Sections 51 to 60, both inclusive, of the Code of Civil Procedure, fix the place at which actions that can be brought under the laws of this state must be brought. Of these sections, 55 and 60 are the only ones which have any bearing on the case at bar. Section 55 is as follows: "An action other than one of those mentioned in the first three sections of this title, against a corporation created by the

laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose." Section 60: "Every other action must be brought in the county in which the defendant, or some one of the defendants, reside, or may be summoned." It has been urged by counsel that because section 55 contains the word "may" with reference to where actions might be brought, the section is remedial and not exclusive. This position is wholly without merit. By reading this section of the statute, and inserting the word "shall" in each place where the word "may" occurs, the weakness of this contention will readily be manifest. The legislature could have used no other word in this section than the word "may," and for this reason it does not serve as an aid in determining whether the section itself is or is not exclusive of the provisions of other sections. In construing this section, the word "may" should be considered in connection with the rule of statutory construction that "may" and "shall" are to be read interchangeably, so as best to express the legislative intention. *Fowler v. Pirkins,* 77 Ill., 271. The purpose of the legislature in using the word "may" was to permit suit to be brought in any one of the counties embraced within the terms of section 55, and not to permit suit to be brought in other counties under the terms of any other section. The question whether this section is exclusive must be determined by considering it in connection with all other statutory provisions relating to where actions may be brought.

It is contended that by section 60 an action against a domestic insurance company might be brought at other places than those designated in section 55. Section 60, speaking for itself, says that it has no application in any case provided for by preceding sections, and it has been so considered by this court. In the case of *State v. Hill,* 38 Nebr., 698, 704, this court, speaking through IRVINE, C.,

said: "As between section 54 and section 60, it would seem clear that the action was one of those designated in section 54, and that, therefore, that section would govern rather than section 60, which is simply a general provision meant to apply to such cases as should not fall within any of the preceding special provisions." In *Barry v. Wachosky,* 57 Nebr., 534, a similar view was taken of this section. That this is the purpose of section 60 is indicated, not only by the order in which the sections occur in the Code, but by the use of the words, "every other action." Why, it may be asked, after providing for the place where a domestic corporation may be sued in section 55, should the legislature, if still having domestic corporations in mind, use the language, as in section 60, "every other action"? Again, that section 60 is intended to provide only for those cases not previously provided for by special enactment, is indicated in the omission from it of the saving clause, which occurs in the preceding sections, viz, "other than one of those mentioned in the first three sections of this title." This clause could not have been omitted unless the legislature assumes that the language "every other action" would be given its ordinary and natural meaning. But disregarding the order in which sections 55 and 60 occur in the Code, and the use of the words "every other action," in section 60, if it should be held that section 55 operates to enlarge section 60, it is difficult to see how, in any given case, except in one arising under the last clause of section 55, that section would ever accomplish the result of enlarging the operation and effect of section 60. If, under section 60, an action against a domestic corporation may be brought in the county in which one of the principal officers may be found, in what manner do the provisions of section 55, that a domestic corporation may be sued in the county where it is situated, or in the county where it has its principal office or place of business, operate to enlarge section 60? That section would already be broad enough to authorize a suit in either one of these places, and to so

construe section 60 would be to render useless the major portion of section 55. Another argument is in the fact that in section 59, where provision is made for the county in which a foreign corporation may be sued, it is said that such action "may be brought in any county * * * where said defendant may be found," while in section 55, relative to domestic corporations, no such language is found. Yet, if such language is unnecessary in section 55 because of the provisions of section 60, it is equally unnecessary in section 59. In no case brought to our attention has section 60 ever been quoted concerning jurisdiction over a corporation except in *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Nebr., 537, cited by defendant in error. The Council Bluffs Canning Company was a foreign corporation, having a managing agent in Washington county, this state. The contract was entered into with such managing agent within this state. The action was held to be maintainable in this state under the provisions of section 59, which provides, "an action * * * against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found." The learned judge writing the opinion in that case, in a mere dictum, by inadvertence said, at page 541, "Section 60, under the same title, is as follows: 'Every other action must be brought in the county in which the defendant, or some one of the defendants resides, or may be summoned,'" and, after finding that the foreign corporation had a managing agent in this state, concluded: "This being true, service on him was the service prescribed by law as set forth in our Code in the section last quoted [60]." It seems clear that, jurisdiction having been sustained under section 59, applicable to foreign corporations, the service upon the resident managing agent could have been more properly sustained under section 75, which provides, "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon

such agent." Section 60, therefore, was not applicable in a determination of that case, and its citation was erroneous. It is contended by counsel for defendants in error that section 55 is remedial in its nature, and, therefore, not restrictive, and *Insurance Company of North America v. McLimans,* 28 Nebr., 653, is cited to support this view. In that case, a policy of insurance was issued on a store building situated in Ogden, Iowa. Loss occurred and suit was brought on the policy in Madison county, Nebraska, and a summons was served on an agent of the company residing in that county. The company was a foreign corporation, and the learned judge writing the opinion in that case said that a contract of insurance was personal in its nature, and that the action may be brought wherever service may be had upon the insurer. Citing section 55, he says that under the authority of that section an action could be brought against an insurance company in any county where the cause of action or some part thereof arose. The cause of action had risen in Iowa where the building was situated and where the loss occurred. Section 55 has no application to foreign corporations, and if the cause of action had arisen in Nebraska, the action could properly have been brought under the provisions of section 59, which was at that time in force. If the court in that case had any jurisdiction, it must have been acquired by service under section 74, which provides: "When the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." That section 55 authorizes suit against a domestic insurance company in the county where the cause of action arose scarcely warrants the conclusion that a foreign corporation, on a cause of action arising in Iowa, can be sued in Madison county, this state. The jurisdiction in that case was correctly sustained, but a wrong reason given therefor. Yet there will be found in that opinion no authority to institute an action against a domestic incorporated insurance com-

pany in any county other than that designated in section 55.

Originally, and under the common law, corporations were created in some particular place. Thompson, Corporations, sec. 687. And they were not permitted to have two domiciles. Thompson, Corporations, sec. 688. And suit had to be brought at the domicile of the corporation. Section 55 of our Code is remedial to the extent that it allows an action to be brought in a county where a domestic corporation has a place of business, and maintains an agency for the transaction of the business for which it exists, although it might not be its principal place of business; and, also, that it allows an action to be brought against a domestic insurance company in the county where the cause of action, or some part thereof, arose; but it does not follow from this fact that the section under consideration is not also exclusive. Sedgwick, Construction of Statutory & Constitutional Law [2d ed.], p. 32, says: "Remedial acts are those made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause. The object is sometimes affected by imposing restrictions, in which case the statute is a restraining or disabling statute; sometimes by granting powers, in which case it is an enabling or enlarging statute." Section 55 was considered in the case of *Fremont Butter & Egg Co. v. Snyder*, 39 Nebr., 632. The Fremont Butter & Egg Company had its principal office or place of business in Dodge county, and that, by its articles of incorporation, was fixed as its principal place of business. It also had a business house, that is, a building, which it occupied as a place of business in Wahoo, Saunders county. Suit was brought against it in Saunders county. In sustaining the jurisdiction, this court held that the action was properly brought in Saunders county under section 55, and said: "That the meaning of this statute is that a domestic corporation may be sued (*a*) in the county where

its principal place of business is fixed by its charter, although its actual business is carried on and its officers reside in some other county; (*b*) * * * in any county where it is situated, and that it is situated in any county where it has and maintains a place of business, and servants, employees, or agents engaged in conducting and carrying on the business for which it exists." This section was again considered by this court in the case of *Bankers Life Ins. Co. v. Robbins,* 53 Nebr., 44, and the case of *Fremont Butter & Egg Co. v. Snyder, supra,* cited with approval. From the authorities cited, and from what has been said, it follows that an action against a domestic incorporated insurance company may be brought, first, in any county where, by its articles of incorporation, it has fixed its principal office or place of business; second, in any county where it maintains an agency, and servants, and employees, engaged in carrying on the business for which it exists; and third, in the county where the cause of action or some part thereof arose.

We will next consider the controlling sections under chapter 2, of title 5, of the Code, providing for the manner of service. The only sections applicable to a corporation such as in the case at bar are sections 73 and 74. These sections are exclusive, and have been so regarded by this court in *Bankers Life Ins. Co. v. Robbins, supra.* Section 73 reads as follows: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or last usual place of business of such corporation." Section 74 reads as follows: "When the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." It is contended by counsel for defendants in error that summons could be served in

Douglas county in accordance with section 73, and that, therefore, under section 60, the action was properly brought in Douglas county. As already determined, section 60 has no application, and it therefore follows that this contention can not be sustained. In examining section 73, it must be borne in mind that its only purpose is to provide the manner in which summons shall be served, and it can not be held in any manner to authorize the institution of an action in any county not authorized by preceding sections, or to add to the enumeration of places where a domestic corporation may be sued. An examination of this section discloses three modes of service: (1) upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; (2) if none of the principal officers named can be found in the county, then upon the cashier, clerk, or managing agent; (3) if none of the last mentioned officers can be found, then service may be made by leaving a copy of the summons at the office or last usual place of business of the corporation. From a careful analysis, it seems clear that the word "county" should be understood and read in connection with the second and third provisions as well as with the first; that is, if the cashier, treasurer, secretary, clerk, or managing agent is not found in the county, then service may be made by leaving a copy of the summons at the office or last usual place of business of such corporation in the county. It is also clear that the word "county" refers to the county where the action is authorized by law to be brought. The return of the sheriff showing service upon the officer or person named in the second class would not be *prima facie* good unless it recited that the chief officers named in the first class could not be found; and service by leaving the summons at the office or last usual place of business of the corporation would not be good unless it appeared by the return that the persons named in both the first and second classes could not be found in the county. *Hoen v. Atlantic & P. R. Co.*, 64 Mo., 561. It is not reasonable to suppose that the legisla-

ture intended a search to be made by the sheriff where there was no prospect that the officers or agents of the corporation would be found. The place to look for the officers or agents of a corporation is at the place of business of such corporation, and not in some county distant from its place of business, where there would be no reasonable expectation of finding them. The presumption is that officers of a corporation will be found at its place of business.

The Code of Michigan, in respect of the institution of actions and obtaining service upon defendants, does not essentially differ from our own. The statute of that state providing for service upon corporations is as follows: "Service of any legal process against any corporation formed under this act, may be made on the president, secretary, or agent, or if neither of them can be found in the county in which, by their articles of association, they are to do business, then such service may be made by posting a true copy thereof on some conspicuous place at the business office of the company in said county." If we are correct in our conclusion that the word "county" must be read in connection with each of the three alternative provisions of section 73, and that the county referred to, in case of a domestic incorporated insurance company, is the county where, under section 55, the action is authorized to be brought, then the reasoning in the case of *Dewey v. Central Car Mfg. Co.*, 42 Mich., 399, 403, is applicable here. In that case the supreme court of Michigan, construing the section of the statute above quoted, says: "Now only two modes of service are here authorized: First, on the president, secretary or agent, if found within the county where the business office is located, and if they are not found within that county, then second, by posting at the business office within such county. There is no middle course. The method by posting is absolute and exclusive if those upon whom the law authorizes service are out of the county. No service can be made in a foreign county. Whether it is effected on the president, secretary or agent, or by means of posting, it must be

done in the county where the business office is fixed, and the effect is to exclude courts which are not empowered to have their process served in the county containing the office. The defendant's office was located in Jackson county, and hence, if all the officers and agents had been found in the city bounds of Detroit, the authority of the court would have been no greater than if they had stayed in Jackson. Finding them in Detroit would not be finding them in Jackson county, and the not finding them in Jackson county would authorize the alternative mode of service by posting in Jackson county and exclude all others. There is no provision for making the right of service and jurisdiction follow the persons of the officers and agents of the corporation wherever they may go. In short, the organic act confines the service to a locality in which this process of the superior court can not be served." It will be noticed from this language, that the word "may" in that statute is construed as "shall," and the provisions of the statute quoted above held to be exclusive.

Again, in the case of *Detroit Fire & Marine Ins. Co. v. Judge of Saginaw Circuit Court,* 23 Mich., 491, 495, it is said: "But if those officers are to be engaged in looking honestly after their official duties, the presumption must always be that in every county but one they will not be found, and if this section will allow suits in every county, then the personal service will be the rare exception and the constructive service the rule—a result which is neither just nor reasonable. There is no legitimate reason for making corporations generally stand on any different footing from other persons. * * * In cases where men may suffer from personal damages from corporate negligence, there is some reason for exceptional regulations. But where their relations are generally contract relations, entered into voluntarily—inasmuch as every one has knowledge, or means of knowledge, of the residence of all private corporations, and therefore can always tell where a suit will lie—those who chose to make agreements do it with their eyes open, and can not complain if they are compelled to sue where the law has required."

The service authorized by our section 73, on a clerk or subordinate officer, is in the nature of substituted service, and is only permitted upon the theory that such clerk or subordinate agent is usually found at the place of business of the corporation, and it is a reasonable supposition that service so made will in due course actually reach the principal officers of the corporation. If the contention of defendant in error be sustained, it would mean that a clerk in the employ of any bank or other corporation in any city of the state, temporarily found in some other county transacting business for the corporation, however trivial the character of such employment might be, could be served with summons and the corporation compelled to go to such county to defend the suit. In that case it would only be necessary to have the officer make his return of process show that the chief officer of the corporation could not be found in his county, and that, therefore, he served the summons on the clerk. The statute contemplates no such absurdity. Section 73 must be taken as an entirety, and to permit the construction contended for would be to leave nugatory and of no force that portion of the section which provides for service by leaving a summons at the office or last usual place of business of such corporation. If this action had been brought in Hall county, the domicile of the company, where under the provisions of section 55 it might have been brought, service could have been made upon any one of the officers of the company, from president down to managing agent, providing the superiors of the officer upon whom service was made were absent from the county, and in the absence of all these officers, service could be made by leaving a copy of the summons at the office of the company.

Again, under the provisions of section 74, service might be made upon a corporation in any county where it had an agency, *i. e.*, a place of business, upon the chief officer of such agency.

It is contended that the secretary of the company being present in Douglas county transacting the business of the

corporation, the corporation was present in his person. We are unable to find merit in this contention. The corporation is an entity of which the secretary is no part. The board of directors, and, in fact, all of the officers, might be temporarily present in Douglas county, as the secretary was, but this would not change the domicile of the corporation. It is true, the corporation might have changed its domicile, and established its place of business in Douglas county, but no such change is claimed in this case. The business transactions of a corporation are usually kept in books, and records more or less voluminous and difficult to transport from place to place, and there is every reason why it could more conveniently defend a suit in the courts of its domicile; and to establish a rule such as contended for by defendant in error would result in grievous injustice. The theory upon which service is permitted to be made upon an individual in a county other than his residence is that the defendant is found in such county, and if his presence there is voluntary, and no process of court or fraud or deception has been employed to secure his presence there, service may be made upon him. The same principle might be applied to a corporation if its *corpus* was found in another county than that of its domicile. But an officer of a corporation, even though transacting business for the corporation, does not have the corporation present with him in his person. He acts only as an agent, with special powers delegated to him for the performance of certain acts, and although his acts, within the scope of his authority, are the acts of the corporation, he is not in any sense the corporation. Our attention has been called to the case of *Houston v. Filer & Stowell Co.*, 85 Fed. Rep., 757, and that of *Glaize v. So. Ca. R. Co.*, 1 Strob. [S. Car.], 70. An examination discloses that neither of these cases present facts at all similar to the case at bar, and neither is applicable on principle to the questions requiring determination in this case. From the authorities cited, and from what has been said, it is clear that neither the county nor district

court of Douglas county acquired jurisdiction over plaintiff in error by service of summons upon the secretary while temporarily in Douglas county.

Having reached a conclusion which disposes of the case, it will not be necessary to consider other questions presented. It is therefore recommended that the judgment of the district court be reversed and the action dismissed.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the action dismissed.

REVERSED.

NORVAL, C. J.

I dissent for the reasons stated in the following opinion of HASTINGS, C.:

Two questions are presented in this case: First, whether this action was prematurely brought; and, second, whether the county court of Douglas county had jurisdiction, and by consequence the district court on appeal. The first question would seem not difficult.

This is an action against an insurance company upon an accident policy which provides that no action shall be brought until ninety days after furnishing proofs of injury. Proofs were furnished on the 30th of September, and this action commenced on December 28, following. If ninety days were absolutely required between the filing of the proof and the institution of the action, evidently it was prematurely commenced, and should abate. Plaintiff in error quotes Judge Brewer, in *Cobb v. Insurance Co. of North America,* 11 Kan., 93, to the effect that this provision in a policy is a credit, and its expiration therefore marks the maturity of the cause of action. Our own court seems not to have so regarded it. Judge Mitchell, in *Hand v. National Live-Stock Ins. Co.,* 57 Minn., 519, 59 N. W. Rep., 538, declares this is not an extension of credit, but a privilege given for the purpose of examining proofs and investigating the loss which may be waived by the party, and the expiration of which is not strictly the "due day"

of the contract. This has been repeatedly held in Nebraska. *Omaha Fire Ins. Co. v. Dierks,* 43 Nebr., 473; *German Ins. & Savings Institution v. Kline,* 44 Nebr., 395; *Omaha Fire Ins. Co. v. Hildebrand,* 54 Nebr., 306.

On December 28, 1895, the plaintiff below, as assignees, were claiming through Cook, the injured party, $514; the company's secretary offered $440 or $450. The assignees were threatening to bring suit, and were distinctly told that no more would be offered. There is testimony that they were also told that the company recognized no liability, would pay this amount for a settlement, and if it was not satisfactory they might sue. The offer was not accepted, and suit commenced. After its commencement the offer was raised to $465, but was not accepted. The secretary says that he never denied the existence of some liability, but does not deny telling plaintiffs below that the offer would not be raised, and if not accepted they might sue. This seems to be a sufficient waiver of further time to consider the proofs.

In deciding as to the jurisdiction more difficulty has been found. The company was organized, and has its principal place of business in Grand Island, Nebraska. It does business throughout the state, in the way of taking travelers' accident insurance, but had no agency in Douglas county, and no resident agent there. Its secretary and manager was temporarily there at the time this summons was served, engaged in the attempt to settle this very claim, as to which the unsuccessful negotiations are stated above. Summons was served upon him, a special appearance was made in the county court, which was overruled. Lack of jurisdiction was set up in the answer in that court, and this defense found against, as well as the other one, that the action was prematurely brought. On appeal the same defenses were again set up, and again overruled by the district court, and this court is now asked to find that there was no jurisdiction over the defendant in Douglas county, and no authority to institute the action there. The writer of this opinion has not been

able to reach that conclusion. The subject of process and jurisdiction over domestic corporations is absolutely under the control of the legislature. *Railroad Co. v. Hecht*, 95 U. S., 168. General grants of jurisdiction not restricted in terms to natural persons are held to apply to artificial persons also. *Fresno Nat. Bank v. Superior Court*, 83 Cal., 491, 24 Pac. Rep., 157; *Van Dresser v. Oregon R. & N. Co.*, 48 Fed. Rep., 202; *Holgate v. Oregon P. R. Co.*, 16 Ore., 123, 17 Pac. Rep., 859. The statutes which have relation to this matter are section 55, of the Code of Civil Procedure, as follows: "An action other than the one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose"; section 60 of the Code of Civil Procedure, as follows: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned"; and section 73 of the Code, as follows: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or last usual place of business of such corporation." No complaint is made in this case that the officer served was not one of those mentioned in section 73. There could not well be raised such an objection, for an inspection of the by-laws shows that in the intervals of the meetings of the executive board of the company the secretary has the entire charge of its affairs; he is its managing officer. He was, at the moment this summons was served, negotiating with full power to settle this very claim. It seems clear, therefore, that section 60 of the Code, giving jurisdiction in any

county where defendant may be summoned, would apply to this case, unless section 55 is to be construed as limiting the provisions of section 60. That section 55 has no such effect, but is remedial, is indicated, first, by its phraseology, which uses the word "may" where sections 54 and 60 employ the word "must," and where section 51 has the phrase "shall be brought only in the county," etc.

It is further indicated by the repeated decisions of this court. In the case of *Insurance Co. of North America v. McLimans,* 28 Nebr., 653, service was made upon the local special agent of a foreign company in Madison county, upon a cause of action which had arisen in the state of Iowa. Sections 55 and 914 of the Code were cited to the point that the Madison county district court had no jurisdiction. The objection was overruled, and section 55 was declared to be remedial and not restrictive, and the jurisdiction complete. The case was reaffirmed in *Springfield Ins. Co. v. McLimans,* 28 Nebr., 848. In *Fremont Butter & Egg Co. v. Snyder,* 39 Nebr., 632, the contention that a corporation can only be sued where it has its principal place of business, and that "may" in section 55 means "must," is expressly overruled, and it is stated that section 55 was enacted for the benefit of creditors and persons having claims against domestic corporations. In *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.,* 49 Nebr., 537, the assertion of jurisdiction on the part of the court is justified under section 59, and also under section 60, neither of which would apply in that case if section 55 is to be held restrictive. There seems no question that these cases all contemplated that section 55, instead of restricting the operation of section 60, operates for its enlargement, and that by consequence the same rule is applicable to corporations as to individuals, viz., that they are subject to an action in any county where they may be regularly and lawfully summoned. The same doctrine is upheld as to federal corporations under a federal law somewhat similar. *Van Dresser v. Oregon R. & N. Co.,* 48 Fed. Rep., 202.

We are cited to a large number of cases presenting rulings with regard to foreign corporations. It is evident that as to those a different rule must prevail from that relating to domestic ones. An officer of a foreign corporation, as such, in the absence of any express delegation of authority, would have no power beyond the jurisdiction of the laws creating his corporation, and providing for his office. But even this distinction would not prevail where the officer was traveling and present in the jurisdiction with express authority in reference to and for the purpose of dealing with the particular subject-matter of the action. *Council Bluffs Canning Co. v. Omaha Tinware & Mfg. Co., supra; Houston v. Filer & Stowell Co.,* 85 Fed. Rep., 757. A municipal officer traveling beyond his municipality would come under a different rule. He is distinctly a territorial officer. His jurisdiction has territorial limits. He is not authorized unless specially empowered to do anything on behalf of his municipality outside of its own limits, and by consequence no service can be there had upon him in its behalf. *Pack, Woods & Co. v. Greenbush Township,* 62 Mich., 122. There was no such limitation on the powers of the secretary of this company. He was as much its secretary in Douglas county as in Hall county. He could by virtue of his office make any settlement or write any new policy there. He was in Douglas county transacting business of his principal with relation to this very claim. Section 73 of the Code seems to authorize service of summons upon him there, and if such service was authorized, then, under section 60, the institution of the action in Douglas county against this corporation should be held as proper as it would be against an individual who could be there summoned. Why should not corporations and other persons stand on this same footing? Works, Jurisdiction of Courts, pp. 319, 323.

It has been suggested that the provisions of section 60 apply only to "other" cases, and, therefore, not to cases against corporations which are previously mentioned in section 55. Aside from the express holdings above men-

tioned, that section 55 is not so restrictive of section 60, it would seem that a sufficient reference for the words "all other cases" can be found in the various sections absolutely fixing jurisdiction of various forms of action.

DAY, C., concurs.

NOTE.—Statutes in derogation of common law are to be *strictly* construed. *Handy v. Brony*, 4 Nebr., 60, 62, opinion by GANTT, J. Statutes in derogation of common law should *not* be strictly construed. *Buckmaster v. McElroy*, 20 Nebr., 557, 564, opinion by COBB, J.—REPORTER.

DON C. AYERS, APPELLANT, V. OLIVER S. WOLCOTT ET AL., APPELLEES.*

FILED NOVEMBER 7, 1901. No. 10,424.

Commissioner's opinion, Department No. 2.

1. **Fraudulent Transfer**: TRANSACTION BETWEEN RELATIVES: BURDEN OF PROOF. When a father transfers all of his property to his children and immediately thereafter incurs a large indebtedness for property, a large part of which he also transfers to his children, in a suit by the creditor to set aside such transfers as fraudulent the burden of proof is on the grantees to show a sufficient consideration for the transfers and that the same were made in good faith.

2. **Debt After Conveyance**: FRAUDULENT INTENT. The fact that the debt was contracted after the conveyance was made is no defense where the conveyance was made with a view to incur the indebtedness and avoid its payment.

3. **Voluntary Conveyance**: SUBSEQUENT CREDITOR: INTENT. A voluntary conveyance made with the intent on the part of the grantor to defraud subsequent creditors is void as against such creditors without proof that the grantees had notice of the fraudulent intent of the grantor.

APPEAL from the district court for Merrick county. Heard below before ALBERT, J. *Reversed.*

W. R. Morris and *W. T. Thompson*, for appellant.

J. C. Martin and *John Patterson, contra.*

*Rehearing allowed.

SEDGWICK, C.

This action was begun in the district court for Merrick county by this plaintiff to set aside conveyances alleged to be fraudulent, and to subject the lands conveyed to the lien of this plaintiff's judgment. The trial court entered decree for defendants, and plaintiff has appealed.

On the 3d day of May, 1895, the plaintiff recovered a judgment in the district court for Merrick county against the defendant, Oliver S. Wolcott, for the sum of $2,292.50 and costs. The judgment was based upon a promissory note for $2,000 and interest, dated November 25, 1892. On the 23d day of November, 1892, the defendant, Oliver S. Wolcott, and Calista Wolcott, his wife, deeded the lands in controversy, consisting of about 1,400 acres, to their four children. These deeds were executed at the same time and place. They were not recorded until the latter part of 1893, when they were recorded, one on the 20th of November and two of them on the 7th, and one on the 12th day of December. In the case of *Bartlett v. Cheesbrough*, 23 Nebr., 767, the son transferred to his father a stock of goods valued at $2,600, and the good faith of the transfer was challenged by the creditors of the son. The court, after mentioning some of the facts shown in the evidence as to the consideration paid by the father for the stock of goods, says: "Under these circumstances it devolved on the defendant in error clearly to establish the good faith of the transaction, and the actual existence of the several items of the alleged debt owing by the son to him. These facts we think he has failed to prove. Transactions between relatives, by reason of which such relatives derive an advantage from credit obtained from strangers, will be scrutinized very closely, and the bona fides of such transactions must be clearly established." *Plummer v. Rummel*, 26 Nebr., 142; *Adler & Sons Clothing Co. v. Hellman*, 55 Nebr., 266.

The land constituted a tract which was, by the parties, commonly designated as the "ranch." The defendant,

Oliver S. Wolcott, with his family, came to Merrick county from Iowa about the year 1880. Some of the children came with the family at that time, but it does not appear from the evidence definitely, how many. One of the sons was then twenty-one years old, the daughter was about eleven. The evidence does not show the ages of the other sons. It seems that some of the family had been here before that time, and that part of the land in question had been bought before the family came to this state. Upon coming here Mr. Wolcott homesteaded a quarter section of the land and made it his home with his family from the year 1880 until shortly before the transaction in question, when the father and mother removed to Central City, and one of the children, the daughter, went with them and was living with them at the time of the transaction in question. The other three defendants remained upon the ranch. The land was bought in tracts from time to time, but apparently none later than ten years prior to the transactions in question. The defendants testified that the boys bought this land; for one quarter they traded thirteen cows, and another quarter was bought from the railroad company at $5 per acre on ten years time. The evidence is not very clear in regard to the particulars of the purchase of the several tracts of land. One of the boys on the witness stand was asked:

Q. Did the three boys buy this land?

A. Not in particular.

Q. Did you in general?

A. In some cases and in some instances, what belonged to one, belonged to all.

The father and his family lived on this land for about twelve years, commencing in 1880. During that time all the business was done in the name of the father; the title to all of the land was taken in his name; notes and mortgages were given by him to secure the purchase price. These notes and mortgages were paid, generally, out of the proceeds of the farm. The father had a bank account, and the stock was bought and sold by the father, and the

proceeds of sales, in some instances, and so far as the evidence shows, went to his bank account. The evidence is quite voluminous. It can not be quoted here at length. But it comes very far short of showing "the actual consideration paid" to the father and the bona fides of the transactions.

It is suggested that the deeds were executed before the indebtedness was incurred, and that the grantees were in actual possession of the land conveyed, so that this creditor had notice of the conveyances before he extended the credit. But we do not think that these are controlling facts in this case. In *Steele v. Coon*, 27 Nebr., 586, it is said: "A deed not fraudulent at first, may become so afterwards by being concealed, or not pursued, by which means creditors have been drawn in to lend their money." The fact that the debt was contracted after the conveyance was made is no defense where the conveyance was made with a view to incur the indebtedness and avoid its payment. *Echols v. Orr*, 106 Ala., 237; *Marks v. Crow*, 14 Ore., 382. When a grantor intends by voluntary conveyance to hinder and delay subsequent creditors the conveyance will be void as against creditors without showing actual notice of such intent to the grantee. *Preston v. Cutter*, 64 N. H., 461. Where the grantor is insolvent at the time of making the conveyance, want of consideration is a controlling fact on the question of fraud. *Erickson v. Quinn*, 47 N. Y., 410. Prior to the giving of the note, on which the judgment was obtained, one Heffner came from Nevada, Missouri, to sell Mr. Wolcott, the father, some horses, and was taken by him out to the ranch and shown over the ranch. There is some testimony that something was said in his presence to the effect that the boys wanted to sell the farm, but nothing to the effect that they owned it or claimed to own it, or had any further interest in selling or holding it than they had in the other business which was transacted there, all of which appeared to belong to the father. It also appears that on the day that the deeds in question were made the father went away from home,

and immediately after executing the deeds he handed them to his wife, and himself went to the B. & M. depot. He testified that he intended to go to some place in Kansas to look at some land for one of his sons, and that his son furnished him the money for the journey; but as a matter of fact he did not go to Kansas but went directly to Nevada, Missouri, and there bought four stallions, for which he gave the note in question, and another note of like amount. These stallions he took home with him. One of them died, one of them he traded for a piece of land which he took in the name of one of his sons; another he traded for another piece of land which he took in the name of another of his sons, and the fourth he took out to the ranch, where it remained and was at the time of the trial. Several disinterested witnesses testified that the elder Mr. Wolcott always claimed to own the land in question, and that after giving this note he made statements to the effect that he would not pay the note, and that he had fixed his property so that he could not be compelled to pay it. It appears that he had no other property, except this ranch, and the property thereon; and that all of the children knew that the business was transacted in their father's name; that most of it was done by him personally, that the titles to the land were taken in his name and the mortgages given thereon by him. There is no doubt that at the time he went to Nevada, Missouri, the father contemplated buying the horses in question, or at least had in mind the possibility that he might conclude to do so. He testified that when Mr. Heffner was here they talked it over a great deal, and had even gone so far as to prepare the notes, but he concluded not to execute them for some reason, not very clearly shown; and there can be no doubt from the evidence that he then had in mind the fact that he might incur a large liability while gone, which thought caused him to execute all these deeds in such great haste before he went, the grantees not being present (except one of them, the girl, to whom only eighty acres were deeded), and the deeds not being delivered until some time after his

return, and not placed upon record for more than a year thereafter. The indebtedness was incurred as soon as possible after executing the deeds in question. There was no such actual and immediate possession by the grantees as to constitute notice equivalent to recording the deeds. The lands were largely wild lands, and the grantees did not respectively occupy and have exclusive possession of the tract of land conveyed to each respectively. The father made the original purchase of the lands, and held the title for ten or twelve years, during which time the lands were occupied and controlled and treated by the defendants substantially as they were after these deeds were executed, the father to all appearances being the owner of the same, and there was no outward act that would be notice to any one of any change of title or ownership.

It is recommended that the decree of the district court be reversed and the cause remanded with instructions to enter a decree as prayed in plaintiff's petition.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the decree of the district court is reversed and the cause is remanded with instructions to enter a decree as prayed in plaintiff's petition.

REVERSED.

PIONEER SAVINGS & LOAN COMPANY V. BENJAMIN F. EYER ET AL.

FILED NOVEMBER 20, 1901. No. 10,298.

1. **Admission Evidence: MOTION FOR NEW TRIAL: PETITION IN ERROR.** Rulings upon the admission of testimony can not be reviewed unless raised by a motion for a new trial and a petition in error.

2. **Foreign Building Association Must Have Authority To Do Business.** A contract made in this state with a resident thereof by a foreign building and loan association which has failed first to

procure a certificate of approval and authorization from the proper officers for transacting business in this state, is void and unenforceable in our courts.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

W. C. LeHane and *G. D. Emery,* for plaintiff in error.

George A. Murphy, contra.

NORVAL, C. J.

Plaintiff is a foreign building and loan association incorporated under the laws of Minnesota and having its domicile in that state. In 1890 it made a loan of $500 to the defendant, B. F. Eyer, a resident of Nebraska, and the same was secured by a mortgage on real estate situated in this state. This was a suit to foreclose said mortgage. The defenses interposed were usury and that plaintiff was a foreign building and loan association and had not complied with section 148*p*, chapter 16, Compiled Statutes, 1891. From a decree dismissing the suit plaintiff has prosecuted error.

The first contention is that the court below erred in the admission of certain evidence on behalf of the defendants. This is unavailing, for more reasons than one. No ruling in the admission of the testimony is raised by the motion for a new trial, nor is there any assignment in the petition in error relating thereto. Moreover, the case was tried to the court without the aid of a jury; therefore, error can not be successfully predicated upon rulings of the trial court on the admission of testimony. This view has been so frequently announced and applied by this court as to make unnecessary the citation of the cases so holding. In *Henni v. Fidelity Building & Loan Ass'n,* 61 Nebr., 744, it was distinctly ruled that a foreign building and loan association which has failed to comply with the laws of this state is not entitled to enforce a contract made within the state, though it stipulated that it should be governed

by the laws of the state where the association is a resident. That case is decisive of the one at bar. As stated elsewhere, plaintiff is a Minnesota corporation. The loan in question was made in this state to a resident thereof. Plaintiff has failed to obtain a certificate of approval and authorization from the proper officers of the state, as required by section 148*p*, chapter 16, Compiled Statutes, 1891; therefore, plaintiff has no standing in the courts of this state.

It is suggested, however, that the loan was made prior to the passage of said section 148*p*, and hence the provisions thereof can not be successfully invoked. True, the loan antedates this section, but the record discloses beyond controversy that after the statute was passed and became operative the plaintiff and defendant entered into an agreement which materially changed and modified the original contract of the parties, which as thus modified is sought to be enforced herein. The contract is unenforceable. The decree is

AFFIRMED.

PIONEER SAVINGS & LOAN COMPANY V. MAGGIE A. MOSTERT ET AL.

FILED NOVEMBER 20, 1901. No. 10,299.

Foreign Building and Loan Association: AUTHORITY: CONTRACT. A foreign building and loan association, having failed to comply with the law of this state, is not entitled to enforce a contract made within the state.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

W. C. LeHane and *G. D. Emery*, for plaintiff in error.

E. H. Wooley and *O. M. Enlow*, *contra*.

NORVAL, C. J.

The facts in this case are in all material respects identical with those in the case of *Pioneer Savings & Loan Co. v. Eyer*, 62 Nebr., 810, decided herewith. For the reasons stated in the opinion filed therein, the case at bar is

AFFIRMED.

A. E. DURLAND, APPELLEE, V. M. C. DURLAND ET AL., IMPLEADED WITH HARRY V. TEMPLE, APPELLANT.

FILED NOVEMBER 20, 1901. No. 10,350.

1. **Foreclosure:** PLEADING BREACH OF CONDITION: SUFFICIENT ALLEGATION. In a suit to foreclose a real estate mortgage, brought subsequently to the maturity of the note it was given to secure, an averment in the petition that neither the debt nor any part thereof has been paid sufficiently pleads a breach of the condition of the mortgage.

2. **Averments:** CODE. In a mortgage foreclosure, the plaintiff is required, by suitable averments in the petition, to comply substantially with the requirements of section 850 of the Code of Civil Procedure.

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

E. A. Cook, for appellant.

Warrington & Stewart, contra.

NORVAL, C. J.

This is an appeal by defendants from a decree foreclosing a real estate mortgage. The sole ground urged for a reversal is that the petition fails to state a cause of action. The petition alleges the execution and delivery to plaintiff by defendants of the promissory note in the sum of $1,800, dated July 19, 1893, due one year thereafter with interest at eight per cent. per annum (a copy of which note

is set out in the pleading); that the defendants, to secure said note, executed and delivered to plaintiff their certain mortgage deed on the real estate therein described; that said mortgage contained the following condition: "Provided always, and these presents are upon the express condition, that if the said M. C. Durland, and Fanny B. Durland, their heirs, executors or administrators, shall pay or cause to be paid to the said A. E. Durland, his heirs, executors, administrators, or assigns, the sum of eighteen hundred dollars on the 19th day of July, 1894, with the interest thereon at the rate of eight per cent. per annum from this date according to the tenor and effect of the one promissory note of said M. C. Durland and Fanny B. Durland, bearing even date with these presents, then these presents to be void, otherwise to be and remain in full force." The petition alleges the filing and recording of the mortgage; avers that the defendant Temple has an interest in the land by virtue of a certain deed, which is subject to the mortgage sought to be foreclosed. The fourth paragraph of the petition is as follows: "No proceedings at law have been commenced or maintained for the collection of the debt secured by the said mortgagor, nor any part thereof, nor has said debt, nor any part thereof, been paid, and there is due thereon from the said M. C. Durland and Fanny B. Durland to the plaintiff the sum of $1,800 with the interest on said sum at eight per cent. per annum, payable annually, from the 19th day of July, 1893."

It is argued that the petition is fatally defective in that a breach of the condition of the mortgage is not averred. In this contention counsel for defendant is in error. Suit was not brought until August 17, 1897, or nearly three years after the maturity of the note that the mortgage was given to secure, and in paragraph four of the petition it is expressly stated, "nor has said debt, nor any part thereof been paid." Therefore, a breach of the condition of the mortgage is averred with sufficient particularity.

The further objection is made to the petition that it does not meet the requirements of section 850 of the Code of

Civil Procedure, which declares that "upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid." There can be no doubt that this requirement of the statute is mandatory and a plaintiff seeking the foreclosure of a real estate mortgage must substantially comply therewith by making the proper averments in his petition. The defect imputed to the petition is that it is not alleged therein, in the language of the statute, whether any proceedings have been had at law for the recovery of the debt secured by the mortgage. But the petition does aver that no proceedings at law have been commenced or maintained for the collection of the debt secured by said mortgage. This is equivalent to the allegation required by the statute. The word "collection" in the sentence quoted from the petition is the equivalent of the word "recovery" contained in said section 850 of the Code of Civil Procedure. The petition states a cause of action, and the decree is accordingly

AFFIRMED.

HATTIE BOSTWICK, APPELLEE, V. DINA KELLER ET AL., IMPLEADED WITH WILLIAM F. VEST ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,484.

1. **Copy of Appraisement for Sale Must Be Filed With Clerk of District Court.** A copy of an appraisement of lands made for the purpose of judicial sale must be forthwith filed with the clerk of the district court of the proper county.

2. **Silence of Record: PRESUMPTION.** When the record is silent as to filing of a copy of the appraisement, it will be presumed that it was duly and regularly filed.

3. **Appraisement: ACTUAL VIEW.** A sale is not invalidated because the appraisement was not made upon actual view of the premises, when the appraisers are familiar with the property.

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

Hamer & Hamer, for appellants.

Warren Pratt, contra.

NORVAL, C. J.

From an order of the district court confirming a sale of real estate made under a decree foreclosing a real estate mortgage, the defendants appeal.

It is urged that no copy of the appraisement was filed by the sheriff in the office of the clerk of the district court. The officer is required forthwith to file a copy of the appraisement, and prior to the publication of the notice of sale. *Kearney Land & Investment Co. v. Aspinwall,* 45 Nebr., 601; *Burkett v. Clark,* 46 Nebr., 466; *Walker v. Patch,* 52 Nebr., 763; *First Nat. Bank of Broken Bow v. Hamer,* 51 Nebr., 23; *Globe Loan & Trust Co. v. Wood,* 58 Nebr., 395. Therefore, if it appears from the record before us that no copy of the appraisement was ever filed, the sale for that reason would have to be set aside. Unfortunately for the defendants, this record does not so show. It is true no transcript of any copy of the copy of appraisement is to be found in the record, but that proves nothing. The transcript does not purport to be a full and complete copy of the records and files of the lower court. On the other hand, the return of the officer, which we find in the record, states that after the appraisement was made he forthwith deposited a copy thereof in the office of the clerk of the district court of said county. This is not overcome by the mere silence of the record upon the subject. The presumption is that the officer did his duty; especially is this true when his return shows he has done so.

That the appraisement was not made upon actual view of the premises does not vitiate the sale. The statute does not require that the appraisers should be on the lands at

the time they make the appraisement, although it is better that they view the premises, as ordinarily it would enable them the more intelligently to perform their duties, as the appraiser must be familiar with the premises.

The order complained of is

AFFIRMED.

STATE OF NEBRASKA, EX REL. CHARLES Q. DE FRANCE ET AL., V. DOUGLAS FRYE.

FILED NOVEMBER 20, 1901. No. 12,363.

1. **Election Law:** OFFICIAL BALLOT: DUTY OF PROPER OFFICER. It is the duty of the proper officer, in preparing all official ballots, to put at the top and left side of the ballot, in black-faced capital type, not less than one-eighth of an inch high, the name of each party having candidates on the ballot, and to the right of each party a circle one-half inch in diameter, with leaders connecting the party name to such circle.
2. **Form of Ballot:** UNIFORMITY. The form of the ballot should be uniform throughout the state.

ORIGINAL proceeding in mandamus to require a county clerk to prepare an official ballot in a manner specified. *Writ allowed.*

Doyle & Berge, for relator.

George A. Adams and *Norris Brown, contra.*

Argued orally by *Doyle* and *Berge,* for relator; by *Brown* and *Adams, contra.*

NORVAL, C. J.

This was an action in mandamus brought against the respondent, as county clerk of Lancaster county, for the purpose of determining the arrangement or form of the official ballot for use at the general election held in November, 1901. The decision in the case was announced

orally from the bench prior to the election, and the views of the court are incorporated in this opinion.

The record shows that Andrew Wanmer was the nominee of the people's independent party and democratic party for the office of sheriff of Lancaster county, and it was and is his contention that it was the duty of the respondent, in preparing and printing the official ballot, to cause to be printed, at the top and left side of the ballot, the name of each party having candidates on the ballot, and to the right of each party name a circle, with leaders connecting the party name to the circle, notwithstanding the nominees of the people's independent and democratic parties are the same. The respondent contends that it is his duty to place at the top of the ballot, and immediately under the other words, "Democrat," "People's Independent," and connect the two with a bracket, and have leaders connecting the bracketed names with a circle, thus:

"To vote a straight ticket, make a cross within your party circle.

"Republican ..... O

Democrat
People's Independent } ..... O

Prohibition ..... O"

There is ground for argument in support of either proposition. The respondent is entrenched behind the form of the official ballot contained in Schedule A of the election law, Compiled Statutes, 1901, p. 622. The form there prescribed is identical with that set out above. The relators base their right to relief upon the provisions of section 140, chapter 26, Compiled Statutes, 1901, which reads: "All official ballots prepared under the provisions of this act shall be white in color, and of a good quality of news printing-paper, and the names shall be printed thereon in black ink. At the top and left side of the ballot shall be printed in black-faced capital type, not less than one-eighth of an inch high, the names of each party having candidates on the ballot; and to the right of each party name, a circle

one-half inch in diameter, with leaders connecting the party name to the circle. Over the top circle shall appear the following printed instructions: 'To vote a straight ticket make a cross within your party circle.' Every ballot shall further contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names, and the name of no candidate shall appear on the ballot more than once. The names of candidates for each office to be arranged as follows: The party polling the highest number of votes at the last general election for the first set of candidates on the state ticket, shall have the right of its nominees immediately beneath the name of the office for which such candidate was nominated; the party polling the second highest number of votes shall have the second place; the party polling the third highest number shall have the third place, and so on, leaving those candidates whose names appear upon said ballot by petition to appear beneath all other candidates placed there by nomination. The party names at the top of the ballot shall have the same order of priority as is here provided for names of party candidates. * * * The form of the ballot shall, as near as possible, conform to schedule 'A' hereof," etc.

The question is, what construction shall obtain,—the one which gives force and effect to the plain and explicit provisions of the statute, or the other which makes the wording of the statute yield to the form prescribed in Schedule A? It would seem that form should give way to substance. It is manifest that the form of the ballot as given in the schedule would be inappropriate, and could not be used in any county where the nominees of two or more parties are not identical all the way down the line. Thus, if the nominees of the people's independent and democratic parties should be the same, except as to the office of overseer of roadways, and there should be no fusion on such office, the form of ballot laid down in Schedule A would be wholly inapplicable, and could not be used. To construe

the statute according to its letter would render the form of the ballot uniform throughout the state, and not be so liable to confuse the voters as if the form given in the schedule should be held proper where there existed complete fusion all along the line between two or more political parties, and the letter of the statute control when fusion on nominees was not completed as to every office. Every consideration demands that the form of the ballot should be the same throughout the state, instead of one form in one county and a different form in another county. We are unanimously of the opinion that the relator was entitled to the relief sought herein, and the writ is accordingly allowed.

WRIT ALLOWED.

JAMES F. TOY, APPELLEE, V. JOHN MCHUGH, APPELLANT.

FILED NOVEMBER 20, 1901. No. 10,491.

1. **Land Tax, Lien In Rem.** A land tax creates no personal liability against the owner of the land. Such tax must be collected, if at all, by a sale of the particular tract against which it is charged and upon which it is, by the statute, made a specific lien.

2. **Relief: PLEADING: PROOF.** A plaintiff is entitled to relief to the extent that the averments of his petition are sustained by the proof.

3. **Variance Not Material, Unless Misleading.** A variance between an averment of a pleading and the evidence given to sustain it is not to be deemed material unless it has misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

4. **Tax Lien Extinguished by Payment: EXCEPTION.** The tax lien upon real estate existing in favor of the public is ordinarily extinguished by payment. The exception to the rule is where land has been sold by the county treasurer and taxes against the same, becoming afterwards delinquent, are paid by the holder of the tax-sale certificate.

APPEAL from the district court for Holt county. Heard below before KINKAID, J. *Reversed.*

Michael F. Harrington, for appellant.

M. J. Sweeley and *E. H. Benedict, contra.*

SULLIVAN, J.

This action was brought by James F. Toy against John McHugh to foreclose certain tax liens. The plaintiff recovered judgment in the district court in accordance with the prayer of his petition and the defendant thereupon removed the case to this court by appeal. The property affected by the decree of foreclosure is the southwest quarter of section 6, township 26, range 14, in Holt county.

The first point made by counsel for defendant is that the proof does not respond to the averments of the petition. The plaintiff alleged that the entire quarter section was sold in one body and he demanded, and was given, a lien upon the entire tract for the gross amount due upon the tax-sale certificates and tax receipts, produced at the trial. The evidence, however, shows that the land was not sold in one body, but that each of its constituent forties was separately assessed, taxed and sold. It is the law, of course, that a land tax creates no personal liability against the owner of the land. Such tax must be collected, if at all, by a sale of the particular tract against which it is charged and upon which it is, by the statute, made a specific lien. This being so, it is clear that the decree of the trial court is unsupported by the evidence and must, therefore, be reversed. We are of opinion, however, that there is no fatal disagreement between the facts pleaded and the facts proved. The plaintiff is not entitled to the relief given him by the district court, but he is entitled to some relief. To the extent that the allegations of his petition are sustained by the evidence he has made out his case and should be given judgment accordingly. Each tax-sale certificate establishes plaintiff's right to a lien upon a distinct part of the quarter section and shows that he is entitled to a part of the relief for which he prays. Consid-

ered as a whole the evidence does not, it is true, respond to the averments of the petition; but the variance is not in an essential matter and should, at this stage of the litigation, be altogether disregarded, for it is evident that it did not mislead the defendant to his prejudice nor embarrass him in making his defense upon the merits. The right asserted in the petition is not unproved in its general scope and meaning, and, consequently, the plaintiff should be given in this court the relief to which he would be undoubtedly entitled if he had sought in a more appropriate way to have each tax-sale certificate enforced as a lien upon the particular tract described therein. Our statute on the subject of variances is very liberal, and this case, in our view, comes fairly within its beneficent provisions. See Code of Civil Procedure, secs. 138-140.

Another point made by counsel for the defendant is that the trial court erroneously included in the decree certain taxes which had been paid after the sale by others than the tax-sale purchaser. Section 116 of the revenue law (Compiled Statutes, ch. 77, art. 1) is in part as follows: "The purchaser of any tract of land sold by the county treasurer for taxes, will be entitled to a certificate in writing, describing the land so purchased, the sum paid, and the time when the purchaser will be entitled to a deed, which certificate shall be signed by the treasurer, in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings. The purchaser acquires a perpetual lien of the tax on the land, and if after the taxes become delinquent he subsequently pays any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase, and the treasurer shall make out a tax receipt and duplicate for the taxes on the real estate mentioned in such certificate, the same as in other cases, and shall write thereon, 'sold for tax at public sale,' or 'sold for tax at private sale,' as the case may be." The right given by this section is limited to the owner of the

tax-sale certificate. If any person, other than such owner or his agent, pays delinquent taxes, the lien thereon becomes at once extinguished. The land in question was first sold to Edward DeLand for the taxes in 1890. The taxes for 1891 were paid by the Farmers Loan & Trust Company, and the taxes for 1892 were paid by James F. Toy. There is no evidence tending to show that either of these payments was made at the instance of the purchaser or for his benefit, and we must therefore hold that the lien of these taxes was extinguished and did not pass to the plaintiff when he succeeded to the rights of DeLand. In 1894 the land was sold to the plaintiff for the delinquent taxes of 1893, and he afterwards paid the delinquent taxes for 1894 and 1896. The amount of the taxes for these three years was properly included in the decree; but the taxes for 1895, which were paid by the Randolph State Bank, should have been excluded, as it does not appear that the bank, in making such payment, was acting as plaintiff's agent. For the errors indicated the decree of the district court is reversed, and, in accordance with the stipulation of the parties, a final decree will be entered in this court. We find that plaintiff is entitled to a lien upon each forty of the land described in the petition for the sum of $36.25, and that he is also entitled to recover as part of his costs an attorney fee equal to ten per cent. of the amount due upon each tax lien. The costs of this court will be taxed to the plaintiff, and the costs of the district court to the defendant.

JUDGMENT ACCORDINGLY.

CHARLES NELSON V. CITY OF OMAHA.

FILED NOVEMBER 20, 1901. No. 10,576.

1. **Directing Verdict.** Where the evidence is undisputed and unequivocal, it is not error for the trial court to direct a verdict.
2. **Evidence Conclusive.** The evidence in this case examined, and found to conclusively establish plaintiff's right to a verdict and judgment.

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

George A. Magney, for plaintiff in error.

W. J. Connell, contra.

SULLIVAN, J.

This was an action of ejectment brought by the city of Omaha against Charles Nelson in the district court of Douglas county. The property in controversy is part of a public street, but Nelson claims to have acquired title to it by adverse possession. At the trial, however, he did not attempt to make good his claim. The case was submitted to the jury on the evidence of the plaintiff and, in accordance with the instructions of the court, a verdict was given in its favor. Seeking to reverse the judgment rendered on the verdict, the defendant brings the record here for review, alleging as error that the evidence does not tend to show that the city had any right to, or interest in, the property. We have read all the evidence in the record and are well satisfied that it establishes, conclusively, plaintiff's ownership of the real estate described in the petition. The property, according to the testimony of the witness Craig, is part of Tenth street and lies between Seward and Cuming streets, in the city of Omaha. Thomas S. Crocker, register of deeds for Douglas county, produced and gave in evidence the record of certain deeds showing that the city is the owner of the east half of the southeast quarter of section 15, township 15 north, range 13 east, in this state. Before this record was introduced, but after it had been properly identified, the attention of the witness was called to the property described in the petition, and he was asked whether it was covered by the description contained in the record, or in other words, whether it was part of the east half of the southeast quarter of section 15, aforesaid. This question, to which no

objection was interposed, was answered in the affirmative, and the answer stands in the record, no motion having been made to strike it out. This evidence, being undisputed, was sufficient to justify the instruction of the court and the finding of the jury.

The judgment is

AFFIRMED.

BATTLE CREEK VALLEY BANK v. FIRST NATIONAL BANK OF MADISON.

FILED NOVEMBER 20, 1901. No. 10,588.

1. **Levy of Execution:** PHYSICAL DISPOSSESSION: TRESPASS BUT FOR PROTECTION OF WRIT: EFFECTIVE LEVY. It is not essential to the levy of an execution upon chattels that there should be a physical seizure or a dispossession of the person in whose custody the chattels are found. If the officer does that which would make him a trespasser, but for the protection of his writ, the levy is effective.

2. **A Thing Without Potential Existence Can Not Be the Subject of Mortgage.** Things which have neither an actual nor potential existence are not the subject of sale or mortgage. Within the meaning of this rule, animals which have neither been littered nor conceived are without actual or potential being.

3. **A Mortgage on a Thing Not In Esse, a Mere Executory Contract.** An instrument which assumes to convey or incumber a thing not *in esse* is a mere executory contract, which does not, "without a new intervening act," create any legal right to, or interest in, the thing to which it relates.

4. **Lien:** PROVISION IN MORTGAGE: POSSESSION: TITLE. A provision in a mortgage of domestic animals, assuming to give the mortgagee a lien upon the increase to be thereafter begotten, is nothing more than an agreement for a lien which, without possession, vests no legal right to, or interest in, such increase.

ERROR from the district court for Madison county. Tried below before ROBINSON, J. *Affirmed.*

Robertson & Wigton, for plaintiff in error.

Allen & Reed, contra.

SULLIVAN, J.

The judgment here presented for review was rendered in an action of replevin commenced before a justice of the peace and, after trial, removed by appeal to the district court. The property in controversy is twenty-two head of hogs, which the owner, Dufphy, raised upon his farm in Madison county. These hogs are claimed by the plaintiff, The Battle Creek Valley Bank, by virtue of a mortgage which it had upon their dams before they were littered or conceived. The defendant bank is a judgment creditor of Dufphy and it asserts a right of possession under an execution issued upon its judgment. The trial court found in favor of the defendant, and the only question raised by the petition in error is the sufficiency of the evidence to sustain the finding.

According to the express terms of the mortgage, the plaintiff was given a lien upon the property therein described and upon its increase. Possession was taken under the mortgage on February 2, but defendant claims the hogs were seized under its execution on the evening of February 1. One of the contentions of plaintiff is that there was not a valid levy of the writ and that, therefore, the defendant never acquired a lien or possessory right. The evidence upon this point is undisputed. It shows that the sheriff called on Dufphy at his farm and, after stating the object of his visit, told him that he would have to levy upon whatever he could find; that thereupon Dufphy pointed out some corn and cattle which were levied upon; that the sheriff then asked about the hogs, and went with Dufphy to where they were; that while standing "at the fence and edge of them" he told Dufphy that he would have to levy on them too and asked whether he could get any of the neighbors to take them and keep them for him. It further appears that a levy was indorsed upon the writ, but that the hogs were not removed until about eleven o'clock the next morning. The reason they were not removed on the evening of February 1

was that no one could be found to keep them. The sheriff informed Dufphy of this fact and added that he would leave the hogs on the farm until morning. The evidence is, in our judgment, sufficient to prove a levy. It was not necessary that the sheriff should physically seize the property or remove it from the custody of the execution defendant. It was in his immediate possession and he exercised dominion over it by virtue of the writ. What he said to Dufphy was apparently intended and understood to be an assertion of authority, and amounted, we think, to an effective seizure. In looking about for some one to take charge of the hogs and in saying to Dufphy that he would leave them on the farm until morning, the sheriff evidently acted upon the assumption that they were under his control, by virtue of what he had previously done. In *Boslow v. Shenberger,* 52 Nebr., 164, the rule by which to test a levy is thus stated: "A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ." Applying this test to the facts above recited, we conclude that the levy was valid because what the sheriff did in regard to the hogs would, in our opinion, constitute a trespass if he had been acting under a void process. Having made a good levy, the sheriff was, at the commencement of the action, entitled to the possession of the hogs unless the plaintiff had on February 1 a valid lien by virtue of its mortgage. On principle, it would seem, this question should not be difficult of solution. Things which have neither an actual nor potential existence are not the subject of sale or mortgage. Benjamin, Sales, sec. 78; Jones, Chattel Mortgages, sec. 138. A grant of them can not operate *in præsenti.* An instrument which assumes to convey or incumber a thing which has not even a potential existence must be regarded as a mere executory contract. And whatever might be the status of these contracts in courts of equity where that

is considered done which ought to be done, it is well settled, both in this country and England, that they do not create any legal right to or interest in the thing to which they relate without, what is called by the old writers, "a new intervening act." The offspring of domestic animals, it is true, belong to the owner of the dam (1 Blackstone Commentaries [Book 2], 390; 2 Am. & Eng. Ency. Law [2d ed.], 349); but a chattel mortgage in this state does not transfer title to the mortgagee (*Musser v. King,* 40 Nebr., 892; *Bedford v. Van Cott,* 42 Nebr., 229; *Randall v. Persons,* 42 Nebr., 607); it only creates a lien, and consequently the young of mortgaged animals, when brought forth, belong to the mortgagor. The case of a mortgage given during gestation may, perhaps, constitute an exception to the rule, but this we do not decide. It was held in *Cole v. Kerr,* 19 Nebr., 555, that the lien of a chattel mortgage on a crop of corn not planted will not attach to the crop when it comes into existence, unless possession is taken by the mortgagee. "Until then," it is said, "it remains a mere license, and, until acted upon, it conveys neither a lien nor right of property which the mortgagee can assert against a purchaser or execution creditor." It is true, of course, as suggested Mr. Justice COBB in the case last mentioned, that in this latitude the field will not fructify without labor. It must be diligently cultivated and seed must be sown. But it is equally true that domestic animals can not be made to breed without human endeavor. A union must be brought about between the male and the female and they must be given shelter and sustenance or they will perish. It is, indeed, too plain for argument that labor is no more a factor in raising crops than in raising live stock. But the real ground of the decision in *Cole v. Kerr* is not that a mortgage on unplanted crops is a mortgage on labor, but that the thing mortgaged has no existence and is, to use the language of Lord Bacon, "no interest at all but a mere future." *Steele v. Ashenfelter,* 40 Nebr., 770. This view of the matter is, we know, opposed

to the rule laid down by Jones and Herman (Jones, Chattel Mortgages, sec. 149; Herman, Chattel Mortgages, sec. 44); but it is fully supported by a very lucid and logical opinion recently handed down by the supreme court of California. *Shoobert v. De Motta,* 112 Cal., 215. Our conclusion upon the whole case is that the plaintiff having failed to obtain possession—having failed to secure the lien for which it had contracted—until after the levy of the execution, the defendant has the superior right, and was therefore entitled to succeed in the action.

The argument touching the jurisdiction of the court to try the cause, which is in substance an assertion that the judgment in favor of the defendant is void, is not considered, because a reversal is not claimed upon that ground. The judgment is

AFFIRMED.

ALFRED R. MOSS V. A. LINDSEY (REAL FIRST NAME UNKNOWN).

FILED NOVEMBER 20, 1901. No. 10,615.

Taxation of Costs by Justice on Change of Venue Absolute. The taxation of costs by a justice of the peace on sustaining a motion for a change of venue is not provisional merely, but fixed and absolute.

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

W. H. Barnes, for plaintiff in error.

Heasty & Clapp, contra.

SULLIVAN, J.

This proceeding in error grows out of an action to recover damages brought by Moss against Lindsey before one of the justices of the peace for Thayer county. The defendant in due time moved for a change of venue on the

ground that he could not, as he verily believed, have a fair and impartial trial on account of the bias and prejudice of the justice. He also paid the costs properly chargeable to him as a condition of having his motion sustained, and thereupon the venue was changed. The justice to whom the cause was transferred gave judgment against the plaintiff and taxed him with all the costs that had accrued before as well as after the change of venue. The district court having approved this decision, the judgment is brought here for review.

It is conceded that the action was properly dismissed, but it is contended that the defendant is not entitled to recover the costs paid by him in order to obtain a change of venue. This contention, we are persuaded, is based upon sound reason, and should be sustained. Unless otherwise provided by statute, a successful party in an action before a justice of the peace to recover money only is, by virtue of section 622 of the Code of Civil Procedure, entitled to recover his costs. The defendant in this case was successful. He had judgment in his favor. But he was not entitled to have all his costs taxed against the plaintiff, because the statute which gives the right to a change of venue in an action pending before a justice of the peace otherwise provides. By the terms of this statute the place of trial may, upon the payment of certain costs, be changed in any case under the following circumstances: (1) When the justice before whom the action was commenced or is pending for trial is shown by affidavit to be a material witness for either party; (2) whenever one of the parties shall demand a jury and the other shall file an affidavit stating that he can not, as he verily believes, have a fair and impartial trial in the precinct or place for which the justice was elected, on account of the bias or prejudice of the citizens thereof (Code of Civil Procedure, sec. 954); and (3) whenever there shall be filed, by the defendant, or in his behalf, an affidavit stating that he can not, as the affiant verily believes, have a fair and impartial trial on account of the interest, bias or preju-

dice of the justice having cognizance of the cause. Code of Civil Procedure, sec. 958*a*. The section of the statute providing for the taxation and payment of costs is as follows: "When such change is at the instance of the plaintiff, he shall be taxed with all the costs which have accrued and which shall accrue in the cause, until such transcript and papers shall be delivered to the justice to whom such cause is removed for trial; and when on the application of the defendant, he shall be taxed for the costs which have accrued for issuing subpœnas for witnesses and service thereof, witness fees, and costs of the justice for transferring the cause to the docket of the other justice." Code of Civil Procedure, sec. 958. It will be observed that this section provides that the costs which the party obtaining the change of venue is required to pay shall be taxed against him. We understand this to mean that they shall be charged or assessed by the justice, and that such charge or assessment is not to be provisional merely, but fixed and absolute. There is, assuredly, no express authority for a retaxation of these costs, and, in our judgment, none exists by fair legal construction. It is but just and right that a party who obtains a change of venue should bear the expense occasioned thereby. It is, it seems to us, highly improbable that the legislature intended to permit a litigant to increase the burdens of a luckless adversary by swearing that he believes he can not have a fair trial where the cause is pending. Too frequently the belief which is alleged as a reason for demanding a change of venue is in truth nothing more than a groundless suspicion, which should be made the basis of judicial action only at the expense of the party by whom it is entertained. If a change of venue were to cost nothing but the making of an affidavit as to his mental state, the litigant afflicted with an hepatic disorder would soon become a vexatious factor in the administration of justice.

Another consideration influencing our decision is this: A construction of the statute which would permit a party

to recover costs paid by him when the place of trial was changed would also enable him to recover costs which he had recklessly made after having determined to have the cause transferred to another justice.

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

REVERSED AND REMANDED.

PHINEAS WILLIAMS V. SAMUEL W. AUTEN ET AL.*

FILED NOVEMBER 20, 1901. No. 10,488.

1. **Statute of Frauds:** ORIGINAL PROMISE. Where goods, money or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing. *Peyson v. Conniff*, 32 Nebr., 269.
2. ———: COLLATERAL LIABILITY: VOID UNLESS IN WRITING. Where, however, goods are furnished to a third party at the request of a promisor and with reliance on his credit, and the transaction is such that the third party or beneficiary is liable therefor to the promisee as an original undertaking on his part, and there being no joint contract the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds.

ERROR from the district court for Saunders county. Tried below before SEDGWICK, J. *Reversed in part.*

H. Gilkeson, Conrad Hollenbeck and *Frank Hollenbeck*, for plaintiff in error.

Good & Slama, contra.

HOLCOMB, J.

This cause originated in the county court for Saunders county. After trial an appeal was taken to the district court. A trial was had in the district court to the court and a jury, which resulted in a verdict and judgment against the defendants therein, Phineas Williams and

*Rehearing allowed.

Debolt B. Welty. Williams prosecutes error in this court from the judgment thus rendered against him. By the action had in the lower courts, Williams and Welty were sought to be held jointly liable on account for goods and merchandise alleged to have been sold them by the plaintiffs below, who are doing business as a partnership in conducting a general retail merchandise establishment. Williams's defense is that his liability for the account sued on, if existing at all, is collateral only, and not that of a principal debtor, and that such contract obligation, being to answer for the debt of another, and not being in writing, is void under the statute of frauds. Welty makes no defense. A clear understanding of the issues necessitates brief reference to the pleadings filed by the plaintiffs, both in the county and district courts. In the county court, the petition alleges: "That at the instance and the request of the defendant, Phineas Williams, and upon his expressed promise to become liable therefor, the plaintiff sold and delivered to the defendant Welty, goods, wares, and merchandise. * * * That requests for payments thereof has been made both upon the defendant Welty and defendant Williams." In the district court the petition alleges: "That on and between said dates at the instance and special request of the defendant, Phineas Williams, and upon his express promise to be liable therefor, and pay for the same, the plaintiff sold to the defendants and delivered to the defendant Welty, goods, wares and merchandise, * * * and request for payment has been made upon the defendants."

The above constitutes the material averments in the pleadings of the plaintiffs with reference to the character of the contract on which a recovery is sought against both defendants. While the defendant Williams denies any agreement with the plaintiff, either as an original undertaking or as guarantor of the debts of Welty, the evidence, we think, warrants the conclusion of an agreement to pay the account on which the action is founded, either as guarantor or as promisor on an independent contract

as a principal therein. Construing the evidence as favorably to the plaintiffs as it is fairly capable of, we find the facts substantially as follows: Plaintiffs were engaged in the general merchandise business, as has been mentioned. Welty was a tenant farming land owned by Williams. Williams at one time spoke to one of the plaintiffs about letting Welty have goods from their store as he might be in need of, saying: "Will you let D. Welty have goods if I pay for them?" to which the party answered in the affirmative. Williams then directed the merchant to: "charge me with what I get, if anything, and charge De with what he gets; when I pay give me credit and when he pays give him credit; when I pay money have the books to show that Williams paid and not Welty. I want those books to show the transactions of each." Welty soon after began to get merchandise, which was charged in the books of the plaintiffs to him. After the account had thus run for some time and after giving Welty credit for payments made on the account by him, a balance was found due of $164.25. It is then testified that Williams, in conversation with one of the plaintiffs, said: "I have no money, I will pay in a few days." Later on he told the merchant not to let D. B. Welty have any more goods as he would not pay for them; that he was going to move him from the farm. Afterwards Williams stated: "De and I have fixed it up." Later he said: "I don't know as I can pay for those goods." After some further conversation in which plaintiffs said they wanted to know who was to pay for the goods, and later on during the same day, Williams stated to the plaintiffs: "I stand for the payment of De's [Debolt Welty's] goods in the future as I have in the past." There is also some evidence showing that Welty's credit was not good and that Williams said he had security from Welty for the obligation he assumed by the contract sued on. We are disposed to the view that the evidence is sufficient to support a finding that Williams was liable as the party with whom the contract was made as the promisor in an original undertaking, and

to whom the credit was extended and the goods sold, although for the benefit of and delivered to another, except for that which appears in the record from the pleadings and the evidence, and which conclusively shows that the contract was made with, and the goods sold to Welty, and credit extended to him as well as to Williams. We are not dealing with a case where an agreement upon a valid consideration is entered into, whereby one obligates himself to pay for goods or services for the benefit of and furnished or rendered to a third party, such third party having no other or further interest in or connection with the transaction save that of being the recipient of the benefits thus bestowed. In the class of cases referred to, the promise, although verbal, is clearly an original undertaking in no way affected by the statute of frauds. In such cases the contract is made with, and the credit is given exclusively to the party sought to be charged, and his obligation is that of a principal, and not a guarantor. Regarding these cases, the rule is well stated in *Peyson v. Conniff*, 32 Nebr., 269, where it is held: "Where goods, money, or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing." The rule stated is well supported by the authorities cited in the opinion. Nor is the case at bar one where two or more may become jointly obligated under an agreement entered into by all the parties thereto for goods or services, even though but one of the contracting parties or a third party may receive the thing contracted for and be the beneficiary under the contract. In this case the contract was made with and the goods sold to either Williams or Welty, but not to both of them. There is nothing in the record warranting the inference of a joint liability. The nature of the transaction and the circumstances surrounding the same, conclusively negative the idea of joint obligation. If one is liable under the agreement, the other is not. Both can not be held jointly for the goods obtained by and deliv-

ered to Welty under the account sued on. The question then is, can Williams, who is here complaining, be held under the pleadings and the evidence as a principal promisor on an original contract of indebtedness, or must his agreement be construed as one of guaranty or of promise to answer for the debt of another, and therefore void because not in writing?

It is argued that because there is evidence tending to show that Williams had secured himself by taking a mortgage on Welty's property, and also that the plaintiffs would not have extended the credit had it not been for their reliance on Williams's promise to pay the debt, he should be held responsible as a principal in the transaction. But these facts are equally consistent with his liability as guarantor. The plaintiffs may have relied on his verbal guaranty of payment of the debt of Welty, if such be the legal effect of the transaction, and Williams may have undertaken to obtain security from Welty because of such verbal guaranty, and yet these facts would not justify us in construing a collateral into an original undertaking. These facts, admitting them to be established, do not materially aid us in determining the true character of the liability of defendant Williams under the agreement mentioned. We are of the opinion that the question hinges and must turn on the action of the parties under and in pursuance of the alleged agreement, and especially of the plaintiffs, in what they have said and done with reference to the credit extended to and liability sought to be imposed on the defendant Welty. They have obtained a judgment against him which could have been done only on the theory that the contract for the sale of the merchandise sued for was made with him and that he thereby became legally liable for the payment of the value thereof. They charged the goods to him, and he made and was credited on the account with certain payments. While this is not conclusive standing alone, when taken in connection with other action of the plaintiffs it admits of no other conclusion than that the credit

was extended to Welty. They demanded payment of him before beginning the action. They sold the goods relying on Williams's agreement to see that they were paid for. They demanded payment also of him. What then must be the true character of the contract under plaintiffs' own version of the transaction and to which they are solemnly and irrevocably committed by their actions as shown by the pleadings and the evidence? The liability of the defendants, as has been stated, can not be that of joint debtors. The essential requirements of a joint obligation are altogether wanting. Both defendants can not then be held liable as principals, and the liability of one, therefore, must be secondary. Welty's liability can not be of a secondary character; his obligation is that of a principal, or it does not exist. Williams's liability may be, and must, we think, be conclusively held to be such under the pleadings and the evidence. If his verbal agreement to pay the debt is not that of a principal in the transaction, his is a collateral undertaking, and the statute of frauds may be invoked to determine his legal liability. The object and intent of the statute, says Reed in his work on the Statute of Frauds, section 87, is to deny the imposition of a liability by parol on two persons to pay the debt of one. See, also, *Hendricks v. Robinson,* 56 Miss., 699.

The authorities appear entirely harmonious in support of the rule that if the beneficiary or person for whose use the goods are furnished is liable at all by reason thereof, any other promise by a third person to pay the same debt must be in writing, otherwise it is void by operation of the provisions of the statute of frauds. Reed, Statute of Frauds, sec. 31, and authorities there cited. In *Cowdin v. Gottgetreu,* 55 N. Y., 650, it is stated in the headnotes that: "While a person may become liable upon a parol promise for goods purchased which are delivered to and are intended for the use of another, in order to make him so the debt must be his only; he must be exclusively liable therefor." In speaking of the rule applicable to the same state of facts as in the case at bar, it is observed by

the appellate court of Illinois in *Schotte v. Puscheck*, 79 Ill. App., 32: "It appears clearly from the evidence presented that there was an original undertaking by Wilmot; that credit was given to him; that he was charged with the account upon the books of appellees, and that a legal obligation, capable of being enforced by law, existed on the part of Wilmot to pay appellees for these goods. The undertaking of appellant, if any, was collateral, and the statute of frauds would apply." The converse of the proposition we are considering is thus stated by the supreme court of Illinois in the case of *Resseter v. Waterman*, 151 Ill., 169, 176: "In order that the promise can be held to be within the statute, it is essential that there be a binding and subsisting obligation or liability to the promisee, to which the promise is collateral. In other words, 'that the party for whom the promise has been made must be liable to the party to whom it is made' "—citing, 3 Parsons, Contracts, *21, note *p; Hargreaves v. Parsons*, 13 M. &. W. [Eng.], 561; *Eastwood v. Kenyon*, 11 A. & E. [Eng.], 438; *Westfall v. Parsons*, 16 Barb. [N. Y.], 645; *Preble v. Baldwin*, 6 Cush. [Mass.], 549; *Pratt v. Humphrey*, 22 Conn., 317; *Alger v. Scoville*, 1 Gray [Mass.], 391; *Barker v. Bucklin*, 2 Denio [N. Y.], 45; *Perkins v. Littlefield*, 5 Allen [Mass.], 370; *Tighe v. Morrison*, 116 N. Y., 263, and cases cited. See, also, *Rose v. O'Linn*, 10 Nebr., 364; *Langdon v. Richardson*, 12 N. W. Rep. [Ia.], 622; *Studley v. Barth*, 54 Mich., 6.

In the case at bar the liability of Welty, the person for whom it is alleged the debt was contracted and promised to be paid by Williams, has been pleaded and proved in the proceedings heretofore taken in this cause, and it now stands as a final adjudication that such liability as to him exists in favor of the promisees, the plaintiffs in the action; and, applying the rule we have just discussed, it must follow, as a necessary sequence, that Williams's agreement to pay the debt is collateral only, and, not being in writing, is void by reason of the statute of frauds, and the judgment as to him must be reversed and he

dismissed from the case. The judgment is accordingly reversed as to the defendant Williams, and the cause remanded with direction that the action as to him be dismissed.

JUDGMENT ACCORDINGLY.

W. S. COLE V. ELIZA A. WILLARD ET AL.

FILED NOVEMBER 20, 1901. No. 10,639.

Appraisement: MISTAKE IN VALUATION. An appraisement of real estate for the purposes of a judicial sale can not be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property. *Nelson v. Alling*, 58 Nebr., 607.

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

Leslie E. Kirkpatrick and *John S. Kirkpatrick*, for plaintiff in error.

Adolphus R. Talbot and *Alpha Morgan, contra.*

HOLCOMB, J.

From an order confirming the sale of real property made in a foreclosure action the defendants prosecute error. The objection to the confirmation of sale was also presented in a motion to vacate and set aside the appraisement, and is "that said appraisement on which sale is made is inadequate and fraudulent, and is so low as to be presumptively fraudulent." The only evidence in support of the objection consists of the affidavits of five persons, whose opinion of the value of the real estate sold was from $4,000 to $4,800, the average value being $4,240. The appraisers found the value of the property to be the sum of $2,800. The most that can be said from the evidence is that the appraisers were mistaken as to the value of the property. In *Nelson v. Alling*, 58 Nebr., 607, it is

said: "It is now the established doctrine of this court that the appraisement can not be successfully assailed merely because the appraisers were mistaken in their valuation of the property," citing *Vought v. Foxworthy*, 38 Nebr., 790; *Ecklund v. Willis*, 44 Nebr., 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Nebr., 601; *Brown v. Fitzpatrick*, 56 Nebr., 61; *Ballou v. Sherwood*, 58 Nebr., 20; *Lockwood v. Cook*, 58 Nebr., 302; *Michigan Mutual Life Ins. Co. v. Richter*, 58 Nebr., 463. The writer reluctantly yields assent to this rule. It is, however, firmly settled by the many prior adjudications and should, we are constrained to say, be adhered to. Applying the rule to the case at bar, the objection, with the evidence adduced in support thereof, is insufficient to warrant an order setting aside the appraisement and sale made thereunder.

The order of confirmation is accordingly

AFFIRMED.

STATE OF NEBRASKA, EX REL. PLATTSMOUTH TELEPHONE COMPANY, V. BENJAMIN S. BAKER.

FILED NOVEMBER 20, 1901. No. 12,381.

1. **Temporary Injunction**: DISSOLUTION: SUPERSEDEAS: DUTY OF JUDGE AT CHAMBERS. Where a temporary order of injunction has been granted and subsequently dissolved or modified, the party in whose favor the injunction was allowed may, as a matter of right, under the provisions of section 679 of the Code of Civil Procedure, have the amount of a supersedeas bond fixed, and supersede the order of dissolution or modification, and continue the injunction in force until the order is reviewed by an appellate court; and it is the duty of the trial court, or judge sitting at chambers, to fix the amount of such supersedeas bond on the entry of the order of dissolution or modification.

2. **Temporary Restraining Order**: PARTY NOT ENTITLED TO SUPERSEDEAS. A temporary restraining order pending a hearing on the application for a temporary order of injunction may be subsequently dissolved, and the party in whose favor it was allowed is not entitled to have the order of dissolution super-

seded pending review, as in the case of a temporary order of injunction.

3. **Form and Substance of Order Determines Its Character.** Whether the character and function of a writ restraining the parties to the action from doing certain things, issued at its commencement, are those of a temporary order of injunction, or a temporary restraining order, must be determined by the form and substance of the order so issued.

4. **Distinguishing Features of the Two Writs.** The chief distinguishing feature of the two writs is that the temporary restraining order contemplates a further hearing on the application for a temporary injunction upon notice to and a hearing by the adverse party on such application.

5. **Writ Set Out and Construed To Be Injunction.** Writ set out in the opinion construed and *held* to be a temporary order of injunction, on the dissolution of which an amount for a supersedeas bond should have been fixed, by which the order of dissolution may be superseded.

6. **Effect of Writ.** The temporary order of injunction issued in this action *held* not to dispossess the defendant city of its streets and alleys, or take from it the authority granted by law to control and regulate the use thereof, and that the order is not for that reason void.

ORIGINAL application for mandamus to compel the respondent, as district judge, to fix a reasonable amount as a supersedeas bond. *Writ allowed.*

Byron Clark and *C. A. Rawls,* for relator.

James H. Van Dusen and *W. J. Connell, contra.*

Argued orally by *Van Dusen* and *Connell.*

HOLCOMB, J.

The relator asks a peremptory writ of mandamus requiring the respondent, one of the district judges of Douglas county, to fix a reasonable amount as a supersedeas bond on an order entered in an action pending in the district court of that county, dissolving what is claimed to be a temporary order of injunction. The writ is entitled "The Plattsmouth Telephone Company v. The City of South Omaha, its Mayor, A. R. Kelley, its Chief of Police,

Miles Mitchell, and its Street Commissioner, Frank Clark. Temporary Order of Injunction," and reads as follows: "This cause came for hearing upon the bill of complaint of the plaintiff verified positively, and was submitted to me, on consideration whereof it is ordered that an injunction be granted herein enjoining the defendant, the city of South Omaha, its mayor, A. R. Kelly, its chief of police, Miles Mitchell, and its street commissioner, Frank Clark, and all other officers and employees of said city, from in any manner interfering with the telephone business of the plaintiff, the Plattsmouth Telephone Company, either by cutting its wires leased from the Postal Telegraph-Cable Company, removing its instruments, arresting its officers and employees or from obstructing or prohibiting the receiving and sending of messages over its said leased wires in any manner until the further order of this court; this order to take effect upon the plaintiff executing and delivering to the clerk of the district court, an undertaking to the defendants in the sum of $1,000 with approved sureties, conditioned as required by law, this writ returnable before Hon. Chas. T. Dickinson on the 7th day of November, 1901." The order was issued at the time of the commencement of the action.

It is contended by the respondent that the writ is a restraining order issued in pursuance of section 253 of the Code, and that a modification or dissolution thereof is not such an order as may be superseded as in the case of a temporary injunction. In our view of the case the question must be determined by a construction of the character, scope, and effect of this writ. If a temporary order of injunction restraining the defendants from the acts mentioned pending litigation, upon its dissolution the relator is, under the statute, entitled to have the order superseded by virtue of the mandatory provisions of section 679 of the Civil Code, Compiled Statutes, 1901. On the other hand, if the writ is a restraining order pending and for the purpose of having a hearing on the application for a temporary injunction, upon notice to the ad-

verse party as provided by section 253 of the Code the plaintiff is not entitled to have the order of dissolution superseded. *Manning v. Connell,* 47 Nebr., 83; *Trester v. Pike,* 60 Nebr., 510. After the commencement of the action in the district court on October 26, in which the temporary order of injunction was allowed, and the issuance thereof, the respondent as judge of the district court, on October 28, without notice to the plaintiff, entered the following order: "On further consideration of the petition in the above entitled cause, it is now ordered that the restraining order heretofore allowed in said cause be and the same is hereby revoked, annulled and dissolved; and it is further ordered that the plaintiff's application for a temporary injunction be set for hearing before Hon. Chas. T. Dickinson one of the judges of said court at room 7 in the Bee building at the hour of 9:30 A. M., 31st day of October, 1901, and that two days' notice of said hearing be given the defendants." Later, and on the 29th day of October, on motion of the defendants to correct and modify the order and entry of October 26 "so as to show on its face that said order and entry was a temporary restraining order as was intended by said judge in place of a temporary order of injunction and because the same was so entered as a temporary order of injunction through inadvertence and mistake," the following order was made by respondent as district judge: "And the court now being fully and well advised in the premises doth find that said order was issued by the court through inadvertence and mistake, and that the intention was to issue a restraining order until the application of plaintiff could be heard for temporary order of injunction, and the court further finds that said order issued upon October 26, A. D. 1901, should be corrected and made to express the intentions of the judge, and to read as follows: 'This cause came on for hearing upon the petition of the plaintiff verified positively, and was submitted to me, on consideration whereof it is ordered that plaintiff's application for a temporary injunction be denied, and that said ap-

plication be set for hearing before the Hon. Chas. T. Dickinson upon November 7, 1901, at 9 o'clock A. M., or as soon thereafter as it can be heard, and that three days' notice be given to the defendants of said application, and that in the meantime the defendants and each of them be restrained from in any manner interfering with the telephone business of plaintiff, either by cutting its wires leased from the Postal Telegraph-Cable Company, removing its instruments, arresting its officers and employees, or from obstructing or prohibiting the receiving and sending of messages over its leased wires in any manner until said application for a temporary injunction be heard. This order to take effect upon the plaintiff executing and delivering to the clerk of the district court an undertaking to the defendants in the sum of one thousand ($1,000) dollars, with approved sureties, conditioned as required by law,' to all of which plaintiff objects to the jurisdiction of the court to enter said order and excepts thereto."

These subsequent proceedings to which we have alluded operate, if at all, as a dissolution of the order first issued and unless they may be superseded the relator is without remedy in so far as that order in any way affects his case and must rely upon a further order of the district court to grant it such injunctional relief as it may be entitled to after a hearing is had upon its application. These subsequent orders may also, and probably do, have some value as showing the construction placed upon the first order by the judge issuing the same, as it must be admitted that some doubt exists as to its true character and function. If the order of injunction is open to any reasonable construction which will give to it the office and character of a restraining order pending the application and until a further hearing can be had thereon for a temporary injunction, we would be disposed so to construe it. It is, we think, unless the right to an injunction is perfectly clear, preferable and will come nearer subserving the rights of all parties to require notice to be given the adverse parties of the application for an injunction and

until the hearing thereof restrain all action that would in any wise tend to render an injunction ineffectual in the event upon hearing it should be determined that one ought to issue. We must, however, take the record as we find it, and not what we might prefer it to be.

By section 251 of the Civil Code it is provided: "When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during litigation would produce great or irreparable injury to the plaintiff, or when during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." Under the authority thus granted, a district court, or a judge thereof sitting at chambers, may grant a temporary order of injunction without notice to the adverse party at the time of the commencement of the action, which becomes effective when the bond required is given and approved by the clerk of the court; and, when issued, the plaintiff in the action is invested with certain rights in the litigation, which he can not be deprived of without being given the opportunity to have the order affecting such rights superseded and reviewed on error. Modification or dissolution of such temporary injunction affects those rights, and gives him, under the statute, the unqualified right to have the order superseded until a review thereof can be had by an appellate tribunal. The form and substance of the order under consideration meets every essential requirement of a temporary order of injunction, fully complies with the statutory provisions relative to the subject, and operates effectually to restrain the parties enjoined from doing the things prohibited while it remains in force, and until finally disposed of in the manner provided by law. It will not be

contended, we apprehend, that in form or in substance the order does not in all things meet the demands of a valid injunctional order, under the provisions of the statute we have just quoted. It is to all intents and purposes a complete and final action on the application for a temporary order of injunction, subject only to the right of the defendant to a modification or dissolution, upon which plaintiff may stay the order by giving the supersedeas bond authorized by statute. Can the same be said of the writ with respect to the contention that it is only a restraining order, effective until a hearing is had on plaintiff's application for an injunction? The spirit of the statute and the authority given for a temporary injunction is that it may issue when it appears from the petition that plaintiff's relief, or any part thereof, consists in restraining the defendants from doing the things complained of, without regard to notice to the adverse party; that when it is issued after notice the order may be modified or dissolved on the application of the defendant, and that, upon such order of dissolution or modification by any court or any judge at chambers, there should at the same time be fixed a reasonable sum as the amount of a supersedeas bond which the person or persons applying for said injunction may give, and prevent the doing of the act or acts restrained by the injunction so modified or dissolved, pending a review of the proceedings thus had. These statutory provisions, clear and explicit as they are, can not be ignored under the pretense that the writ is a temporary restraining order, unless it is, in substance and truth, such a writ as is provided for by the section of the statute we shall now consider. By section 253 it is provided that: "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may, in the meantime, restrain such party." This section is not difficult of construction. When it is deemed proper that the defendants

shall have notice of the application and be heard before the injunction is granted, the judge may so direct and in the meantime restrain the party from doing the things complained of. By referring to the order heretofore set out, it will be noticed that the judge found the petition sufficient to grant a temporary order of injunction, and on consideration of the petition alone the order was issued. The order does not by its terms indicate or contemplate that a further hearing on the application was to be had before the application was finally acted upon; and herein, in our judgment, lies the chief distinguishing characteristics between a "temporary order of injunction" and a mere "restraining order" until the application is fully heard. There is nothing to indicate that he deemed it proper that the defendants should be heard before granting the injunction; no order or direction that any notice be given to such party to attend for the purpose of hearing the application; no time or place mentioned for such hearing; nor does the wording of the order itself indicate that it was to operate as a restraint on the defendants "in the meantime," and only until such hearing should be had. This is made more manifest by the order subsequently made vacating the first order and dissolving the same, and directing a hearing to be had before another judge of the district court at a time and place therein named at an early date thereafter. It probably also emphasizes the fact that the case was one where a hearing might more properly be had before the application for a temporary injunction was finally passed upon. The same may be said of the second subsequent order, finding that by mistake and inadvertence the first or temporary order of injunction was allowed. While such a mistake or inadvertence may be corrected by modifying or dissolving the temporary order of injunction the order when made can not operate to defeat a party's right to have it superseded under the authority of the statute providing therefor. In the temporary order of injunction is the following recital: "This writ returnable before Hon. Chas. T. Dickinson on

the 7th day of November, 1901." These words alone furnish the only ground for any doubt which can arise as to the scope, effect and function of the order under consideration. We can only regard them as surplusage and without legal import. Judge Dickinson is one of the six other judges of the same judicial district as respondent. Whether it was intended that future proceedings on the order or in the case should be had before the judge mentioned, or whether the application was referred to him for further consideration, or what was the purpose of the use of these words, we can only surmise. The phrase has no legal significance. It does not have the effect of a finding that the defendants should be granted a hearing before granting an injunction, and of directing notice to be given to attend for such purpose at a specified time and place, when the application would be heard and acted upon; nor does the entire instrument indicate that a further hearing was contemplated. These are the chief characteristics of a restraining order under the statute, and these are wanting in respect of the order first issued. The order is not addressed to the defendants. It is not directed to be served on them. It does not expressly or impliedly warrant the inference that a hearing is deemed proper before granting the injunction applied for. It shows that the injunction is granted. It does not serve the purpose of giving notice to or warning the defendants that they may appear at any time and place and be heard regarding the application, if desired. It can hardly be said that service of the order on defendants would be notice to them that the application for an injunction was pending, undetermined, and they would be given an opportunity to be heard in resistance thereof at a time and place therein specified. Were some action dependent on notice to the adverse party before such action is authorized, or the judge or court could obtain jurisdiction over the defendants, would it be seriously contended that the order in question would bring them into court and subject them to its jurisdiction? It was not necessary, as a jurisdictional step, to serve the

order on the defendants. A summons regularly issued, indorsed and served, returnable as required by law, operated as notice that a temporary injunction had been granted. The order, if served, was useful in bringing directly home to the defendants knowledge of the things they were restrained from doing.

The difference in the office and purposes of a temporary order of injunction and of a restraining order pending a hearing on the application for an injunction is well defined by statute, and there should be no room for doubt as to which is issued at the beginning of the action. If a further hearing is deemed advisable, this may very easily be expressed in unmistakable terms and the temporary restraining order could only be regarded as issued for the purpose of restraint until the contemplated hearing was had. Each of the two writs has certain well-defined characteristics, which distinguish the one from the other, and there ought to be no reason or opportunity for confusion as to which was intended to be issued. The order in question falls clearly within all the requirements of a temporary injunction, and fails in several essential particulars to answer to the demands of a temporary restraining order; and we must therefore hold it to be, as contended by relator, a temporary order of injunction, from a modification or dissolution of which a party is entitled to have a bond fixed to supersede such order pending proceedings to review the action had in the trial court.

It is further contended that the temporary order of injunction, if it be construed as such, is void, because its effect is to dispossess the city of the streets and alleys, and takes from it the authority granted it by law to control and regulate the use thereof; and the case of *Calvert v. State,* 34 Nebr., 616, is appealed to as authority in support of this contention. The rule therein stated, which appears to us sound in principle and to be followed in all proper cases, is not, we think, applicable to the facts in the case at bar. The two cases are not at all analogous. In the case cited it is held that: "A preliminary injunction is

merely to preserve matters *in statu quo* until a hearing. It can not divest rights nor transfer the possession without a trial." Says the author of that opinion in speaking of the case as presented by the pleadings and the evidence: "The judge, in effect, has undertaken to dispose of the merits of the case without a hearing. A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in the property, it is simply void"; citing a number of authorities in support of the proposition. The order in the case at bar divests the city of nothing. It prevents only the city and its officers from interfering or molesting the plaintiff in the enjoyment of its property then under its possession and control, during the pendency of the action. It takes away no rights of the city and transfers none to the plaintiff. The city is yet in the full enjoyment of its streets and alleys and the control thereof. If the possession which the plaintiff is enjoying of a right to do business over the lines of a franchised corporation engaged in a lawful occupation in the city is not good in law, this may be determined at the proper time and in a proper proceeding. But the mere fact that the city is restrained from interfering with such possession and the enjoyment by plaintiff of its own property pending the determination of its right to do business which it at the time is engaged in is not a divesting of the city of its possession or rights in property, within the meaning of the rule invoked. The order of injunction does what is said to be its proper function; that is, prevents action, and holds the litigated matters *in statu quo* pending a hearing, and until a final judgment may be rendered, adjudicating the rights of the parties litigant.

It is the duty of the respondent to fix a reasonable sum as the amount for which a supersedeas bond may be given on the order entered dissolving the temporary order of injunction first issued, and it will be so ordered.

JUDGMENT ACCORDINGLY.

W. S. POPPLETON, APPELLEE, V. FRANK E. MOORES ET AL., APPELLANTS.*

FILED NOVEMBER 20, 1901. No. 10,450.

Commissioner's opinion, Department No. 1.

1. **Ordinance**: OMAHA WATER COMPANY: EXTENSION OF FRANCHISE: POPULAR VOTE: CONSTITUTION. An ordinance extending from June 11, 1900, to September 1, 1908, the right of the Omaha Water Company to exercise its franchise free from the city's option to purchase, without compensation to the city, and without submission of the question of such extension to a popular vote, is forbidden by section 19, chapter 12*a*, Compiled Statutes, 1897.

2. ———: EXTENSION OF FRANCHISE: LEGISLATIVE POWER: INJUNCTION. An extension of a franchise, though made in the form of an ordinance, is not such an act of legislative power as to be free from interposition of the courts by injunction, where such extension is clearly contrary to the city's statutory charter, and is liable to operate to the prejudice of taxpayers and water-users.

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

W. J. Connell and *James H. Adams,* for appellants.

Weaver & Giller, contra.

Argued orally by *Connell,* for appellants, by *Weaver, contra.*

HASTINGS, C.

A somewhat careful examination of this case seems to reveal but one question in it, viz., has a taxpayer and water-user a right to enjoin the mayor and city council from passing an ordinance postponing a city's right to purchase at an appraised valuation the plant of a water-works company furnishing it water under an exclusive franchise? By the terms of its franchise the water-works

*Rehearing allowed.

company of the city of Omaha was subject, after twenty years from June 11, 1880, to have its plant taken at any time by the city upon a valuation to be made by three engineers, one to be selected by the city, one by the water company, and these two to choose a third. In 1897, a proposition was made by the company to furnish water for the exposition, if the city's right to purchase were postponed to September 1, 1908. An ordinance providing for such postponement by means of amendment of the original ordinance was introduced into the city council, was referred to a committee, and was reported upon without recommendation by a majority of that committee, but unfavorably by a minority, and was pending for passage when by the interposition of an injunction in this action its further consideration or passage were prevented. A temporary injunction was allowed against the passage of the ordinance; against in any way adopting the proposition of the water company embodied in it; against passing any ordinance, resolution or proposition which would to any extent embarrass, curtail, weaken, put off or change the right of the city to buy the water plant or get it by exercise of eminent domain after June 11, 1900. At the trial of the case the injunction was made perpetual, and the defendants appeal. The questions raised are simply as to the sufficiency of the allegations of plaintiff to authorize the action of the court. There seems to be no issue of fact in the pleadings. The only one attempted to be raised is the legal one as to whether or not the water company is a necessary party.

It is claimed that the proposed action of this city council should be enjoined, because it cedes away future powers of the city; because the right to acquire the water plant by exercise of eminent domain was not reserved; because the city would be disabled from performing its duty of control over the water plant and its power to purchase would be lost, an exclusive franchise of great value would be given away; that all of the belongings of the water company were worth less than $3,000,000, but it was proposed

on the passage of this ordinance to issue stock and mortgage bonds for $10,250,000; that there was no compensation for the extension; that water prices and hydrant rentals were extortionate and would be continued; that no opportunity for competition was allowed; that it was a fraud upon the taxpayers and water consumers; that it would pass unless enjoined; that such action by the council was unauthorized, would cause irreparable injury and was fraudulent and in violation of sections 19 and 135 of the city's charter (Compiled Statutes, ch. 12*a*); that such extension of the franchise was unlawful under the terms of section 19 of the charter; that it would prevent the purchase of the water plant, and that the water company, if improvements were made under the ordinance, would claim an estoppel against the city.

The important objection to the ordinance itself seems to be that its passage is a palpable violation of the provisions of section 19 of the charter of metropolitan cities. The last clause of section 19 reads: "No new franchise shall hereafter be granted, nor any extensions of franchises heretofore granted be lawful unless an annuity to the city be provided, based upon either a fixed reasonable amount per year, or a percentage on the gross earnings of the owners of said franchise, nor until a proposition for the same has been submitted to a vote of the electors of the city at a general city election or a special city election called for that purpose, and to carry such a proposition it shall require a majority of the electors voting at such election." Compiled Statutes, ch. 12*a*. It is not seriously contended that the proposed action was not in violation of this provision, but it is contended that such action, however unauthorized, can not be prevented by an injunction. It is claimed that the authority of the city council is legislative, and that a court of equity will not interfere with it. It is urged, and numerous authorities cited to sustain the proposition, that the utmost that can be done is to enjoin attempts to enforce invalid ordinances, and that any attempt on the part of a court of equity to control action

merely legislative is without jurisdiction. It is also asserted that the proof fails to disclose that the defendants were about to pass the ordinance, and fails to disclose any damage which would result to plaintiff in any capacity, either as taxpayer or water-user, by reason of its passage. Counsel admit that this court, in *Wabaska Electric Co. v. City of Wymore,* 60 Nebr., 199, has held that city authorities may be enjoined from adopting an ordinance entirely beyond the power of the city board. "And while, as is thus shown, equity will not enjoin the action of municipal corporations while proceeding within the limits of their well-defined powers as fixed by law, it has undoubted jurisdiction to restrain them from acting in excess of their authority and from the commission of acts which are ultra vires." 2 High, Injunctions, sec. 1241. Where the extension of a franchise is expressly prohibited, except upon condition of providing an annuity for the city and submitting the question of its extension to a vote at a general or special city election, it would seem that an attempt to extend it without complying with such conditions would be an act entirely beyond the power and jurisdiction of the council. The question as to equitable interposition depends simply upon whether it is needed; whether the mere passage of an ordinance or resolution extending a franchise without authority imports such an injury that without special proof of damage a citizen, taxpayer and water-user might have a remedy by injunction. It is urged that if the action is unauthorized, it is void; if authorized, it is valid; and in either event, that there can be no injunction. It must be conceded that no special damage, as distinguished from public wrong, is shown in this case. It must be conceded that the only action complained of is the taking of steps to pass an ordinance, and the only thing enjoined against is the passage of an ordinance, which involves the acceptance of the water-works company's proposition. It hardly seems, however, that this is or can be treated as simply a legislative act. It is in fact an act entering into a new contract with the water com-

pany. It is not by any means simple legislation. The allegations as to the manner in which plaintiff will be affected by it seem amply to disclose such an interest as a court of equity should protect against an unauthorized action of municipal authorities. It involves at least a possible, if not a certain, maintenance of water rates and an embarrassment of one remedy if rates are oppressive. It is undoubtedly true that as against mere legislation a court of equity will not interfere. 2 High, Injunctions, sec. 1246; *Harrison v. City of New Orleans,* 33 La. Ann., 222, 39 Am. Rep., 272; *New Orleans Waterworks Co. v. New Orleans,* 164 U. S., 471, 41 L. Ed., 518; *Crescent City Live-Stock Landing & Slaughter-House Co. v. Police Jury of Parish of Jefferson,* 32 La. Ann., 1192; *People v. Mayor of City of New York,* 32 Barb. [N. Y.], 35; *Warwick v. Mayor of City of New York,* 28 Barb. [N. Y.], 210; *City of Chicago v. Evans,* 24 Ill., 52; *Murphy v. Town of East Portland,* 42 Fed. Rep., 308; *Montgomery Gas-Light Co. v. City of Montgomery,* 87 Ala., 245, 4 L. R. A., 616; *Des Moines Gas Co. v. City of Des Moines,* 44 Iowa, 505; *Meredith v. Sayre,* 32 N. J. Eq., 557; *Lewis v. Denver City Waterworks Co.,* 19 Colo., 236; *Johnson v. Cincinnati,* 26 Week. Law B., 223; *Alpers v. City of San Francisco,* 32 Fed. Rep., 503. Where, however, as in this case, the proposed action on the city's part involves the entering into, or, rather, continuing in, contractual relations materially affecting the interests of citizens, and is an extension of a franchise not only unauthorized, but forbidden, by the city charter, it would seem to warrant the trial courts interposing by injunction. *People v. Sturtevant,* 9 N. Y., 263, 59 Am. Dec., 536. The upholders of the ordinance can hardly argue with consistency that the proposed action is so entirely void as to need no injunction to prevent its effects.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

W. M. CONNOR ET AL. V. GEORGE BECKER.

FILED NOVEMBER 20, 1901. No. 11,624.

Commissioner's opinion, Department No. 1.

1. **Patent Clerical Error: "PAIN" FOR "PAID."** Pleading that "no part of said check has been pain except the sum of $68.12, which sum was paid by defendant's assignee for creditors" is to be construed as if the word written "pain" were "paid."

2. **Motion for Judgment Non Obstante Veredicto: CONSTRUCTION.** As against a motion for judgment notwithstanding verdict for defendant, all the facts set out in the two paragraphs stated as first and second defenses will be considered together, so far as they are consistent and go towards showing a valid defense.

3. **Motion for Judgment: STATUTE OF LIMITATIONS.** On motion for judgment for plaintiff after verdict for defendant, as regards the statute of limitations, the above is to be construed as if it alleged a payment by an assignee under an insolvency law.

4. **Allegation of Residence.** Allegation that defendant has continuously resided in Nebraska ever since "on or about January 13th, 1888," sufficiently indicates such a residence on and after January 24th, 1889, as against a motion, after verdict in favor of defendant, for judgment for plaintiff.

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

C. W. De Lamatre and *Byron G. Burbank,* for plaintiffs in error.

Charles S. Lobingier, contra.

Argued orally by counsel for both parties.

HASTINGS, C.

The question in this case is as to the sufficiency of the third amended answer to set up the statute of limitations against a second amended petition. Trial was had and verdict rendered for defendant, and a motion was made by plaintiff for judgment under section 440 of the Code, which is as follows: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." This section has been held to be equivalent to the common law practice of judgment *non obstante veredicto,* and such a judgment is only to be rendered when the pleadings of the party, who has obtained a verdict, confess facts entitling the other party to a judgment. *Manning v. City of Orleans,* 42 Nebr., 712; *Gibbon v. American Building & Loan Ass'n,* 43 Nebr., 132; *Johnston v. Spencer,* 51 Nebr., 198. The summons which was served in the action was issued January 24, 1894. The second amended petition sets out a check in favor of plaintiffs dated Cincinnati, Ohio, December 10, 1888, and alleges presentation of it on December 11, 1888, and dishonor and protest; that the statute of limitations in Ohio allows 15 years for an action on such a check; and that at the commencement of this action "defendant had not been a resident of the state of Nebraska five years."

The answer, which is claimed to entitle plaintiffs to a judgment, is as follows:

"First Defense.—Comes now the defendant, and, by leave of court first obtained, answering the second amended petition herein filed, says: He admits the execution and delivery of the check set out in the first paragraph of said petition; and admits that no part of said check has been pain except the sum of $68.12, which sum was paid by defendant's assignee for creditors and accepted by plaintiff; and admits that the plaintiffs composed and compose the partnership of Conner, Sleet & Co., as alleged in the petition; and admits that they are the owners of the check

sued upon; and admits that the check sued upon was presented for payment and protested as alleged in the petition at the cost therein alleged and that notice of nonpayment and protest thereof was given as alleged in the petition; and admits that the statutes of the state of Ohio were and are as alleged in plaintiff's petition; and defendant denies each and every other allegation in said petition contained.

"Second Defense.—Further answering said petition, and for a second defense thereto, the defendant says that on or about the 13th day of January, 1888, this defendant took up his residence and began permanently and legally to reside in the state of Nebraska, and ever since that time has been, and is now, a resident of the state of Nebraska; that the plaintiff's cause of action herein sued upon, accrued on the 11th day of December, 1888, and that ever since the 3rd day of January, 1888, the plaintiffs have been able to sue the defendant in the state of Nebraska; and that prior to the first day of January, 1889, the said plaintiffs were able to have sued this defendant in the city of Cincinnati in the state of Ohio; and by reason of the facts aforesaid, this defendant says that said plaintiff's cause of action is barred by the statute of limitations, and this defendant now pleads and relies on said statute of limitations in bar of said plaintiff's right to recover herein."

A considerable dispute is raised in the record as to the word "pain," in the first paragraph. In the transcript, as originally filed, it has been marked over, to render it uncertain whether the last letter is "d" or "n." It appears, however, that in the original, as filed, it is an "n." This answer was filed by leave of court during the last trial; the case having been before this court on a former occasion, and a judgment for defendant reversed [56 Nebr., 343]. It is perfectly evident from the context that the pleader meant to use the word "paid," and the substitution of a letter, which would render the entire paragraph unintelligible, will not be held to defeat his intention, and we shall treat the word as being "paid."

The petition alleges this payment to have been made on January 29, 1890, and the first contention raised by plaintiff is that this answer admits a payment which brings the instrument on which it was made within the limits fixed by the Nebraska statute of limitations. If this payment of $68.12 was a voluntary one or is to be given the effect of a voluntary payment, then this claim must be allowed. It is contended that the statement "paid by defendant's assignee for creditors" does not amount to the allegation that it was paid by the assignee for an insolvent debtor, and without his voluntary participation. However, after verdict and in the absence of any demand for a more specific statement, this allegation must be liberally construed, and must be held to state that this payment was made by an assignee of defendant as an insolvent; and under the decision of *Whitney v. Chambers,* 17 Nebr., 90, such a payment must be held not to take the case out of the operation of the statute. It is conceded in that decision that good authority can be cited for the opposite rule, but we are not asked to change it, and have no disposition to do so.

It is urged that the two defenses of the answer, stated as a first defense and second defense, must be construed separately, and unless there is enough in either one or the other of them, taken by itself, to establish a defense, the motion for judgment for plaintiff must be sustained. Counsel cite *Catlin v. Pedrick,* 17 Wis., 91, to this proposition that separate counts must be separately construed. Such a doctrine is certainly laid down in that case, but it is to be observed that the court was dealing not with a motion for judgment, but a demurrer to each of separate counts, and not with the statement of a defense, but with the statement of a counter-claim, and is holding that the pleader, who has stated a part of his facts in making the one counter-claim, and part of them in making another, can not complain on the sustaining of the demurrers to each of them that the court did not consider them both as one. We are here, however, dealing with a motion for

judgment, which the statute authorizes only when the defendant's pleadings, read in connection with the plaintiff's, disclose a right to it on plaintiff's part. We think if these two sections of the answer, stated as two defenses, read together and as a whole, disclose a defense to the plaintiff's action, his motion for judgment was properly overruled. *Sabin v. Austin*, 19 Wis., 443, is another case where attempt to make two causes of action out of one was attacked by demurrer, and the sustaining of such demurrer upheld. A similar ruling on demurrer would doubtless obtain in our own courts, unless the pleading was helped by reference from one count to the other. *Schuyler Nat. Bank v. Bollong*, 24 Nebr., 823. But after verdict matters purely formal should be disregarded, and the substance of the pleading, taken as a whole, given its full effect. In case a demurrer had been filed to this petition as a whole, and not to each of its two separate counts, the court would have been compelled to examine the whole answer. Plaintiffs certainly can not claim that they are in any better position than they would be under a general demurrer to the whole answer, and there are plenty of authorities for a more liberal rule of construction under a motion of this kind, especially under our statute, than prevails as against a general demurrer. It will be observed that the answer really attempts to state but one defense, viz., the statute of limitations, and in the first so-called defense seeks to raise this by way of denial of plaintiff's allegation that defendant had not resided in Nebraska five years at the commencement of the action. This allegation was necessary to save the petition from a general demurrer. After a verdict, where a denial of this allegation has been treated as raising the bar of the statute, it does not seem quite clear that it does not do so. In the so-called second defense the same question is sought to be raised by pleading "that on or about the 13th day of January, 1888, this defendant took up his residence and began permanently and legally to reside in the state of Nebraska, and ever since that time, has been and is now

a resident of the state of Nebraska." Following is an allegation that ever since January 3, 1888, suit could have been brought in Nebraska; and following that an allegation that prior to January 1, 1889, it could have been brought in Cincinnati, Ohio. The word "about" is held in *Hedges v. Roach,* 16 Nebr., 678, to render valueless an allegation that "defendant has been absent at different times from the state of Nebraska, amounting in all to the period of about two years." It was held that this did not allege an absence for any specific time, and should be allowed no weight in preventing the running of the statute of limitations. It is true that the court had previously remarked that these absences might, so far as the pleadings indicate, be merely temporary, and so have no effect upon plaintiff's right to bring suit; and it is also true that the question was raised by demurrer to the petition, and not, as here, by motion for judgment. In *District Township of Sidney v. Des Moines Ins. Co.,* 75 Ia., 647, 36 N. W. Rep., 902, an allegation of loss on or about April 14, and of furnishing proofs to the defendant insurance company on or about June 19, is held not demurrable, though subject to motion to make more specific. To similar effect are *Bement v. Wisner,* 1 Code Rep., n. s., 143; *Kansas P. R. Co. v. McCormick,* 20 Kan., 107. Even if it be held that the date, on or about January 13, 1888, may refer to any day in that year, it would still be in time. The action, as before remarked, was commenced January 24, 1894, and a continuous residence in Nebraska for five years preceding that time would be a complete bar.

This pleading, even harshly construed, does not indicate a right of recovery on plaintiff's part. It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN C. DREXEL V. DOUGLAS COUNTY.

FILED NOVEMBER 20, 1901. No. 9,925.

Commissioner's opinion, Department No. 1.

1. **Sheriff Can Not Employ Assistants at Public Expense Without Authority.** Under the provisions of section 42, chapter 28, Compiled Statutes of 1899, a sheriff is not permitted to employ assistants at the expense of the county without the authorization of the board of county commissioners, prescribing the number of such assistants, time of service, and compensation.
2. **Sheriff Can Not Claim Credit for Wages of Stenographer.** Where a sheriff employs a stenographer without the authorization of the board of county commissioners, he is not entitled to credit, in his accounts with the county, for money paid to such person.
3. **Sheriff: RECEIVER: FEES.** A sheriff is not required to account to the county for moneys received by him while acting as temporary receiver.
4. **Conveying Convicts to Penitentiary: FEE ACCOUNT.** The fee of $3 per diem allowed to sheriffs by the state for conveying convicts to the penitentiary, and the insane to the Nebraska Hospital for the Insane, should be accounted for to the county. The fee allowed to guards and assistants, he is not required to account for.

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

Charles Ogden, for plaintiff in error.

A. N. Ferguson, contra.

DAY, C.

This action was brought by John C. Drexel in the district court for Douglas county and is in the nature of an appeal to review certain findings and orders of the county commissioners of Douglas county, disallowing certain claims for fees and compensation arising out of services of said Drexel as sheriff. A trial was had to the court without the intervention of a jury, resulting in certain findings favorable to the plaintiff, upon which judgment

was rendered in his favor for $325.47 and costs. This judgment is much less than plaintiff's claim, and to review it he brings the case on error to this court.

During the years 1894 and 1895, Drexel was the duly elected, qualified and acting sheriff of Douglas county, and, as such officer, was entitled to receive as compensation $2,500 per annum out of fees collected by him, *ex officio*, and the remainder, over that sum, he was obliged to account for to the county. He was also to be credited with all moneys actually paid by him to deputies and assistants, provided that the number of such deputies and assistants, their term of service and compensation, should have been fixed by the county board. The trial of the case involved the consideration of several hundred items of account, and as the view we have taken demands that the case be reversed, and some of the questions presented are not likely to arise upon a retrial, we have deemed it necessary to discuss only the more important items of the account.

One of the errors complained of was the refusal of the court to allow the claim of the plaintiff for $950, paid to a stenographer employed in the sheriff's office. There is no dispute that the stenographer performed the services and that the commissioners knew of the fact that she was employed in the office. Section 42 of chapter 28 of the Compiled Statutes of 1899 prescribes the compensation of the several county officers, including the office of sheriff, and provides, "That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive." The employment of a stenographer to assist in the dispatch of business may have been a great convenience, and perhaps well-nigh indispensable to a proper administration of the office; and

yet, her employment not having been authorized by the county board as required by the plain provisions of the statute, the compensation paid to her can not be recovered from the county. The commissioners were not bound to reimburse the sheriff for money paid to the stenographer merely because they may have seen her working in the office. The legislature seems to have left it to the wisdom of the county board to determine what deputies and assistants are necessary to be employed in the county offices. There was no error in refusing to allow this claim.

Complaint is made that the court erred in requiring the sheriff to account to the county for moneys received by him while acting as temporary receiver in various cases, amounting in the aggregate to $926. The record shows that the sheriff was appointed by the district court, for the convenience of the parties litigant, temporary receiver, in one case of a stock of merchandise, in another of a number of buildings, for such services he received $926. While acting as temporary receiver under the appointment of the court, he was not performing the services as sheriff. He is by statute a mere convenient person to be chosen by the court until a receiver is regularly made. Such duties do not ordinarily pertain to the office of sheriff. His compensation and the allowance or disallowance of his expenditures depend wholly upon the order of the district court. The statute fixes no schedule of fees which may be charged, each case standing on its own merits and the compensation and expenses allowed are as varied as the various properties placed in his charge. Office fees are charges authorized by law to be made for specific acts of official duty. The services performed by plaintiff in the capacity of receiver were extra to his duties as sheriff of the county, and the compensation therefor is not to be classed as "fees," within the meaning of that term as it is used in the statute, for which the sheriff is obliged to account. In our opinion the court erred in requiring the sheriff to account for moneys received by him as temporary receiver, in rendering his accounts to the county.

The plaintiff contends that it was error of the court in requiring the plaintiff to account for items of per diem for conveying prisoners to the state penitentiary and reform school, amounting to the sum of $252. Section 36 of chapter 86 of the Compiled Statutes provides: "The expenses and legal fees of sheriffs and other officers," etc. In our view, the word "fee" for which the officer is required to account includes the fee of $3 per day allowed to sheriffs by the state for conveying convicts to the penitentiary, and the insane to the Nebraska Hospital for the Insane. It does not include the per diem of guards and assistants, because such per diem belongs to the guards and assistants.

Counsel for plaintiff have pointed out a large number of items of the account in which it was claimed there was no testimony to support the finding of the court. It will subserve no good purpose to review these, as upon a new trial the objections now made are not likely again to arise.

It is therefore recommended that the judgment be reversed and the cause remanded.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM L. PERDEW V. MICHAEL TILLMA.

FILED NOVEMBER 20, 1901. No. 10,502.

Commissioner's opinion, Department No. 1.

Action on Note: PLEA OF ACCORD AND SATISFACTION. In an action upon a promissory note, the execution of which is admitted, where as a defense an accord and satisfaction is attempted to

be pleaded, the plea is bad when the performance necessary to constitute the satisfaction is not alleged, and it appears upon the face of the plea that performance, and not the agreement to perform, was to be received in satisfaction.

ERROR from the district court for Butler county. Tried below before BATES, J. *Reversed.*

E. W. Hale, for plaintiff in error.

Matt Miller and *Arthur J. Evans, contra.*

DAY, C.

On December 23, 1896, William Perdew commenced this action in the district court of Butler county against Michael Tillma and Lettie Tillma to recover upon a promissory note executed and delivered to the plaintiff by the defendants. Subsequently the action was dismissed as to Lettie Tillma. By his answer, Michael Tillma admitted the execution and delivery of the note, and that it was due and unpaid, but by way of defense alleged that at the time of the giving of the note he gave as security therefor a real estate mortgage upon certain lands situated in Decatur county, Kansas, a particular description of which was set out in the answer. He further alleged that by reason of failure of crops, and other losses he was unable to pay the note when due, and, being desirous of liquidating the indebtedness, entered into an agreement with the plaintiff prior to the commencement of the suit, whereby the plaintiff agreed to accept a deed to the lands above mentioned in full payment for all claims against the defendant upon the note; that he has been ready and willing at all times to carry out the terms of the agreement and is still willing to do so; that before he was able to get the deed executed and comply with the agreement, plaintiff commenced this action. As a second defense he pleaded a foreign statute in bar, but, as no evidence was introduced in support of this defense, it will be deemed to have been abandoned. The reply denied all new matter

set up in the answer. The result of the trial was a verdict for the defendant, upon which judgment was subsequently rendered, to review which plaintiff brings error.

The only testimony introduced upon the trial was that of the defendant, which, in the main, tended to establish the allegations of his answer with respect to the agreement to accept a deed for the land in full settlement of all claims upon the note. The only question presented by the record is whether a defense to a recovery upon the note has been pleaded or proved. It is very evident upon the face of the pleading that the conveyance of the land, and not the mere promise to convey, was to be received in satisfaction of plaintiff's claim. Nowhere has the defendant alleged performance of the agreement, or even made or tendered a deed in compliance with the agreement. True, the defendant alleges that he has at all times been ready and willing, and now is ready and willing, to carry out the terms of the contract, but he did not bring his deed into court and tender performance of the agreement. A mere allegation of readiness and willingness to perform the contract in a law action, when performance is the essence of it, is not a sufficient plea of performance to constitute a defense. At the very least, defendant should have made tender of his deed, so that, in the event a judgment should be rendered in his favor, the plaintiff's rights could be protected by a suitable order. Besides, the testimony of the defendant does not sustain the allegations of his answer. It was shown that the title to an undivided one-half of the land was in a brother of the defendant, and, while the defendant testified that he had made arrangements to get a deed from the brother, the fact remained that at the time of the trial he had not done so. The allegation that he was at all times ready to carry out the contract was not, therefore, sustained by proof. He may have been, and perhaps was, mentally ready and willing to perform the agreement; but in point of fact he was not ready, even at the time of the trial, to perform it. The principle here involved was before this court in *Goble v.*

American Nat. Bank, 46 Nebr., 891. That case was an action upon a promissory note. The answer alleged that defendant agreed with plaintiff to turn over to the plaintiff a sufficient number of cattle owned by defendant, at a price to be fixed by one Samuel Temple, to pay off and discharge the note; that the defendant had at all times since the making of the agreement been ready and willing to perform and fulfill said agreement and turn over said cattle. The court said, quoting from the syllabus: "To a petition upon a cause of action not controverted, where there is attempted to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged." In this case the court quoted with approval from 2 Parsons, Contracts [6th ed.], p. 836: "If he [the defendant] sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction, and does not aver performance, the pleading will, of course, be bad." It is clear to our minds that the performance of the contract to convey the land was the essence of the contract, and not the promise to perform. To be a sufficient plea of accord and satisfaction it was necessary for the defendant to allege, not only that the parties had agreed upon terms of settlement, but to show an actual performance of the contract, or a tender to perform, in accordance with the agreement.

In our judgment, a defense to the note was neither pleaded nor proved, and the court erred in not directing a verdict for the plaintiff. It is therefore recommended that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN H. PETTIBONE ET AL., APPELLEES, V. MARY FITZGERALD, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,519.

Commissioner's opinion, Department No. 1.

1. **Equity Case:** BILL OF EXCEPTIONS: DECREE: PLEADINGS. In an equity case, where there is no bill of exceptions preserved, the only question presented by the record is whether the decree is supported by the pleadings.

2. **Contiguous Lots Sold Together.** The mere fact that the pleadings show that two contiguous lots owned by the same person were assessed, taxed and sold together does not of itself render the tax proceedings illegal.

3. **Official Action:** PRESUMPTION. The law presumes that the officer making the assessment performed his full duty, and until the contrary is made to appear, it will be presumed that the lots were so situated as to render their assessment together necessary.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Affirmed.*

James Manahan, for appellants.

Jesse L. Root, contra.

Argued orally by counsel for both parties.

DAY, C.

This suit was brought by John H. Pettibone and others, in the district court for Cass county, against Mary Fitzgerald, administratrix, and others, to foreclose a lien claimed by virtue of certain tax-sale certificates issued to appellees by the county treasurer of Cass county. The trial resulted in a finding and judgment in favor of the appellees, to review which appellants have brought the case to this court by appeal.

Appellants' bill of exceptions was quashed by this court,

February 9, 1899, so that the only questions now presented arise on the pleadings and the decree.

It appears from the petition that two lots were assessed and valued in gross as lots "1 and 2 in block 28." The taxes were levied against these lots in an aggregate amount, and on the same becoming delinquent they were sold together for a lump sum by the county treasurer. The decree of the lower court also gave the holders of the county treasurer's tax-sale certificate a lien on both lots in a gross amount and ordered both lots sold to satisfy the lien. The same is also true of the second and third counts of the petition, where the property is described, respectively, as "lots 7 and 8 in block 28" and "lots 5 and 6 in block 94." The answer of appellants was substantially a general denial.

Appellants contend that the assessment, levy and sale of the different lots in gross is illegal under our revenue laws. Article 1, section 5, chapter 77 of the Compiled Statutes of 1901, is cited by counsel for appellant. This section provides as follows: "Each tract or lot of real property shall be valued at its fair value, estimated at the price it would bring at a voluntary sale thereof, where public notice had been given, and a payment of one-third cash and the balance secured by a mortgage upon the property." Section 52 of the same chapter provides that the assessor shall "actually view and determine as nearly as practicable, the value of each tract or lot of land listed for taxation." Section 109 directs the treasurer to add for each town lot the sum of ten cents to defray expenses of advertising, which sum shall be added to the amount due on said lot for taxes, and collected in the same manner as the taxes.

As to all of the property described in the five causes of action, it was alleged in the petition that when the property was assessed and taxed it was owned by John Fitzgerald. The court found that this allegation was true. The mere fact that the lots were not assessed, taxed and sold separately, does not of itself render the proceedings

illegal and void. It may have been that the lots are so situated and improved that their valuation separately could not have been determined. The presumption of law is always in favor of the due performance of official duty by public officers, and until the contrary is made to appear it will be presumed that such officers have performed the duties enjoined upon them by law. *Taylor v. Wilson*, 17 Nebr., 88. In the absence of a showing to the contrary, the court will presume that the lots were so situated as to be incapable of separate valuation. The question here presented is discussed in *Spiech v. Tierney*, 56 Nebr., 514, from which we quote the following: "In 1871 and 1876 the three lots were assessed as an entirety, and taxes apportioned against the property on the gross valuation thereof. It is argued on behalf of the appellees that this method of taxation was unauthorized and that the taxes for those years can not be enforced. We think otherwise. The lots were contiguous. They may have been so occupied, used, and improved that a valuation and sale in distinct parcels would not have been practicable. They were owned by the same parties, and the taxes were not merely a charge against the land. The entire personal estate of the owners, within the county, was liable for their payment. Under these circumstances we can not see any just ground for complaint because the lots were not separately valued and a tax based on such valuation apportioned against each. In *Mix v. People*, 116 Ill., 265, it was held under a statute requiring a separate valuation that the presumption would be indulged in favor of the proceedings of the assessor; that the lots were so situated that their valuation could not be separately determined, as if one building had covered part of both lots. In *Dodge v. Emmons*, 34 Kan., 732, 735, the supreme court of Kansas, considering the question now before us, say: 'The mere fact that there are two descriptions does not determine that there were more than a single piece or parcel of land within the meaning of the tax laws. That is to be determined rather from the situation, use, and occupation of

the land; and so it has been held that "where two or more tracts of land adjoin each other, and are used and occupied as one tract, they may all be taxed together and sold together as one tract." A section of land lying in the same taxing district, which is owned by a single individual, and which is used, occupied and treated as a single tract, although containing many legal subdivisions, may be listed and taxed as a single tract; and so may any compact portion of the same situated and treated in like manner.' See, also, *Wright v. Cradlebaugh*, 3 Nev., 345, and *People v. Morse*, 43 Cal., 541."

In our opinion, the decree is supported by the pleadings, and it is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN GLYNN ET AL. V. THOMAS GLYNN ET AL.

FILED NOVEMBER 20, 1901. No. 11,191.

Commissioner's opinion, Department No. 1.

1. **Resident Alien.** A "resident alien," mentioned in section 25 of the bill of rights, is one who resides in the state of Nebraska.

2. **Statute, Re-enactment of Common Law: PROVISO EXCEPTS PROPERTY IN TOWNS.** Chapter 58 of the Session Laws of 1889, providing that non-resident aliens shall not inherit land in this state, is but the re-enactment of the common law; and the proviso of the act, that its provisions should not apply to any real estate lying within the corporate limits of cities and towns, is by implication a legislative determination that the common law doctrine of inheritance should not be applied to lands within the corporate limits of cities and towns.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Reversed.*

Abbott, Selleck & Lane, for plaintiffs in error.

D. J. Flaherty and *E. F. Pettis, contra.*

T. J. Mahoney and *James H. Van Dusen, amici curiæ.*

DAY, C.

This action was brought in the district court for Lancaster county by John Glynn, Margaret Quinn, Honoria Mulchrone and John Gildea, against Thomas Glynn (insane), Robert Glynn, his guardian, Malachy Glynn, Patrick Gildea, James Gildea, Michael Gildea, Mary Ann Muldoon, Kate Muldoon, Nora Gildea, Delia Gildea, John S. Butler, administrator of the estate of Robert Glynn, deceased, and W. R. Scott, praying for a judgment confirming the shares of the respective parties in and to certain real estate, and for a partition of the real estate according to the respective rights of the parties interested. Upon the issues joined and the evidence, the court found in favor of Malachy Glynn and Thomas Glynn and Robert Glynn, as guardian of Thomas Glynn, and against each and all of the plaintiffs and against each and all of the other defendants, and decreed partition of the lands accordingly. From this judgment the plaintiffs and the defeated defendants have brought error to this court.

The question presented by the record arises out of the following facts: Robert Glynn resided for a great many years immediately prior to his death in Lancaster county, Nebraska. He died March 26, 1897, seized in fee of certain land situated and lying within the corporate limits of the village of Bethany Heights, Lancaster county, Nebraska. This land, which now forms the basis of this controversy, had been owned by the deceased since January, 2, 1884. Robert Glynn died intestate, without issue or father or mother living. The parties to this controversy are the brothers and sisters of deceased and the children of a deceased sister. Two of the brothers, viz., Thomas and

Malachy, are citizens of the United States; Thomas residing in the state of Ohio, and Malachy residing in the state of New York. Another brother, John, and two sisters, viz., Honoria Mulchrone and Margaret Quinn, were subjects of Great Britain, and resided in Ireland. The other claimants, John, Patrick, James, Michael, Nora, and Delia Gildea and Mary Ann and Kate Muldoon, resided in Illinois and are the children of Maria Gildea, a sister of the deceased, who was a subject of Great Britain, and died in 1895. The record also discloses that Robert Glynn, deceased, was an alien; but, in view of our constitutional provisions respecting alien residents, that fact is not of importance. The precise question presented by the record relates to the capacity of aliens to inherit real estate situated within this state and located within the corporate limits of cities and towns.

Section 25 of the bill of rights provides as follows: "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, or descent, of property." The words "aliens" and "citizens," as used in this section of the bill of rights, relate to the political status of persons as respects their relation to the United States, while the word "resident" immediately preceding the word "aliens" relates to the status of persons with respect to the state of Nebraska. Thus, a subject of Great Britain who lived in Nebraska would be a "resident alien," within the meaning of this phrase in the bill of rights, whilst, had he resided in Illinois, he would not have been a resident alien. Under the provisions of this section, Robert Glynn, deceased, was authorized to own and acquire real estate in this state, and the same would descend to his heirs under the same limitations and restrictions as though he had been a citizen of the state. There is nothing in this section alone which confers any rights of inheritance upon such of the brothers and sisters of the deceased who at all times were subjects of the Queen of Great Britain, and resided in Ireland; neither does it confer any rights upon the chil-

dren of Maria Gildea, who resided in the state of Illinois, and who, if they inherit at all, must trace their pedigree through their mother, an alien. The construction to be placed upon this section in so far as it applies to the facts of the present case, is that the law makes no difference as to the right of inheritance between persons who are citizens of the United States and aliens who are residents of this state. There was nothing in the early legislative policy of the state prohibiting aliens, whether resident or non-resident, from acquiring and holding real estate situated in this state by purchase, devise or descent. In this respect aliens were accorded the same freedom as a citizen. The Revised Statutes of 1866, chapter 43, section 59, which continued to be the law of this state until 1887, provided as follows: "Any alien may acquire and hold real estate, or any interest therein, by purchase, devise or descent, and he may convey, mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such real estate shall be held, conveyed, mortgaged or devised, or shall descend in like manner and with like effect as if such alien were a native citizen of the United States." In 1887, the above quoted section of the statute was repealed and chapter 62 of the Laws of 1887 was enacted, which provided as follows: "No non-resident alien shall hereafter acquire or hold any real estate or interest therein in the state of Nebraska by purchase, devise or descent." There was a proviso, however, that any alien who then owned real estate might convey, mortgage or devise the same, or if he should die intestate the same should descend to his heirs in like manner as if such alien were a native citizen of the United States. There was also enacted by the legislature of 1887, chapter 65 of the Laws of 1887, which was approved upon the same day as chapter 62, above quoted. The substance of this act was that no non-resident alien foreigner who has not declared his intention to become a citizen of the United States, nor any corporation not incorporated under the laws of this state, shall acquire, own or hold by

right, title or descent, accruing hereafter, any real estate in this state; provided, that the act should not apply to real estate necessary for the construction of railroads: and provided that, if any non-resident alien, who was the owner of real estate at the time of the passage of the act, should die, his lands which would have descended to his heirs, shall escheat to the state, and also provided for the appraisement of such lands and the payment of their value to such heirs as otherwise would have inherited the same. In 1889 both of the acts of 1887 were repealed and chapter 58 of Session Laws of 1889 was enacted, which is still in force. The act of 1889 provides that non-resident aliens and corporations not incorporated under the laws of this state are prohibited from acquiring or holding any lands or real estate in this state by descent, devise, purchase or otherwise, and contains this proviso: "And provided further, that the provisions of this act shall not apply to any real estate lying within the corporate limits of cities and towns." As we view it, the provisions of the act of 1889, as applied to lands outside of the corporate limits of cities and towns, was but the re-enactment of the common law doctrine that an alien could not take land by descent. True, it went further, and prohibited the acquisition by purchase or otherwise. The proviso specially provides that the act shall not apply to lands within the corporate limits of cities and towns, and, by implication at least, is a legislative declaration that lands within the corporate limits of cities and towns should remain unaffected by the common law doctrine of inheritance, and that the general law of descent should apply. If this were not the intention of the legislature, we would have the anomalous condition of a statute prohibiting non-resident aliens from taking real estate in this state outside of the corporate limits of cities and towns, with a proviso that it had no application to lands lying within cities and towns, and a common law prohibiting aliens from taking by descent lands in cities and towns. The effect of this would be to render nugatory the proviso declaring that

the act should not apply to lands within cities and towns. It seems to us clear that the limitation upon the power of non-resident aliens to acquire land by purchase, devise or descent, applies only to lands situated without the corporate limits of cities and towns, and that, by fair implication, lands within the corporate limits of cities and towns should remain unaffected by the common law doctrine on the subject.

From these observations it follows that the brothers and sisters of the deceased, or their descendants, whether they be aliens or citizens, and wheresoever they may reside, are entitled to their respective shares in the property of the deceased. It is therefore recommended that the judgment be reversed and the cause remanded with direction to enter judgment in favor of all the respective claimants, each in proportion to his respective share as indicated by this opinion, or, if the land can not be partitioned, that it may be sold and the proceeds divided.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

REVERSED AND CAUSE REMANDED.

HORACE C. METCALF v. ANNA S. BOCKOVEN.

FILED NOVEMBER 20, 1901. No. 9,996.

Commissioner's opinion, Department No. 1.

1. **Malicious Prosecution**: SUFFICIENCY OF PETITION. A petition wherein it is alleged that a civil suit which resulted in impounding defendant's property was prosecuted maliciously and without probable cause states a cause of action without alleging that the attachment and garnishment proceedings were sued out maliciously and without probable cause.

2. **Admission and Exclusion of Evidence.** Rulings of the trial court on the admission and exclusion of evidence examined, and *held* not erroneous.

3. **Instructions.** Action of the trial court in the giving and refusal of instructions *held* without error.

4. **Verdict:** AGREEMENT. A jury, after consideration and discussion of the evidence in a case, agreed to find for plaintiff in a sum equal to one-half the amount claimed in the petition. *Held* not error.

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

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

Othman A. Abbott, contra.

Argued orally by *France,* for plaintiff in error; by *Abbott, contra.*

KIRKPATRICK, C.

This is an action brought in the district court for Hamilton county on June 14, 1895, by defendant in error, Anna S. Bockoven, against plaintiff in error, Horace C. Metcalf, to recover the sum of $3,954.71, claimed as damages for the prosecution, maliciously and without probable cause, of an action in the district court for Douglas county, Nebraska. Trial was had to a jury, which on February 24, 1897, resulted in a verdict and judgment in favor of Anna S. Bockoven, and against Horace C. Metcalf in the sum of $1,977.35. From this judgment Metcalf prosecutes error to this court.

The petition of defendant in error in substance alleges that she is a widow; that her husband, A. C. Bockoven, died April 28, 1891; that during his lifetime he had procured his life to be insured in the Ætna Life Insurance Company of Hartford, Connecticut, in the sum of $5,000 in favor of his wife; that she had made proofs of death; that the proofs had been accepted, and the loss approved for payment; that on the 11th day of June, 1891, Horace

C. Metcalf, plaintiff in error herein, maliciously and without probable cause commenced an action in the district court of Douglas county, charging that one Alphonso J. Metcalf and Anna S. Bockoven were partners, doing business under the style of Bockoven & Metcalf, that he had advanced said partnership large sums of money, that an accounting had been had, that $8,529.49 had been found due him from such partnership, that the sum of $5,187.33 had been paid, and that there remained due him from said partnership $3,392.16; that said Horace C. Metcalf filed an affidavit of attachment and garnishment in said cause, and procured the life insurance company to be garnished; that she, Anna S. Bockoven, at great expense, had taken the depositions of sundry witnesses at Grand Island, Los Angeles, California, and at other designated points, and had expended large sums of money in employing counsel to defend said suit, and in paying traveling expenses, to her damage in the sum of $1,000; that afterwards, said Horace C. Metcalf, by leave of court, amended his said petition, and falsely alleged that Anna S. Bockoven and himself had entered into a partnership in August, 1890, under the firm name of Bockoven & Metcalf; that he had advanced $3,000, the entire capital stock of said firm, which it was agreed should be reimbursed to him, and had also loaned said copartnership, at various times, sums of money, the total amount aggregating $10,381.74; that he had advanced this money under an agreement that he should be paid ten per cent. interest on the amount advanced; that profits had accrued in said business to the amount of $3,000; and alleged that the firm had dissolved, and that Alphonso J. Metcalf and Anna S. Bockoven had agreed to continue said business under the firm name of Bockoven & Metcalf, and that they were jointly and severally liable to him for one half of the profits earned by the firm; that he had received $9,905.35, and no more, and that there was still due him $3,476.75, for which, with a further accounting, he prayed judgment against Anna S. Bockoven. The petition in the case at

bar further alleged that on November 9, 1892, trial was had in the district court of Douglas county on the issues joined in said cause, which resulted in a verdict and judgment in favor of Anna S. Bockoven that she recover her costs, and that the attachment be discharged and garnishment released; that Horace C. Metcalf, plaintiff in said cause, took said proceedings to the supreme court on error, and gave bond with sureties, in order to supersede so much of said judgment as released the garnishee; that on November 12, 1894, the judgment of the lower court was duly affirmed by the supreme court, and the garnishee finally discharged (*Metcalf v. Bockoven,* 42 Nebr., 590); that she had been deprived of the use of $5,000 due her from the life insurance company from June 11, 1891, to December, 22, 1894, to her damage in the sum of $1,225.75; that she had been compelled to travel from Philadelphia to Omaha at great expense and loss of time so as to defend said suit, to her further damage in the sum of $500; that she had been compelled to employ counsel in defending said cause in the district court of Douglas county and in the supreme court of Nebraska, and had incurred as an obligation a reasonable compensation for their services; that their services were necessary and reasonably worth the sum of $2,000; that she had commenced and was then prosecuting an action on the supersedeas bond to recover the sum of $771, being the amount of her damages by reason of the loss of the use of the $5,000 insurance money from the 9th day of November, 1892, to the 22d day of January, 1895, leaving the amount due her over and above the amount sued for on the bond the sum of $3,954.70, for which she prayed judgment against Horace C. Metcalf. To this petition Horace C. Metcalf, on February 21, 1897, filed an amended answer, alleging first that the cause set out in the petition, which had been brought in Douglas county, Nebraska, had been brought by an attorney, one Edgar H. Scott, without his knowledge or consent; that after said action had been commenced he was notified of the same; that he consulted said Scott

and also one Sheean, a duly licensed attorney of Anamosa, Iowa; that he laid all facts and circumstances before said counsel, fully and truthfully, and was by them advised that he had a good cause of action against Anna S. Bockoven, and by their counsel and advice he continued the prosecution of the case which had been begun; and by way of further answer, denied any malice, and pleaded that Anna S. Bockoven had transferred her right and claim under the insurance policy mentioned to one Lydia D. Stott, and that she had no further interest therein, and that she had already instituted an action in the county court of Douglas county upon the supersedeas bond which he had given to hold in force the garnishment against the life insurance company. To this answer a reply was filed, admitting the assignment of the life insurance policy, but alleging that it was assigned only as collateral security; admitting the commencement of the action in the county court of Douglas county on the supersedeas bond, but pleaded that said suit was brought against said Horace C. Metcalf and one J. J. Gibson, his surety on said bond, jointly, and not otherwise; that said Gibson had appealed from the judgment in said cause; and that said cause is still pending and undetermined.

Many errors of the trial court are assigned by plaintiff in error, but they may be considered under four general assignments, as follows: (1) That the petition failed to state a cause of action; (2) erroneous rulings of the trial court in the admission and exclusion of evidence; (3) errors of the court in the giving and refusal of instructions; (4) that the verdict was reached by the jury by an improper method. These questions will be considered in the order stated.

Plaintiff in error contends that the petition does not state a cause of action, because "an action will not lie for malicious prosecution of a civil suit without probable cause, where there has been no arrest of the person or seizure of the property of the defendant," and that the attachment and garnishment proceedings in Douglas

county against the life insurance company were so fatally defective that the court acquired no jurisdiction over the insurance company or over the funds in its hands, and, therefore, Anna S. Bockoven should have disregarded them. And, again, even if the attachment and garnishment proceedings were valid, the petition failed to allege that the attachment and garnishment were sued out maliciously and without probable cause, and, therefore, there could be no recovery. The petition contains an allegation as follows: "Plaintiff further alleges that the defendant, contriving and intending to vex, harass and annoy this plaintiff, afterwards, and on or about the 11th day of June, A. D. 1891, maliciously and without probable cause therefor, commenced an action against the plaintiff by the style of Anna C. Bockoven, in the district court of Douglas county, Nebraska, impleaded with his son, one Alphonso J. Metcalf, falsely alleging in his petition filed in said cause that this plaintiff and the said Alphonso J. Metcalf were partners," etc. The attachment and garnishment proceedings were ancillary only, and rest upon the main case; and, that having been brought maliciously and without probable cause, there is no legal foundation upon which the attachment and garnishment could rest. They are dependent proceedings, having no right of existence except as auxiliary to the cause of action pleaded in the petition. We can conceive that an attachment and garnishment might be sued out maliciously and without probable cause, while the suit was brought in good faith and for probable cause. But we can not conceive of an attachment and garnishment being without malice and for probable cause, when the suit to which they are ancillary was brought maliciously and without probable cause. It follows, therefore, that defendant in error was not required to plead in her petition that the attachment and garnishment proceedings were sued out maliciously and without probable cause.

It is contended with much earnestness by counsel for plaintiff in error that an action can not be maintained

for the malicious prosecution of a civil suit; that, the attachment and garnishment proceedings being void for want of jurisdiction, there can be no recovery. Many authorities are cited in support of the proposition that no action will lie for the institution and prosecution of a civil suit with malice and without probable cause, when there is no arrest of the person or seizure of the property of the defendant. These decisions proceed upon the theory that, when a party against whom a civil suit has been brought maliciously and without probable cause recovers costs at the termination of the suit, he is sufficiently compensated for the loss he has sustained. This doctrine arose in England, and its history seems to be as follows: Prior to the reign of Henry III. no person could maintain a civil action without having two or more persons as pledges of prosecution, and, if he failed to recover in the action brought, he and his pledges were amerced to the king. This practice seems gradually to have fallen into disuse, partly because the amercement went to the king, and the defendant in the action received no benefits, and partly because it came to be abused by plaintiffs supplying as pledges persons of mean estate, or even fictitious persons; and about the middle of the thirteenth century, parliament decreed that the successful party should in all cases recover his costs, and this seems to have remained the law in England to the present time. 21 Am. Law Reg., p. 281. Under these conditions, the uniform holding of the English courts has been that the action could not be maintained. This doctrine has been followed by many of the courts of this country. The law of England made a part of the costs, attorneys' fees, and such other costs and expenses as were incidental to the preparation of the defendant's case for trial; and this was supposed to be a sufficient punishment to deter a party from commencing a suit maliciously and without probable cause, and was also intended to fully recompense the party against whom the suit was brought. It was said that, the defendant having been reimbursed for his costs and expenses, he would not

be permitted to maintain an action to obtain a second satisfaction. In jurisdictions such as our own, where a party can not recover his attorneys' fees or the expenses incident to preparing his defense, the reason for the rule fails, and justice would seem to say that the defendant against whom a civil suit had been brought maliciously and without probable cause, should be permitted to recover in an action for malicious prosecution compensatory damages. *Pope v. Pollock*, 46 Ohio St., 367; *McPherson v. Runyon*, 41 Minn., 524; *Marbourg v. Smith*, 11 Kan., 554; *Kolka v. Jones*, 71 N. W. Rep. [N. D.], 558. This question, however, is not necessary to a determination of this case. As hereinafter appears, the attachment and garnishment did result in a seizure of the property of defendant in error; and it follows that the petition states a cause of action, and the first contention of plaintiff in error can not be sustained.

It is contended by plaintiff in error that the court erred in admitting in evidence the affidavit of attachment and garnishment, and the other proceedings concerning the garnishment, for the reason that they were void for want of jurisdiction. The affidavit in attachment filed in the suit in Douglas county set up that Anna S. Bockoven was a non-resident of the state, and was absent therefrom, and that she had property and rights in action in said Douglas county. The affidavit of garnishment states that "the affiant has good reason to believe and does believe that the Ætna Life Insurance Company, a corporation and within the county of Douglas, has property of the said defendant, Anna S. Bockoven, in its possession, to-wit." It will be noticed that the affidavit says, in substance, that the Ætna Life Insurance Company is a corporation within said Douglas county, and that it has property in its possession belonging to the defendant in error, and also that it is indebted to defendant in error. This affidavit seems to have been very skillfully drawn, with a view to confer jurisdiction on the district court, and we

are not able to say that the pleader did not accomplish his purpose. The most that can be said of these garnishment proceedings is that they were voidable, but not void. Being voidable only, they were sufficient to give the court jurisdiction over the life insurance company and the fund. They were sufficient to hold the money from the defendant, and, when the proceedings were discharged by the district court, plaintiff in error gave a supersedeas bond and so kept the garnishment in force until the final disposition of the case in this court. Plaintiff in error, having invoked the powers of the court for the purpose of impounding the fund, and having succeeded in such undertaking, can not now be heard to urge that the proceedings were invalid.

It is also contended that defendant in error should have taken steps to procure the dissolution of the attachment and thus reduced the amount of the damages. The attachment was obtained on the ground that defendant in error was a non-resident, and this she could not deny. She was amply justified in permitting the attachment and garnishment proceedings to abide the result of the suit.

Plaintiff in error also complains of the action of the trial court in admitting in evidence the pleadings and affidavits in attachment and garnishment in the case in Douglas county. We are unable to see in what respect plaintiff in error was prejudiced by this action. These were the original papers filed in the district court in the case which it was claimed plaintiff in error had commenced maliciously and without probable cause. This was competent evidence to sustain the cause of action set out in the petition. Plaintiff in error, having instituted the cause, and procured such proceedings to be had, is not now in a position to complain of their introduction in evidence.

Many other objections to the rulings of the trial court on the admissibility of evidence are urged, but they need not be considered in detail. The complaint of plaintiff in error seems to be based upon two propositions: First, that

the petition failed to state a cause of action, because it did not allege that the attachment and garnishment were maliciously sued out, and without probable cause; and, second, that plaintiff in error should have been allowed to show that defendant in error was actually indebted to him. As we have seen, the first contention is not well taken, and the claim of defendant in error that plaintiff in error was indebted to him having been adjudicated and finally determined in the other action, could not properly be retried in the case at bar. It follows, therefore, that neither of the positions taken by plaintiff in error can be sustained.

It is contended by counsel for plaintiff in error that the court erred in withdrawing from the consideration of the jury the fifth and seventh defenses pleaded in the answer. Concerning the fifth defense, it may be said, first, that plaintiff in error, in his answer, pleaded that Anna S. Bockoven, defendant in error, had sold, assigned and transferred all her interest in the life insurance policy to one Lydia D. Stott, and that defendant in error had no interest whatever in such life insurance money. The reply filed admitted the assignment, but alleged that it was made as security only for money loaned or advanced, and advances thereafter to be made. Under this state of the pleadings the burden was upon plaintiff in error to establish what he pleaded, viz., that defendant in error had transferred all her interest in the life insurance money, and that she then had no interest therein. This plaintiff in error failed to do, and his fifth defense was, therefore, properly withdrawn from the jury.

The seventh defense set out in the answer is that suit had already been brought in the district court of Douglas county. It appears from the pleadings and evidence that the cause mentioned was still pending and undetermined, and it also appears that a different cause of action was pleaded. To constitute a defense, plaintiff in error must have pleaded and proved that the two causes of action were identical. Plaintiff in error having failed in these

particulars, the trial court very properly withdrew both questions from the consideration of the jury.

Many instructions were given by the court and many requested by plaintiff in error were refused, of which complaint is made. It is not necessary to examine these instructions in detail. It is sufficient to say that the instructions seem to have been given with great care, and, taken together, very fully and correctly state the law of the case. The instructions requested by plaintiff in error were based upon the theory that the petition of plaintiff failed to state a cause of action for the reasons hereinbefore discussed, and were, therefore, properly refused.

It is claimed that the jury employed an improper method in arriving at their verdict. It appears from the record that the jury balloted a long time without reaching an agreement as to the amount of damages which should be awarded defendant in error, the amounts ranging from $4,500 to $1,500. Finally a juryman suggested that defendant in error be given one-half of the amount for which suit was brought. This suggestion was put in the form of a motion, but was not agreed to. But a little later it was agreed that defendant in error should be awarded one-half of the amount for which suit was brought. This is not ground for setting aside the verdict. *Village of Ponca v. Crawford,* 23 Nebr., 662.

We find no error in the record, and it is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

HUNN H. GRISWOLD ET AL. V. GEORGE HAZELS ET AL.

FILED NOVEMBER 20, 1901. No. 10,315.

Commissioner's opinion, Department No. 1.

1. **Construction of Supersedeas Bond.** The provisions of a supersedeas bond must be construed so as not to extend the obligation of a surety to any other person, to any other subject, or to any other period of time than is expressed or necessarily included in the terms of his undertaking; otherwise the contract is subject to the ordinary rules of construction.

2. **Contract of Suretyship:** LIABILITY: CONSTRUCTION. The intent and liability of a contract of suretyship must be ascertained by a fair and liberal construction of the instrument in furtherance of what appears to have been the intention of the parties when the contract was made, as appears from the expressions therein contained, and from the nature of the transaction; and the surety will be bound to the full extent of what thus appears to be his contract.

3. **Supersedeas Bond:** LIABILITY FOR RENTS AND PROFITS. A supersedeas bond conditioned that appellants "shall prosecute such appeal without delay, and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in the cause," was given to supersede a decree canceling a conveyance and quieting title only, which was affirmed by the supreme court. *Held*, That in an action on the bond, rents and profits accruing *pendente lite* could not be recovered.

4. **Petition:** NO CAUSE OF ACTION STATED. Petition examined, and *held* not to state a cause of action.

ERROR from the district court for Pawnee county. Tried below before STULL, J. *Affirmed.*

Story & Story, for plaintiffs in error.

Lindsay & Raper and *Broady & Pettis, contra.*

Argued orally by *R. W. Story*, for plaintiff in error; by *Lindsay, contra.*

KIRKPATRICK, C.

This is an action brought by plaintiffs in error in the district court for Pawnee county against defendants in error upon a supersedeas bond given on May 14, 1894, to

supersede a judgment entered by the district court for that county canceling a deed of conveyance made by plaintiffs in error to George Hazels on January 16, 1893, and quieting title to the premises in plaintiffs in that action. Plaintiffs in error pleaded the recovery of a judgment in the district court for Pawnee county canceling the deed mentioned and quieting the title to the premises; that defendants in error had appealed to this court; pleaded the execution and approval of a supersedeas bond, which was set out in the petition; pleaded the affirmance of the judgment of the lower court by this court, and the payment of the costs of that appeal by defendants in error; and alleged that by virtue of the supersedeas bond, defendants in error had retained possession of the premises for two years, and had received rents and profits therefrom during said period in the sum of $700; that on October 28, 1895, the premises were sold under mortgage foreclosure, and the sum of $1,581.66—more than sufficient to satisfy the decree of foreclosure—was paid into court for the benefit of plaintiffs in error; that because of said supersedeas bond the clerk of the district court retained said funds from November 15, 1895, to October 7, 1897, to the damage of plaintiffs in error in the sum of $209.67; with a prayer for judgment in the sum of $700, the amount of the bond, together with interest thereon. To this petition general demurrers were severally filed and sustained, and, plaintiffs in error electing to stand on their petition, the case was dismissed and is now brought to this court for review upon petition in error.

The material portion of the decree which the bond was given to supersede is as follows: "It is therefore considered by the court that the deed of conveyance described in the petition from the plaintiffs to the defendant George Hazels for the following described property [describing it] * * * be and the same is hereby, vacated, and set aside, and annulled, and declared of no force and effect, and the cloud upon the title to said real estate by reason of and in consequence of said deed removed, and that the

defendant George Hazels pay the costs of this action." To supersede said judgment, defendants in error gave the bond in question, conditioned as follows: "Now, therefore, the condition of this obligation is such that if the said George Hazels and Jennie Hazels shall prosecute such appeal without delay, and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in this cause, then this obligation to be void and null; otherwise to remain in full force and effect." The only question presented by the record is whether or not the bond, the condition of which has been set out, can be relied on to recover rents and profits and the interest on the funds withheld, as set out in the petition. The condition of the bond is that provided for in the second subdivision of section 677 of the Code of Civil Procedure. Whether the bond given was properly conditioned under the second subdivision of this section, or whether the decree was such that it could not be superseded as a matter of right, and that, therefore, the conditions of the supersedeas bond should have been fixed by the trial court upon application made, is not material here, and will not be considered.

There can be no doubt that had plaintiffs in error applied to the trial court for the appointment of a receiver, or for the fixing of such conditions and the amount of the supersedeas bond as would have protected their interests, their rights might have been fully secured. This they failed to do, and they are now asking this court to extend the conditions of the bond set out beyond the fair and natural import of the language used.

It is contended that the obligation of defendants in error to abide and perform the judgment of the supreme court means that they shall abide the judgment as of the date when rendered by the trial court; that under the terms of the decree, plaintiffs in error were entitled to the possession of the premises at the time when the decree was entered; and that the order of this court affirming the judgment of the trial court relates back to the entry

of the judgment, and that they are therefore entitled to a recovery of the rents and profits under the terms of the bond. This contention is untenable. The bond in question does not provide for the payment of rent, and it contains no provision for the payment of interest. If the action had been brought, not only to cancel the conveyance and quiet the title, but for rents and profits, and the judgment of the trial court had awarded the rents and profits to plaintiffs in error, there might be some ground for the contention that they were recoverable on the bond in suit. *Burgess v. Doble,* 21 N. E. Rep. [Mass.], 438. The sole purpose of the action in the trial court was to cancel the deed and quiet the title in plaintiff in error, and the decree of the trial court was so entered. The judgment of this court in that suit on appeal was an affirmance. *Griswold v. Hazels,* 52 Nebr., 64. The action not having been brought for the recovery of rents and profits, they can not be held to have been within the contemplation of defendants in error when they executed the bond in suit, and they are clearly not within the terms of the bond.

The liability of a surety on an appeal bond is said to be "*strictissimi juris;* that is, the obligation of surety must not be extended to any other subject, to any other person, or to any other period of time, than is expressed or necessarily included in it. * * * No surety is to be bound beyond the extent of the engagement which shall appear, from the expression of the security and the nature of the transaction, to have been in his contemplation at the time of entering into it. But to this extent the surety is bound. The intent or latitude of the contract of suretyship is to be ascertained by a fair and liberal construction of the instrument, in furtherance of the intention of the parties, and then the case must be brought strictly within the terms of the guaranty, and the liability of the surety can not be extended by implication." *Fisse v. Einstein,* 5 Mo. App., 78.

In the case of *Shreffler v. Nadelhoffer,* 133 Ill., 536, the rule is laid down as follows: "The rule of strict construc-

tion, as applied to the contracts of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms." *Michie v. Ellair,* 60 Mich., 73.

As it appears from the petition filed by plaintiffs in error that the conditions of the supersedeas bond have been fully complied with by defendants in error, it follows that their petition failed to state a cause of action entitling plaintiffs in error to any relief, and the demurrers were therefore properly sustained by the trial court.

From the authorities cited, and from what has been said, it follows that the judgment of the district court was right, and it is, therefore, recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MCCORMICK HARVESTING MACHINE COMPANY V. ED REYNOLDS.

FILED NOVEMBER 20, 1901. No. 10,423.

Commissioner's opinion, Department No. 1.

Chattel Mortgage: DESCRIPTION. A chattel mortgage, duly filed for record, which described the property conveyed as "five hundred bushels yellow corn now in pile on ground on Gilman farm, 8 mi. south and 2 mi. west of Wayne, Nebraska," although a greater quantity of corn is in the pile, the corn being of uniform value and quality, *held* not void for insufficient description.

ERROR from the district court for Wayne county. Tried below before ROBINSON, J. *Reversed.*

O'Neill & Gilbert and *A. A. Welch,* for plaintiff in error.

Frank M. Northrop and *F. W. Burdick, contra.*

Argued orally by *O'Neill, Gilbert* and *Welch,* for plaintiff in error; by *Northrop, contra.*

KIRKPATRICK, C.

This is an action of conversion brought by plaintiff in error in the district court for Wayne county against defendant in error to recover for the value of five hundred bushels of corn. Trial was had to the court, a jury having been waived, which resulted in a finding and judgment for defendant in error. Plaintiff in error brings the cause to this court for review.

The facts in the case, briefly stated, are as follows: One C. K. Rash was indebted to plaintiff in error, and to secure that indebtedness, on the 8th day of January, 1897, executed a mortgage upon five hundred bushels of corn. This mortgage was filed for record in the clerk's office of that county February 1, 1897. Plaintiff in error commenced to haul away the corn, having hauled one load, when defendant in error, who was sheriff of the county, levied upon the remainder of the corn under certain executions, and proceeded to advertise and sell the property, when this suit was brought by plaintiff in error for the conversion of the corn. The sheriff answered by a general denial, and in addition thereto pleaded the recovery of certain judgments against Rash, and the executions in his hands for their satisfaction.

The principal question involved, and, in fact, the only one requiring determination, is whether or not the description in the mortgage was sufficient to charge the sheriff with notice of its existence. The description is as fol-

lows: "Five hundred bushels yellow corn now in pile on ground on Gilman farm, 8 mi. south and 2 mi. west of Wayne, Nebraska." The sheriff contends that there were more than one thousand bushels of corn in the pile on the farm described, and, therefore, the mortgage was void for uncertainty of description. The rule adopted and settled by authority in this state is that announced in *Buck v. Savings Bank*, 29 Nebr., 407: "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." See, also, *Price v. McComas*, 21 Nebr., 195; *Union State Bank v. Hutton*, 61 Nebr., 571.

Defendant in error, in support of his contention that the mortgage is void for uncertainty of description, cited *Richardson v. Alpena Lumber Co.*, 40 Mich., 203. In that case a mortgage was given on a stated quantity of mixed logs in a drive, and the court held that it was void for uncertainty of description, because it furnished no data for separating the mortgaged logs from the mass. The learned judge writing the opinion made use of the language following, which shows that the holding in that case was not intended to support the contention of defendant in error: "This case, therefore, does not call for an opinion as to what the law would be in a case arising between the mortgagor and mortgagee, where the rights of third parties had not intervened, or in a case where no discrimination could be made in taking a part out of a larger undivided quantity, as grain in a bin or elevator. It is not the intention, therefore, to intimate what the rule would be in such cases." The same court in the later case of *DeGraff v. Byles*, 63 Mich., 25, said: "A mortgage on property described as '25,000 feet of hemlock studding, joist and plank, 12 feet long and upwards, lying on Ganoe's dock,' is not uncertain on its face." The property covered by the mortgage in that case was included in a larger quantity of lumber, but because the lumber was of uniform quality and value, the court held the descrip-

tion in the mortgage sufficient. The supreme court of Kansas, in the case of *Souders v. Voorhees,* 12 Pac. Rep., 526, makes the same distinction, namely, that the mortgage under consideration there was void for uncertainty of description, because it appeared that the corn was not uniform in quality and value. In the case of *Wattles v. Cobb,* 60 Nebr., 403, this court, speaking through SULLIVAN, J., held: "A chattel mortgage on 340 acres of corn, which was part of a growing crop of 425 acres, held void for uncertainty of description, the mortgaged property being neither uniform in quality nor capable of identification."

It is the settled doctrine that a valid sale can be made of an aliquot number of bushels, in a bin of grain, of uniform quality and value. It is a rule equally well settled that replevin will lie for an aliquot part of undivided grain in a bin or a pile, provided the grain is of uniform value and quality. It has also been held by this court that an execution may be levied upon an undivided share of a field of grain. If a certain number of bushels of grain in an undivided bin or pile of grain may be the subject of a voluntary sale, there seems to be no valid reason why it can not be the subject of a valid mortgage. The reason for holding such a description good is so well presented in the case of *Kimberly v. Patchin,* 19 N. Y., 330, 332, that we quote the language of Comstock, J., in deciding that case: "It is a rule asserted in many legal authorities, but which may quite as fitly be called a rule of reason and logic as of law, that in order to [constitute] an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but

logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this I apprehend is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller. But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances."

It is the rule that a description of property which will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient. In the case at bar the property was described as five hundred bushels of yellow corn in a pile on the ground at a designated place. It is stipulated by the parties to this case that the corn was of uniform value. The evidence discloses that there was no other pile of corn on the farm to which the description could possibly apply. If the

sheriff had taken a copy of this mortgage and had gone to the farm described in the mortgage, he would have had no difficulty, without making a single inquiry, in finding the exact corn covered by the mortgage. If he desired to levy on the residue, after the five hundred bushels described in the mortgage had been separated from it, he could, by weighing or measuring the corn, have ascertained whether or not there was any corn there subject to levy. The sheriff made no attempt to ascertain whether the corn was mortgaged or not. In fact he had actual notice that it was mortgaged, and this would have been sufficient to put him on his guard, even if the description in the mortgage had been defective. In the case of *Cole v. Green,* 14 Am. St. Rep. [Ia.], 283, it is said: "Though a chattel mortgage may be so defective in its description of the property mortgaged as not to constitute sufficient notice to a purchaser, it will be valid as to a sheriff who has actual notice of the mortgage before levying upon the property."

It follows from what has been said that the trial court erred in holding that the description in the chattel mortgage in suit was void for uncertainty. Other questions are presented by plaintiff in error which need not be considered. It is, therefore, recommended that the judgment of the trial court be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

HASTINGS and DAY, CC., concur.

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

REVERSED AND REMANDED.

JOHN W. PERRY V. JOHN C. ROGERS.

FILED NOVEMBER 20, 1901. No. 10,332.

Commissioner's opinion, Department No. 2.

1. **Representation:** RIGHT TO RELY UPON. A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth. *Foley v. Holtry*, 43 Nebr., 133, followed.

2. **False and Fraudulent Representations:** RESCISSION OF CONTRACT: ELECTION. Where a party is induced to his damage to enter into a contract by the false and fraudulent representations of the other party, and where such false and fraudulent representations have been relied on as the inducing cause for entering into such contract, and where such representations are of facts peculiarly within the knowledge of the party making them, and not mere expressions of opinion, the party so defrauded may elect whether he will stand by the contract or rescind it.

ERROR from the district court for Valley county. Tried below before THOMPSON, J. *Affirmed.*

A. M. Robbins, for plaintiff in error.

Hall & Johnson and *Clements Bros., contra.*

Argued orally by *Robbins*, for plaintiff in error; by *E. J. Clements, contra.*

OLDHAM, C.

This is a suit in which the plaintiff sued the defendant for damages for the breach of a contract for the sale and delivery of 7,000 bushels of wheat. Plaintiff alleges in his petition that he contracted for this wheat from the defendant on the 18th day of September, 1896, for 40 cents per bushel, the wheat to be delivered within thirty days; that in pursuance of this contract a part of this wheat had been delivered at the price agreed upon; that the price

of wheat advanced to 54 cents per bushel during the time within which the wheat should have been delivered; and that defendant refused to deliver the remainder of the wheat, although requested to do so. Defendant answered this petition, alleging, in substance, that the contract with plaintiff for the sale and delivery of the wheat was entered into on an agreement with the plaintiff that he was to pay the market price of cash wheat at Chicago on the 18th day of September, 1896, less 18½ cents per bushel; that plaintiff received the market reports daily from Chicago; that defendant had no means of knowing the market reports except from plaintiff, and that plaintiff falsely and fraudulently, and for the purpose of inducing the defendant to enter into this contract, represented and stated to defendant that cash wheat had closed in Chicago at 58½ cents on said day when in fact and in truth cash wheat had closed at 60 5-8 cents; that but for this false and fraudulent representation this defendant would not have entered into the contract sued upon. Defendant also alleged that, as soon as he discovered the fraud that had been practiced upon him by the plaintiff, he, for that reason, rescinded the contract, and refused to deliver any more wheat. He also alleges in his answer that he did not enter into the contract severally for the sale and delivery of the wheat, but entered into it jointly with James A. Ollis, Jr., and that this fact was well known to the plaintiff at the time the contract was made. Plaintiff filed a reply to this answer, denying all the allegations, except the allegation that cash wheat closed at 60 5-8 cents in Chicago on the 18th day of September, 1896. On the issues thus joined the defendant had judgment below, and plaintiff brings error to this court.

The first question to which our attention is earnestly directed by counsel for plaintiff in error is as to whether the answer of defendant states sufficient ground for the rescission of the contract. We believe that the rule with reference to the kind of a false and fraudulent representation which will be sufficient to warrant the rescission of

a contract of sale is well stated by this court in the case of *Foley v. Holtry,* 43 Nebr., 133, in which it is held: "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." This case also quoted with approval the test as to the character of the representation essential for either the rescission of a contract induced by fraudulent representations or for an action for damages on such a contract, which was laid down by this court in the earlier case of *Stetson v. Riggs,* 37 Nebr., 797, which says it must be alleged and proved (1) what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied and acted upon it; (5) and was thereby injured." Measured by this rule, we are of the opinion that the answer of the defendant does state a legal cause for the rescission of the contract, because the representation on which he claims to have relied was not a representation of an opinion, but of a fact, and because it was a representation which would have required an investigation to discover whether it was true or false, and it was a representation of a material fact peculiarly within the knowledge of the plaintiff, by reason of the fact that he received the market report daily from Chicago, by telegram, and according to defendant's theory the contract was made solely on the market price of wheat at Chicago, and this representation was the inducement which led to the contract. The principles herein enunciated are further supported by the holdings of this court in *Hoock v. Bowman,* 42 Nebr., 80; *Olcott v. Bolton,* 50 Nebr., 779; *Wood v. Roeder,* 50 Nebr., 476.

The next objection called to our attention in the brief of counsel for plaintiff in error is as to the sufficiency of the evidence to sustain the judgment. There was a strong conflict in the testimony as to each material question in issue, and while a different verdict might have been reached by the jury, yet there was competent testimony

submitted which tended to support each allegation of defendant's answer, and, under the rules governing proceedings in this court, we would not feel justified in declaring, as a matter of law, that the judgment was unsupported by the evidence.

Objection is made to the action of the trial court in refusing paragraph 1 of instructions requested by the plaintiff, and while the instruction requested and refused was, probably, unobjectionable, yet each material element which it contained was fairly embodied in paragraph 7 of instructions given by the court on its own motion; consequently its refusal was not erroneous.

Complaint is also made of the action of the trial court in giving paragraph 6 of instructions on its own motion. This instruction was on the measure of damage, and, as far as we can see, was unobjectionable. In any event, the plaintiff could not have been seriously injured by it, in view of the fact that the jury returned a verdict for the defendant and allowed him no damage at all.

Paragraph 6½ is also complained of, but as this instruction was based on the answer and proof offered by defendant, and was merely the submission of his theory of a joint contract to the jury, we can not see how error can be successfully predicated upon it.

It is finally contended that defendant should not have been permitted to rescind his contract until he had offered to place plaintiff *in statu quo;* that is, until he had offered back 40 cents for each bushel of 54-cent wheat which he had delivered to plaintiff, before, as he claimed, he had discovered the fraud practiced upon him. As the alleged injury for which plaintiff seeks damage was all occasioned by defendant leaving him *in statu quo* as to the wheat not delivered, we can not see why plaintiff should complain that another bitter dreg was not added to his cup of woe by defendant tendering him back 40 cents for each bushel of 54-cent wheat which he had received before the contract was rescinded.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

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Attorney. See COUNTY ATTORNEY. TRIAL, 1-6.

Attorney and Client.

1. A party is not bound by any step taken by his attorney in another action. *Hamilton Brown Shoe Co. v. Milliken*.... 116
2. Evidence in an action by an attorney for services, *held* to support a verdict for the plaintiff. *Brennan-Love Co. v. McIntosh* 522
3. The verdict in an action by an attorney for services, *held* not contrary to the instructions. *Idem.*

Banks and Banking.

1. A cashier can not obligate a bank on an undertaking, where the bank has no interest. *Sturdevant Bros. v. Farmers & Merchants Bank*..... 472
2. It is not within the powers of an incorporated state bank to pledge its credit as a mere matter of accommodation by executing undertakings in judicial proceedings. *Idem.*
3. Where an incorporated bank becomes a surety on an undertaking in replevin, it is not estopped to assert want of power to incur the obligation. *Idem.*
4. Where a state bank signs a replevin bond it is not estopped to assert its invalidity, unless it acquired money or property under the contract. *Idem.*
5. Where a city treasurer deposits funds in a bank subject to his check, the city may maintain a suit in its own name to recover the deposit. *Farmers & Merchants Banking Co. v. City of Red Cloud*..... 442
6. Whether the contract pleaded in the petition was *ultra vires* as to the defendant bank, *quære*. *Reynolds v. First Nat. Bank* 747

Bar. See JUDGMENT, 1.

Bastards. See EVIDENCE, 6.

1. The expression "adopted into the family," in Compiled Statutes, ch. 23, sec. 31, means received into one's family and given the family name and acknowledged as a child. *Morton's Estate v. Morton*..... 420
2. An illegitimate child whose parents, before his death, intermarry and have other children and whose father has adopted him into his family, as before stated, and so acknowledged him, shall be counted among the legitimate children of the testator and share in a devise "to my children, share and share alike," equally with the legitimate children. *Idem.*
3. Evidence of a rumor as to undue intimacy between complainant and a man other than defendant, is not relevant to the issue. *Erickson v. Schmill*..... 368
4. Evidence is admissible as to intercourse with men other than defendant. *Idem.*
5. Evidence *held* to sustain the verdict. *Idem.*

Bill of Exceptions. See APPEAL AND ERROR.

1. The statute relating to bills of exceptions, being remedial in its nature, will be liberally construed. *Williams v. Miles*.. 566
2. Stipulations by attorneys to a bill of exceptions *held* equivalent to an agreement that the bill of exceptions was true. *Idem.*

Bills and Notes. See ALTERATION OF INSTRUMENTS. INDIANS.

1. The possession of a negotiable promissory note is *prima facie* evidence of ownership. *Sanford v. Litchenberger*..... 501
2. In an action on a promissory note, a general denial does not put the allegation of non-payment in issue. *Barker v. Wheeler* 150
3. A petition declaring on a note therein set forth *held* sufficient, though it did not directly allege that the sum claimed was due. *Dodds v. McCormick Harvesting Machine Co.*. 759
4. The liability of indorsees for delay in the presentment of a check or negligence of the bank chosen to make the presentation determined. *Bedell v. Harbine Bank*..... 339
5. Indorsees of a check sending it for collection through a distant bank situate outside the state, *held* liable for consequences of the delay, and any default of the bank chosen to make the collection. *Idem.*
6. Evidence in an action on notes *held* not to support a judgment for defendant. *Lewis v. North*..... 552

Bonds. See BANKS AND BANKING. MUNICIPAL CORPORATIONS, 13, 14. REPLEVIN. SHERIFFS AND CONSTABLES.

Boundaries. See COUNTIES.

Breach. See CONTRACTS. COVENANTS. VENDOR AND VENDEE.

Building and Loan Associations.

A contract made in this state with a resident thereof with a foreign building and loan association, which has failed first to procure a certificate of approval and authorization from the proper officers for transacting business in this state is void. *Pioneer Savings & Loan Co. v. Eyer*..... 810
Idem v. Mostert 812

Burden of Proof. See INSTRUCTIONS, 10. MASTER AND SERVANT, 2, 3.

Caveat Emptor. See TAXATION, 18.

Certificate. See APPEAL AND ERROR, 13.

Certiorari. See APPEAL AND ERROR.

Challenge. See JURY.

Change of Venue. See CRIMINAL LAW AND PROCEDURE, 5, 6.

Chattel Mortgages.

Description.

1. ——— duly filed for record, which described the property conveyed as "five hundred bushels yellow corn now in pile on ground on Gilman farm, 8 mi. south and 2 mi. west of Wayne, Nebraska," although a greater quantity of corn is in the pile, the corn being of uniform value and quality, *held* not void for insufficient description. *McCormick Harvesting Machine Co. v. Reynolds*..... 892

Foreclosure.

2. A mortgagor of chattels can waive the benefit of the provisions of the statute relating to foreclosures. *Marseilles Mfg. Co. v. Perry*..... 715
3. The statutory method of foreclosing chattel mortgages is not exclusive. *Meeker v. Waldron*..... 689
4. A court of equity has jurisdiction to foreclose a chattel mortgage. *Idem.*

Right of Possession on Default.

5. Right of a chattel mortgagee to possession of property on default determined. *Marseilles Mfg. Co. v. Perry*..... 715

Requisites and Validity.

6. A provision in a mortgage of domestic animals giving a lien on their increase is only an agreement for a lien, which, without possession, vests no legal right. *Battle Creek Valley Bank v. First Nat. Bank*..... 825
7. An instrument which assumes to incumber a thing not *in esse* does not create any legal right to, or interest in, the thing to which it relates. *Idem.*
8. Things not having actual or potential existence, are not subject to the lien of a mortgage. *Idem.*

Class Legislation. See CONSTITUTIONAL LAW, 3.

Clerical Errors. See PLEADING, 7.

Collateral Attack. See JUDGMENT, 2.

Common Law.

There is no vested right in any rule of the common law. *State v. Heldenbrand* 136

Condition Precedent. See CREDITORS' BILL. INSURANCE.

Confessions. See CRIMINAL LAW AND PROCEDURE, 7-9. JUDGMENT, 3, 4.

Conflict of Jurisdiction. See COURTS.

Consideration. See HUSBAND AND WIFE, 4.

Constables. See SHERIFFS AND CONSTABLES.

Constitutional Law. See COMMON LAW. COURTS. INSURANCE. STATUTES.

1. The legislature may change the rules of evidence. *State v. Heldenbrand* 136

Distribution of Powers.

2. It is the duty of the legislature to express the public will. This function does not pertain to the courts. *Adams v. Weisberger* 325

Class Legislation.

3. There is nothing in the constitution of the United States or of this state which forbids classification of subjects for the purpose of legislation, the only limitation being that the classification must not be arbitrary. *Farmers & Merchants Ins. Co. v. Dobney*..... 213

Due Process of Law.

4. Section 9, chapter 12, Compiled Statutes, relating to the sale of mortgaged property, *held* not a violation of section 3, article 1, of the constitution, as not due process of law. *State v. Heldenbrand* 136

Continuance. See CRIMINAL LAW AND PROCEDURE.

Contracts. See ALTERATION OF INSTRUMENTS. ARBITRATION AND AWARD. COVENANTS. GUARANTY. HUSBAND AND WIFE. INSURANCE. LANDLORD AND TENANT. MARRIAGE. PARTNERSHIP. PRINCIPAL AND SURETY. SALES. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. TRUSTS. USURY. VENDOR AND VENDEE. WORK AND LABOR.

1. A conditional contract to a corporation to be performed in the future is an offer whose acceptance within a reasonable time makes a valid contract. *Omaha Loan & Trust Co. v. Goodman*..... 197

2. An agreement to furnish bond in the sum of $150,000 to

Contracts—*concluded.*

locate a university and commence building by May 1, 1888, and complete it by May 1, 1890, at a cost of $50,000 or more "and this and other buildings and campus to be used for university," is not fulfilled by simply locating and erecting a building of the required cost within the time. *Idem.*

3. An action for damages for breach of contract to purchase securities can not be maintained by one who, after making such contract to sell, has received payment thereof by the maker of such securities and has canceled the securities. *Kay v. McAuley*..... 637

4. Where fraudulent representations have been relied on in entering into a contract, *held* that the party defrauded may elect whether he will stand by the contract or rescind it. *Perry v. Rogers*..... 898

Coroners.

Evidence in an action on the official bond of a coroner, *held* not to sustain a verdict for the defendant. *Barton v. Shull*.. 570

Corporations. See INJUNCTION.

1. The purpose of section 73 of the Code is to provide the manner of service upon a corporation. That section does not enlarge the number of jurisdictions in which suit may be brought. *Western Travelers Accident Ass'n v. Taylor*..... 783

2. A domestic corporation can be sued only in places provided by law. *Idem.*

3. Where the legislature provides the county in which a domestic corporation may be sued, such provision is exclusive. *Idem.*

Costs. See WITNESSES.

1. The taxation of costs on a change of venue in justice court, is absolute. *Moss v. Lindsey*..... 829

2. The taxation of an attorney fee as costs, is constitutional. *Farmers & Merchants Ins. Co. v. Dobney*..... 213

Counties. See WITNESSES. JUDGMENT, 3, 4.

Commissioner Districts. Alteration of Boundary Lines.

1. In mandamus to compel a county officer to call an election in one commissioner district, a determination that a vacancy existed because the commissioner had by change of boundary lines become a resident of another district is not an adjudication that such commissioner would succeed the regular incumbent of such other district. *State v. Haverly*..... 767

2. An officer becoming a resident of another commissioner district by the alteration of boundary lines does not

Counties—*continued.*

thereby succeed the commissioner from such other district after the expiration of his term. *Idem.*

3. Alteration of district boundary lines will not deprive a county commissioner then holding office of his right thereto, although by such change his residence is without the lines of the district from which he was elected. *Idem.*

4. The board of county commissioners in counties having over 125,000 population is empowered by section 54, article 1, chapter 18, Compiled Statutes, 1901, to alter the boundary lines of the different commissioner districts of such county, for the purpose of adjusting such county to changing population, not oftener than once in three years. *Idem.*

County Board. Orders. Taxation.

5. No appeal lies from an order of the county board disallowing a claim made in pursuance of the provisions of section 145, article 1, chapter 77, Compiled Statutes. *Custer County v. Chicago, B. & Q. R. Co.*..... 657

6. An order of the county board in rejecting a claim, under section 145, article 1, chapter 77, Compiled Statutes, does not bar a claimant's right to sue in the district court. *Idem.*

7. A levy of a tax by a county board to pay judgments is unauthorized if there are no judgments. *Idem.*

8. An order of a county board allowing a claim against a county is not a judgment within the statute providing for a levy of taxes to pay judgments against the county. *Idem.*

9. Where county commissioners have made a levy of nine mills for general fund purposes, they can not levy a local tax in excess of the statutory limit without a vote of the people. *Grand Island & W. C. R. Co. v. Dawes County*..... 44

Supervisors. Election. Vacancies.

10. Under chapter 18, article 4, Compiled Statutes, 1901, where a county is divided into supervisor districts in which cities are located, entitled to two supervisors, they are to be elected at large by the electors of such city and contiguous territory, if any, and not by formation of two supervisor districts. *State v. Welsh*..... 721

11. Where a vacancy occurs in a board of supervisors in a county under township organization the remaining members of the board constitute a proper authority to fill such vacancy. *State v. West*..... 461

Treasurer. Fees.

12. A county treasurer is not liable to the county for fees earned and collected, unless in one year they exceed com-

Counties—*concluded.*

pensation allowed, together with salary of deputy and assistant. *Barnes v. Red Willow County*..... 505

13. Where a county treasurer dies, and a successor is appointed for the unexpired term, the fees to be retained by both can not exceed, in the aggregate, the sum fixed by statute as compensation, plus the amount expended for a deputy and clerk hire. *Idem.*

County Attorney. See ATTORNEY. JUDGMENT, 3, 4.

1. The terms "prosecuting attorney" and "county attorney" are used interchangeably in our statutes, and are synonymous. *Bush v. State*..... 128

2. It is proper for the county attorney, under the direction of the district court, to procure an attorney to assist him in the trial of a person charged with a felony, and such assistant is not required to take the oath and give a bond as deputy. *Idem.*

County Board. See COUNTIES.

Courts.

Conflicting Jurisdiction.

1. The holder of a tax lien may sue to foreclose in a state court though an action is pending between other parties in the federal court wherein such lands had been attached. *Leigh v. Green*..... 344

United States Courts.

2. As the federal court is without power to enjoin the state, it is without power to enjoin the attorney general acting for the state. *State v. Chicago, R. I. & P. R. Co*..... 123

3. The circuit court of the United States is without jurisdiction to enjoin a state from the enforcement of its own laws. *Idem.*

4. It is no valid ground for the dismissal of an action by the state against a corporation that the federal court has enjoined the attorney general from the prosecution thereof. *Idem.*

Covenants.

1. A deed by a minor conveyed to the grantee a valid title, and the covenants in such grantee's deed to others were not broken until the minor thereafter disaffirmed the deed. *Pritchett v. Redick*..... 296

2. Covenants in deeds granted by persons holding under conveyance by a minor were not broken until the minor disaffirmed the deed, and hence the statute of limitations did not begin to run against the action of covenant until that time. *Idem.*

3. Where a subsequent grantee satisfies a subsequent claim-

Covenants—*concluded.*

ant for breach of covenant by reason of disaffirmance of a contract by a minor, he becomes reinvested with the covenants running with his deed, and is entitled to sue the grantor holding under the minor. *Idem.*

Coverture. See HUSBAND AND WIFE.

Creditors' Bill.

1. A judgment is a condition precedent to a creditors' bill. *Moore v. Omaha Life Ass'n* 497
2. Where a creditor has acquired a lien on the effects in the possession of the vendee through a fraudulent conveyance, he may enforce it by a creditors' bill. *Glover v. Hargadine-McKittrick Dry Goods Co* 483
3. Equity may subject real estate owned by a judgment debtor to judgment, though the legal title is in another. *Cochran v. Cochran* 450
4. A finding that execution has been duly issued by the proper court and that a return *nulla bona* has been made is sufficient to show that defendant had no property subject to levy of execution. *Idem.*

Criminal Law and Procedure. See ASSAULT. ASSAULT AND BATTERY. BASTARDS. COUNTY ATTORNEY. HOMICIDE. INDICTMENT AND INFORMATION. INSTRUCTIONS. INTOXICATING LIQUORS. RAPE. WITNESSES.

Alibi.

1. Where the defense is an alibi the presence of the accused at the *locus in quo* must be established beyond a reasonable doubt. *Nightingale v. State* 371

Arrest of Judgment. Discharge.

2. Where no information or indictment is filed against a defendant during the term at which he was held to answer he is entitled to be discharged. *Cerny v. State* 626
3. If at a subsequent term to that at which accused was held to answer an information is filed to which the defendant pleads, the court has jurisdiction and after verdict and conviction a motion in arrest of judgment is properly denied. *Idem.*

Calling Witnesses.

4. The refusal of the state to call certain witnesses on second trial whose testimony on a former trial had been impeached, when the same facts can be proved by certain other trustworthy witnesses, is not prejudicial. *Argabright v. State* 402

Change of Venue.

5. In a criminal case an application for a change of venue is addressed to the sound discretion of the trial court and its

Criminal Law and Procedure—*concluded.*

ruling thereon will not be disturbed when no abuse of discretion appears. *Idem.*

6. The overruling of an application for a change of venue is not error where it is not shown that the defendant can not have a fair trial in the original venue. *Idem.*

Confessions.

7. A prisoner confined in jail is not necessarily under coercion, in such a sense as to preclude his making declarations against interest. *Coil v. State*.....15, 23

8. Where a person charged with a crime makes a voluntary statement against his interest, it is not required to prove, as a foundation for its admission, that he was informed that the admission might be used against him. *Idem.*

9. The voluntary confession of a prisoner is properly admissible in evidence. *Idem.*

Reinoehl v. State 619

Copy of Information.

10. The state is only required to furnish defendant with one copy of the information. *Bush v. State*..... 128

Evidence.

11. A witness can not testify that the tracks of a horse were made by a horse defendant was known to have ridden, or so to opine. *Russell v. State* 512

12. In prosecution for rape evidence bearing upon the ultimate facts and tending to show the intent of the defendant toward the prosecutrix is admissible. *Reinoehl v. State*..... 619

13. Prior to the adoption of the constitution, no person had the inherent right to establish his defense in every instance by oral evidence. *State v. Heldenbrand*..... 136

14. Physicians, in a prosecution for homicide, having used the deceased's skull and a photograph thereof in explanation of their testimony it was proper to admit them as exhibits in the case. *Savary v. State*..... 166

Preliminary Examination. Waiver.

15. A preliminary examination may be waived. *Reinoehl v. State*.. 619

Time of Trial and Continuance.

16. In a criminal prosecution for a felony after a plea of general issue and the swearing of a jury an objection that the defendant was held to appear at a subsequent term or that the information was filed at a term previous to the one at which he was held to appear, comes too late. *Idem.*

17. It is not error to overrule a motion for a continuance on the ground that a witness is absent, where the state admits the witness, if present, would testify as stated in the affidavit in support of the motion, and that the statement in the affidavit might be used in evidence on the trial. *Russell v. State* 512

Crops. See LANDLORD AND TENANT.

Damages. See DEATH BY WRONGFUL ACT. HIGHWAYS. NEGLIGENCE. REPLEVIN. WATER AND WATERCOURSES.

Death by Wrongful Act.

1. A petition in an action for wrongful death, under chapter 21, Compiled Statutes, must show a pecuniary injury to decedent's widow or next of kin. *Tucker v. Draper*..... 66
2. In an action for wrongful death under chapter 21, Compiled Statutes, petition *held* to sufficiently state a pecuniary injury to decedent's next of kin as against a general demurrer. *Idem.*
3. Where there was proof tending to show that the next of kin, the father, was receiving from the deceased pecuniary assistance in supporting the mother, brothers and sisters of the deceased it was not error to admit proof of the existence of such relatives. *South Omaha Water-Works Co. v. Vocasek* 710

Deeds. See COVENANTS.

Default. See JUDGMENT.

Deficiency Judgment. See MORTGAGES, 3, 4.

Depositions.

1. Where a deposition is taken by one party to a suit and is not used by him, his opponent may use it in evidence. *Hamilton Brown Shoe Co. v. Milliken*..... 116
2. Where a deposition has been taken by one party and is not used by him, and where the deponent has been examined as to different transactions, the opposite party may introduce that part of the deposition which relates to one or more transactions but should not be permitted to introduce a portion of his testimony on any given subject while declining to introduce all the witness has said on that subject. *Idem.*

Deposits in Court. See EXECUTION, 1.

Descent and Distribution. See ALIENS. BASTARDS.

Heir *held* authorized to foreclose a mortgage made to his ancestor in his own name. *Plummer v. Park*..... 665

Description. See TAXATION, 16.

Directing Verdict. See FRAUDULENT CONVEYANCES, 13. NEGLIGENCE, 2. QUESTIONS FOR JURY. TRIAL, 7-11.

Dismissal. See APPEAL AND ERROR, 17.

1. Striking cause from docket.

See TRIAL, 20.

Dismissal—*concluded.*

2. It is no valid ground for dismissal of an action by the state against a corporation that the federal court has enjoined the attorney general from the prosecution thereof. *State v. Chicago, R. I. & P. R. Co.*..... 123

Distribution of Powers. See CONSTITUTIONAL LAW, 2.

Divorce and Alimony. See PARENT AND CHILD.

A decree of divorce obtained by a wife upon service by publication, without appearance of defendant, in a foreign state, is a bar to an action for alimony in this state. *Eldred v. Eldred*..... 613

Dockets. See JUSTICES OF THE PEACE.

Domicile. See MINORS.

Due Process of Law. See CONSTITUTIONAL LAW, 4.

Ejectment.

1. Evidence examined, and *held* conclusively to establish plaintiff's right to a verdict. *Nelson v. City of Omaha*..... 823
2. Plaintiff in an action for ejectment, must rely for recovery on the strength of his own title and not on want of title in his adversary. *Abbott v. Coates*..... 247
3. Where a sheriff's deed has been executed upon a confirmation of sale in a proceeding to foreclose a tax lien, the grantee may maintain ejectment against an adverse claimant. *Idem.*
4. In ejectment, a receiver to collect rents will not be appointed before judgment. *Smith v. White*..... 56
5. In ejectment, where plaintiff claims under a sheriff's deed on foreclosure, to which defendant was not a party, and defendant under prior unrecorded deed, the burden is on plaintiff to show that he took the mortgage without notice of defendant's title. *Idem.*

Election of Remedies. See CONTRACTS, 4.

A suit having been brought for the malicious attachment of the plaintiff's property, did not constitute an election of remedies so as to preclude plaintiff from subsequently bringing action on the attachment bond. *Simons v. Fagan*.. 287

Elections.

1. The form of ballots should be uniform throughout the state. *State v. Frye*..... 817
2. It is the duty of the proper officer in preparing all official ballots to put at the top and left side of the ballot, in black-faced capital type, not less than one-eighth of an inch high, the name of each party having candidates on the ballot, and to the right of each party a circle one-half inch in diameter, with leaders connecting the party name to each circle. *Idem.*

Electricity.

1. Evidence that a lad of seventeen years touched a guy-wire of an electric light post *held* insufficient to show contributory negligence. *South Omaha Water-Works Co v. Vocasek*.. 710
2. Instruction that if a lad, knowing that a guy-wire was carrying an electric current, voluntarily touched it, he was guilty of contributory negligence, *held* properly refused. *Idem.*

Equity. See ESTOPPEL.

1. Poor judgment is no basis for relief in equity. *Jones v. Stewart* 207
2. A general demurrer to a petition for setting out an equitable cause of action, *held* equivalent to a demurrer for want of equity. *Glover v Hargadine-McKittrick Dry Goods Co*..... 483
3. Questions of fact on equitable issues, *held* properly submitted to the jury. *Lewis v. North*..... 552
4. A court in equity may submit any disputed question of fact to the jury. *Idem.*

Estoppel. See BANKS AND BANKING.

1. Plea of estoppel. Former opinion withdrawn. *Plummer, Perry & Co. v. Rohman*..... 145
2. To sustain estoppel for omission to speak, there must be opportunity and apparent duty. *Smith v. White*..... 56
3. Evidence in ejectment *held* insufficient to sustain plaintiff's plea of estoppel. *Idem.*
4. In order to estop a party by mere silence, it must appear that the person claiming the benefit of the estoppel was ignorant of the rights of the party against whom the estoppel is alleged. *Union State Bank v. Hutton*..... 664

Evidence. See ACKNOWLEDGMENT. APPEAL AND ERROR, 21-27. BASTARDS. BILLS AND NOTES. CRIMINAL LAW AND PROCEDURE, 11-14. DEATH BY WRONGFUL ACT. DEPOSITIONS. EJECTMENT. FRAUD. FRAUDULENT CONVEYANCES. HOMESTEAD. HOMICIDE. INSTRUCTIONS. INSURANCE. MALICIOUS PROSECUTION. MASTER AND SERVANT. PAYMENT. RAPE. REPLEVIN. SALES. TRIAL. WITNESSES.

1. The legislature may change the rules of evidence. *State v. Heldenbrand* 136

Admissions. Pleadings.

2. An offer to prove payment is not in every case an admission that the plaintiff once had an actionable demand. *Barker v. Wheeler*..... 150
3. A petition filed in the county court in an action which was dismissed without prejudice *held* not admissible in a subsequent suit commenced in the district court. *Hamilton Brown Shoe Co. v. Milliken*..... 116

Evidence—*concluded.*

Documents.

4. Entries of material facts on the docket of a justice of the peace, are evidence thereof. *Goldstein v. Fred Krug Brewing Co.*..... 728

Extrinsic Evidence.

5. Extrinsic evidence is admissible to locate lands conveyed by sheriff's deed by general description. *Abbott v. Coates*.... 247

Judicial Notice.

6. The possible period of gestation is not within the judicial notice of the courts. *Erickson v. Schmill*..... 368

Preponderance.

7. An intervener, claiming a fund in dispute, must, if his claim is adverse to both, establish it by a preponderance of evidence. *Racek v. First Nat. Bank*..... 669

Values. Witnesses.

8. The determination of the competency of witnesses to testify as to their opinion of the value of real estate, which is the subject of controversy, rests largely in the discretion of the trial court, and a ruling thereon will not be disturbed on review except when clearly erroneous as a matter of law. *Omaha Loan & Trust Co. v. Douglas County*... 1

Exceptions. See APPEAL AND ERROR. BILL OF EXCEPTIONS. INSTRUCTIONS.

Execution.

1. Execution is a proper process to enforce a decree directing a defendant to pay money into court. *Stuart v. Burcham*... 84

Appraisement.

2. When the appraisers are familiar with the property a sale is not invalidated, because the appraisement was not made upon actual view of the premises. *Bostwick v. Keller*..... 815

3. A copy of an appraisement of lands made for the purpose of judicial sale, must be filed with the clerk of the district court forthwith. *Idem.*

4. Where an appraisement on foreclosure is set aside, and the new appraisement is much higher, a mortgagor has no ground of complaint. *Ackerman v. Allender*..... 700

5. An order vacating an appraisement on the ground that one of the appraisers is not a freeholder, in the absence of evidence, will be presumed to have been made on sufficient showing. *Idem.*

6. Appraisal of lands on foreclosure sale in one body *held* sufficient in absence of showing that the land consisted of separate tracts. *Iowa Loan & Trust Co. v. Whistler*..... 698

7. Where the return of the sheriff shows that the appraisers

Execution—*continued.*

were freeholders, it is *prima facie* evidence of that fact. *Idem.*

8. An appraisement of real estate for the purpose of a judicial sale can not be assailed on the ground that the appraisers were mistaken in their valuation. *Cole v. Willard*.. 839

Confirmation and Vacation.

9. Mere difference of opinion as to value of real estate sold on foreclosure, is not a ground of objection to confirmation. *Goldsmith v. Wright*..... 763

10. Mere constructive service of a resident defendant in the main case not a necessary party, is not sufficient ground for the setting aside of a sale in foreclosure. *Nelson v. Nebraska Loan & Trust Co*..... 549

Levy. Custody of Property.

11. Levy on personalty under execution issued on voidable judgment, and the taking possession thereof, place the property *in custodia legis*. *Pitkin v. Burnham*..... 385

12. An execution issued on a judgment confessed for the purpose of defrauding creditors, can not be treated as a nullity by another officer holding process against the judgment debtor. *Idem.*

13. When personal property has been lawfully seized under mesne or final process, successive levies upon the same property may be made thereon by the same officer, or such officer may be charged as garnishee in a proper proceeding and the property bound from the time of the service of the summons in garnishment. *Idem.*

14. Where personalty has been levied upon under execution, it is not subject to a lawful second levy by another officer under a different process. *Idem.*

15. Where a constable has levied on personalty and taken the property in his possession, he can not be interfered with by an officer holding another process. *Idem.*

16. The test of the validity of a levy upon personal property is whether or not the acts of the officer have been such as would make him liable as a trespasser but for the protection afforded him by his writ. *Idem.*
Battle Creek Valley Bank v. First Nat. Bank..... 825

17. Physical seizure *held* not necessary to validate a levy of execution on chattels. *Idem.*

Notice of Sale.

18. Notice of sale on foreclosure *held* sufficient. *Iowa Loan & Trust Co. v. Whistler*..... 698

19. It is no ground for setting aside a foreclosure sale that a party not necessary to the action was only constructively

Execution—*concluded.*

served while he was a resident. *Nelson v. Nebraska Loan & Trust Co*..... 549

Title of Purchaser. Liens.

20. Where land is sold pending an appeal and the judgment is reversed, the title of purchaser to property may be set aside on review. *Troup v. Horbach*..... 564

21. A purchaser at judicial sale is subject to liens deducted from appraisement. *Battelle v. McIntosh*..... 647

Executors and Administrators. See ABATEMENT AND REVIVOR. DESCENT AND DISTRIBUTION.

Action for Specific Performance.

1. The administrator of a deceased vendor can, under section 323, chapter 23, Compiled Statutes, 1899, prosecute a vendee for specific performance. *Solt v. Anderson*..... 153

Allowance and Payment of Claims.

2. On appeal from an order disallowing a claim against a decedent's estate, an answer that it originated in a fraudulent transaction does not raise a new issue in the appellate court. *Graham v. Estate of Townsend*..... 364

3. Under objections to a claim presented for allowance to the probate court (1) that deceased did not, at the time of his death, owe claimant anything whatever, and (2) that the estate did not owe claimant anything at the time the objection was filed, the administrator may prove payment, release, fraud or any other fact which will show that claimant has no valid claim against the estate. *Idem.*

4. Evidence *held* to show surety of decedent compelled to pay claim against decedent's estate authorizing him to recover the same from the estate. *Harman v. Harman*..... 452

5. Where a decedent's surety is compelled to pay the debt of his principal it is immaterial whether the surety pays the claim before or after the hearing thereon in probate court. In either case he may appeal in the name of the original claimant. *Idem.*

6. Where the surety for a decedent is compelled to pay a claim pending against the estate of his principal, he may take an assignment of the claim and proceed in the name of the original claimant or in his own name. *Idem.*

Exemptions. See HOMESTEAD.

Exhibits. Skull of deceased and photograph thereof. See CRIMINAL LAW AND PROCEDURE, 14.

Federal Courts. See COURTS.

Fees and Salaries. See ATTORNEY AND CLIENT. COUNTIES. GUARDIAN AD LITEM. INSURANCE, 13. SHERIFFS AND CONSTABLES. WITNESSES.

Fellow Servant. See MASTER AND SERVANT.

Felonious Assault. See ASSAULT.

Findings. See APPEAL AND ERROR. TRIAL.

Fixtures.

The right of a tenant to remove agricultural fixtures expires with the tenancy. *Stevens v. Burnham*..... 672

Forcible Entry and Detainer.

Where a defendant in an action of forcible entry and detainer had appealed from a judgment rendered against him for restitution the appeal is void *in toto*, and the right to a writ of restitution may be enforced. *State v. Fields*..... 520

Foreclosure. See EXECUTION.

Foreign Corporations. See BUILDING AND LOAN ASSOCIATIONS.

Forfeitures. See INSURANCE.

Fraud. See SALES. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. WILLS.

1. A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Perry v. Rogers*..... 898
2. Rulings on admission of evidence in an action for deceit reviewed. *Jones v. Stewart*..... 207
3. Where persons are dealing with each other on equal terms and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction. *Idem.*
4. Poor judgment, in the absence of fraud, forms no basis for relief. *Idem.*
   Selz v. Hocknell..... 101
5. Where it is sought to establish fraud in representations made to a mercantile agency upon whose report credit was extended to a merchant, the evidence must connect the merchant with making the report upon which the credit was given. *Cream City Hat Co. v. Tollinger*..... 98

Fraudulent Conveyance. See HUSBAND AND WIFE.

1. A court will protect a creditor against fraud, but can afford no relief against poor judgment and unfortunate trades. *Selz v. Hocknell*..... 101
2. Evidence *held* not to show conveyance by debtor was in fraud of his creditors' rights. *Idem.*

Confession of Judgment.

3. A judgment confessed with the intent to defraud creditors, *held* voidable at the instance of the person attempted to be defrauded. *Pitkin v. Burnham*..... 385

Fraudulent Conveyance—*continued.*

4. A levy of an execution on a judgment confessed to hinder creditors, may be vacated by such creditors in a proper proceeding. *Idem.*

Evidence. Proof. Intent.

5. In an action to set aside a conveyance as fraudulent, the defendant, under a general denial, may disprove the charge of fraud. *Plummer, Perry & Co. v. Rohman*..... 145

6. A party pleading facts which would estop an adverse party to assert a lien on property is not entitled to show that the party against whom estoppel is alleged is precluded from asserting the rights of an unsecured creditor. *Idem.*

7. When a father transfers all his property to his children and then incurs a large indebtedness for property, a large part of which he also transfers to his children, in a suit by a creditor to set aside such transfer as fraudulent the burden of proof is on the grantees to show a sufficient consideration for the transfer and that the same was made in good faith. *Ayers v. Wolcott*..... 805

8. A voluntary conveyance made with the intent of the grantor to defraud subsequent creditors is void, as against such creditors, without proof that the grantees had notice of the fraudulent intent of the grantor. *Idem.*

9. Evidence in a suit to set aside a fraudulent conveyance, *held* not to sustain a judgment for defendant. *Idem.*
Held to sustain. *Berry v. Berk*..... 535

10. Evidence *held* not to show conveyance by the debtor was in fraud of his creditor's rights. *Selz v. Hocknell*..... 101

11. Admissions of vendor in presence of vendee, before payment of consideration, as to fraudulent intent *held* competent. *Bender v. Kingman*..... 469

12. While by reason of section 12, chapter 32, Compiled Statutes, the intent of the vendor in an alleged fraudulent conveyance is always a question of fact, it does not follow that such question of fact must in every case be left to the jury. *Idem.*

13. A verdict *held* properly directed, where the vendor's purpose in making the sale was clearly to hinder creditors and the purchaser had knowledge thereof. *Idem.*

Indebtedness. Intent.

14. The fact that a debt was contracted after the conveyance was made is no defense, where the conveyance was made with a view to incurring the indebtedness and avoiding its payment. *Ayers v. Wolcott*..... 805

Parties.

15. The vendor in a fraudulent conveyance, *held* a proper party

Fraudulent Conveyance—*concluded.*

in an action by a creditor to set the instrument aside. *Glover v. Hargadine-McKittrick Dry Goods Co.*..... 483

16. The vendor in a fraudulent conveyance is always a proper, but not in all cases a necessary, party in an action by a creditor to set the instrument aside. *Idem.*

Payment or Satisfaction of Debts.

17. A mortgage in good faith to a bona-fide creditor *held* not fraudulent *per se*, because including a debt due another creditor which the mortgagee agrees to pay. *Berry v. Berk.*..535

18. In an action to set aside a mortgage as fraudulent, the inquiry is whether it was given to secure a bona-fide debt. *Idem.*

19. A debtor who has made a fraudulent conveyance may afterwards transfer the property to a creditor who is willing to receive it in satisfaction of his claim. *Graham v. Estate of Townsend*..... 364

Subsequent Creditors.

20. Subsequent creditors who have not been prejudiced can not attack a fraudulent conveyance or assert any right under section 17, chapter 32, Compiled Statutes, 1899. *Idem.*

21. A subsequent creditor can not successfully assail a fraudulent transfer of property without showing that he has been actually defrauded thereby. *Racek v. First Nat. Bank*.. 669

Void Conveyances.

22. Transfers made in trust for the use of the persons making the same are void as to creditors. *Idem.*

23. Under section 17, chapter 32, Compiled Statutes, 1899, conveyances and assignments made to defraud creditors are not void generally, but only as against persons defrauded. *Idem.*

24. Where a fraudulent transfer of property or choses in action is made in trust for the use and benefit of the person making the same, it is void both as to existing and subsequent creditors. *Graham v. Estate of Townsend*..... 364

Garnishment.

1. An intervener who claims a fund in dispute between a plaintiff and defendant must, if his claim is adverse to both the original parties, establish his right by preponderance of the evidence. *Racek v. First Nat. Bank*..... 669

2. A proceeding in garnishment binds the garnishee from the time of the service of notice, and the property is not thereafter subject to levy on process thereafter issued. *Pitkin v. Burnham* 385

German Language. See WILLS.

Guaranty. See INDEMNITY. STATUTE OF FRAUDS.

1. Guarantor of mortgage can not obtain lien as against mortgagee, by purchasing real estate at tax sale. *Concordia Loan & Trust Co. v. Parrotte*..... 629

2. Indorser and guarantor of mortgage note who pays taxes to protect his guaranty can not, as against the mortgagee, obtain a superior lien by buying at tax sale. *Idem.*

Guardian Ad Litem. See APPEAL AND ERROR, 16.

Harmless Error. See APPEAL AND ERROR. INSTRUCTIONS.

Highways.

1. Nominal damages can not be recovered in an action against a county upon an allegation that the same were sustained by reason of the grading of a street adjacent to the property of the owner on the theory that the board of county commissioners were guilty of a breach of official duty to plaintiff in not serving notice and having an assessment of damages and benefits. *Omaha Loan & Trust Co. v. Douglas County*..... 1

2. An injunction will not lie to restrain the opening of a road, merely because an appeal is pending on damages. *Lionberger v. Pelton*..... 252

Homestead. See HUSBAND AND WIFE.

1. No one can have two homesteads at the same time. *Davis v. Kelly*..... 642

Abandonment.

2. Where a homestead has once been occupied, the burden is upon the creditor to show abandonment. *Union Stock Yards Nat. Bank v. Smout*..... 227

Constructive Occupancy.

3. Bare intention to occupy property as a homestead at some future time, is not sufficient to impress it with that character. *Davis v. Kelly*..... 642

4. Where property not occupied by the claimant and his family is claimed as a homestead, such claimant must show constructive occupancy. *Idem.*

5. Actual occupancy is not absolutely required in every case where a homestead is claimed. But occupancy is the test established by statute and it is only through liberal construction to meet the beneficent ends of the statute that certain substitutes therefor have been permitted. *Idem*..642, 644

6. Constructive occupancy of a homestead is where property occupied as a homestead has been temporarily vacated without abandonment and with a bona-fide and subsisting intention to return. *Idem.*

Homestead—*concluded.*

Debts Prior to Issuance of Patent.

7. Land acquired under the homestead laws of the United States is not liable for the debts of the patentee contracted before the issuance of the patent. *Jackett v. Bower*.. 232

Execution Sale. Notice to Sheriff.

8. When the execution debtor notifies the sheriff that the premises about to be sold are his homestead, and claims the same as exempt before sale made, the creditor must proceed under section 5 *et seq.*, chapter 36, Compiled Statutes, 1899. *Union Stock Yards Nat. Bank v. Smout*..... 227

Mortgage Prior to Final Entry.

9. Where a homestead-claimant, after entry and occupancy under the U. S. homestead law, executes a mortgage on the land but dies before he was entitled to make final proof, his heirs perfecting the entry, as against such heirs the mortgage created no lien. *Marley v. Sturkert*..... 163

Homicide.

1. Evidence *held* to sustain a conviction of murder in the first degree. *Bush v. State*..... 128
2. Evidence *held* to justify a conviction of murder in the first degree. *Argabright v. State*..... 402
3. A verdict finding defendant guilty of murder in the first degree *held* not the result of passion or prejudice. *Idem.*
4. Evidence *held* sufficient to support a verdict of murder in the first degree. *Savary v. State*..... 166
5. In a prosecution for homicide an instruction defining murder in the first degree *held* not erroneous. *Idem.*
6. An instruction on a trial for murder reviewed and *held* not erroneous. *Coil v. State*..... 15

Information.

7. Under chapter 54 of the Criminal Code, an information lies for the prosecution of one charged with a capital offense. *Idem.*

Irresistible Passion. Cooling Time.

8. In a prosecution for homicide, a request for instruction on determining on the necessity of cooling time refused. *Savary v. State*..... 166
9. Where a homicide was alleged by defendant to have been committed as the result of sudden impulse and irresistible passion, but it appears that the party deliberated and that there was time for cooling, the provocation for homicide is immaternal. *Idem.*
10. A request for an instruction was in the following language: "The court instructs the jury that where anger is shown to have existed between the parties to a killing

Homicide—*concluded.*

before there could be deliberation and the premeditation growing out of the killing the slayer should have had time for his passions to cool and to deliberate in his rational moments over his trouble before he could be convicted of murder in the first degree if he subsequently slew the party with whom he had the trouble; and if you find from the evidence beyond a reasonable doubt that prior to the difficulty that took place between the defendant and [the] deceased at the door of the commissary the deceased and the defendant had some difficulty, then before the jury could find any deliberation or premeditation they must prove some act of hostility either committed or threatened by the defendant toward the deceased, before they could find that the act committed by which the deceased lost his life was committed with deliberation and premeditation," *held* not error to refuse. (Record, p. 20.) *Idem*..166, 175

See *Green v. Commonwealth*, 83 Pa. St., 75.

Self-Defense.

11. An instruction as to the law of self-defense *held* not prejudicial and erroneous. *Coil v. State*..... 15

12. An instruction that one who shoots through mere cowardice will not be justified on the ground of self-defense *held* proper. *Idem.*

Husband and Wife. See DIVORCE AND ALIMONY. MARRIAGE. PARENT AND CHILD.

1. The common law disability of a married woman to contract, is in force in this state except as abrogated by statute. *Citizens State Bank of Wood River v. Smout*..... 223

2. A married woman may make contracts only in reference to her separate property, trade or business or upon the faith or credit thereof and with the intent to charge her separate estate. *Idem.*

3. Where, in an action on a married woman's note she pleads coverture, the burden is on the plaintiff to show that it was given with reference to her separate property and with intent to bind it. *Idem.*

4. The release of a homestead right is a sufficient consideration to support a contract made between husband and wife for an equal division of the money derived from its sale. *Racek v. First Nat. Bank*..... 669

5. A contract of suretyship is binding on a married woman when made on the faith and credit of her separate estate. *McKell v. Merchants Nat. Bank*..... 608

6. The liability of a married woman on a contract made within the scope of her statutory capacity, is to be de-

Husband and Wife—*concluded.*
termined by the rules applicable to persons of full capacity. *Idem.*
7. In an action against a married woman, where she pledged her separate estate, an answer averring that she had no property in her own right states a good defense. *Idem.*

Illegitimate Children. See BASTARDS.

Impeachment. See NEW TRIAL. WITNESSES.

In Custodia Legis. See EXECUTION, 11.

Indemnity. See PLEDGES. PRINCIPAL AND SURETY.

Indians.
A note given for a sublease of lands leased from Indians, can not be enforced by a bona-fide holder under the United States statute making any contract with respect to such lands absolutely void. *Larson v. First Nat. Bank of Pender*.. 303
See BILLS AND NOTES.

Indictment and Information. See ASSAULT. ASSAULT AND BATTERY. HOMICIDE. RAPE.
1. All criminal prosecutions must be carried on in the name of the state. *Worthen v. Johnson County*..... 754

Copy for Accused.
2. The state is required to furnish the defendant with only one copy of the information. *Bush v. State*..... 128

Failure to File.
3. Where no information or indictment is filed during the term at which the accused is held to answer, he is entitled to be discharged. *Cerny v. State* 626

Negative Averments.
4. The rule is that only such exceptions and provisions of a statute are required to be negatived in an information as are part of the description of the offense. *Holt v. State*.... 134

Verification.
5. An information charging murder may be verified by the prosecuting attorney of the proper county. *Bush v. State*.. 128
6. The deputy clerk of the court can swear the county attorney to an information. *Nightingale v. State*..... 371

Waiver of Defects.
7. On a prosecution for felony, the accused waives all defects which may be objected to by a motion to quash or a plea in abatement, when he demurs or pleads. *Reinoehl v. State* 619

Infants. See DIVORCE AND ALIMONY. INTOXICATING LIQUORS. PARENT AND CHILD.
An emancipated minor may acquire a residence of his own. *Russell v. State* 512

Information. See INDICTMENT AND INFORMATION.

Injunction. See COURTS. HIGHWAYS. TAXATION, 3-5.

1. The transfer of stock of a corporation may be enjoined at the suit of the owner when a bank of another state has wrongfully received it in pledge and is attempting to have it transferred to it. *Reynolds v. Touzalin Improvement Co.* 236
2. The extension of a franchise, though made in the form of an ordinance, *held* not free from the interposition of the courts by injunction where contrary to the city's statutory charter. *Poppleton v. Moores* 851
3. In determining whether a writ is a temporary order of injunction or a temporary restraining order, the form of the order is the test. *State v. Baker* 840
4. Writ set out and construed to be a temporary order of injunction. *Idem.*
5. Temporary order of injunction reviewed and *held* not to dispossess the defendant city of the right to regulate and control its streets and alleys, and not to be void for that reason. *Idem.*
6. The chief feature of a temporary restraining order which distinguishes it from a temporary order of injunction is that the former contemplates a further hearing upon notice upon an application for the latter. *Idem.*

Instructions.

Alibi.

1. Instruction as to alibi *held* not erroneous. *Nightingale v. State* 371

Assumption of Facts.

2. An instruction which without warrant assumes the possible existence of a material fact, is erroneous. *Van Nortwick v. Holbine* 147

Conflicting.

3. Instructions that are conflicting or misleading are erroneous. *Faulkner v. Gilbert* 126

Construction.

4. Instructions must be construed together. *Metcalf v. Bockoven* 887

Cumulative.

5. It is not error to refuse cumulative instructions. *Argabright v. State* 402

Harmless Error.

6. Where the plaintiff in error could in no view of the case recover on the issue covered by the instruction of which he complains, the error, if any, is without prejudice. *Dodds v. McCormick Harvesting Machine Co.* 759

Instructions—*continued.*

Language.

7. The use of the words "as in sound reason" in an instruction on the law of self-defense, *held* not prejudicially erroneous. *Coil v. State* 15

8. In an instruction as to the consideration of evidence by the jury, the use of the word "impartial" does not render the instructions erroneous. *Savary v. State* 166

Law of the Case.

9. Where instructions have been held proper on review, on a second review they will be held the law of the case. *Argabright v. State* 402
See APPEAL AND ERROR, 43.

Negligence. Burden of Proof.

10. An instruction that the burden of proof of contributory negligence is on the defendant unless it appears from plaintiff's own testimony, *held* to refer to all testimony produced on plaintiff's behalf. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin* 180

Oral Instructions.

11. Parties who invite oral instructions do so with the probability of the defect, and when such instructions are given, and, taken as a whole, they fairly present the issues, the court will not examine the charge for fly specks on the phrases and sentences. *Chicago, R. I. & P. R. Co. v. Andreesen* 456, 460

Reasonable Doubt.

12. Instruction defining a reasonable doubt *held* not erroneous. *Nightingale v. State* 371

13. An instruction in the following language: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered," is not erroneous. *Savary v. State* 166

Repetitions.

14. It is not error to refuse instructions requested on points substantially covered and included in other instructions. *Coil v. State* 15
Argabright v. State 402

Requests.

15. A request for an instruction not based on the evidence and not pertinent to the issue, is properly refused. *Omaha Loan & Trust Co. v. Douglas County* 1

16. A party who requests instructions on a certain theory can not complain that the court gave other instructions proceeding on the same theory. *Schrandt v. Young* 254

Instructions—*concluded.*

Sufficiency.

17. It is not required that all phases of a case be covered by one instruction. *Savary v. State*..... 166

18. Instruction on burden of proof and credibility of witness need not direct to all matters. *Erickson v. Schmill*..... 368

Witnesses.

19. An instruction of general application regarding the credibility of witnesses, otherwise proper and correct, is not open to objection because the defendant who testified in his own behalf was the only witness having a direct legal interest in the result of the trial. *Savary v. State*..... 166

Insurance. See MORTGAGES, 11.

Accident Policy. Notice of Loss.

1. In construing a policy as to notice of loss or injury, a more liberal construction will be given than when conditions prior to loss or injury are construed. *Woodmen Accident Ass'n v. Pratt*..... 673

2. Where a person is injured by a fall which deranged his mind, failure to give notice is excused. *Idem.*

3. When notice of injury is not given within the time stipulated, the question of the sufficiency of the excuse must be determined by the nature of the individual case. *Idem.*

4. Where an accident policy provided for notice of injury, it will be ordinarily construed a condition precedent to recovery. *Idem.*

5. Reasonable construction as to notice of injury will be given to the policy. *Idem.*

6. Provision as to time in which notice of injury is to be given is not always to be literally followed. *Idem.*

7. Evidence in an action on an accident policy, *held* to sustain a conviction for plaintiff. *Idem.*

Actions.

8. A party relying for recovery on a waiver of condition precedent in a life insurance policy must plead and prove such waiver or it will be unavailing; and proof thereof can not be received under a general denial. *Anders v. Life Ins. Clearing Co.*..... 585

9. Evidence in an action on a policy *held* to present a question for the jury. *Farmers & Merchants Ins. Co. v. Dobney*..... 213

Assessments.

10. A mutual insurance company organized under chapter 46, Session Laws 1899, can not limit, by contract, the number or amount of assessments for which its members are liable. *Morgan v. Hog-Raisers Mutual Ins. Co.*..... 446

Insurance—*continued.*

11. A portion of a contract between a mutual insurance company and a member, limiting the liability of the member as to assessments, *held* invalid. *Idem.*

12. The liability of a member of a mutual insurance company to pay his share of all assessments, is a continuing one during his membership. *Idem.*

Attorney's Fees.

13. Valued policy law permitting the taxation of reasonable attorney's fees as costs, is constitutional. *Farmers & Merchants Ins. Co. v. Dobney*..... 213

Benefit Certificates. Forfeitures.

14. The representative of a mutual benefit insurance company, who, acting within the scope of his authority, accepts a surrender of a benefit certificate, and a fee for the issuance of a new one with knowledge that the holder is in arrears, can not plead ignorance of the law. *Modern Woodmen of America v. Lane*..... 89

15. Under the by-laws and rules of a benefit insurance society *held* that cancelation of a prior certificate, acceptance and retention of a fee for issuing a new one with a change of beneficiary, and the issuance of a new one, accordingly, amounted to a waiver of such requirements, though the certificate holder was not in good health at the time. *Idem.*

16. The recognition of a benefit certificate, with knowledge of facts entailing a forfeiture, is a waiver of forfeiture as a matter of law. *Idem.*

17. An insurance company's secret intention to insist on a forfeiture can not prevail against deliberate acts amounting to a waiver with knowledge of the facts. *Idem.*

Construction of Policy.

18. A provision in a life insurance policy as to payment of premiums *held* a condition precedent. *Anders v. Life Ins. Clearing Co.*..... 585

19. In construing a contract of insurance a construction resulting in a loss of indemnity will not be adopted, except to give effect to the intent of the parties. *Woodmen Accident Ass'n v. Pratt*..... 673

Venue.

20. Section 55 of the Code authorizes a domestic insurance corporation to be sued in (*a*) the county where its principal place of business is fixed by its charter, although its actual business is carried on and its officers reside in another county; (*b*) in the county where it is situate; (*c*) in a county where the cause of action or any part thereof arose. *Western Travelers Accident Ass'n v. Taylor*..... 783

Insurance—*concluded.*

21. A domestic insurance corporation is situated in any county where it maintains a place of business, and has servants, employees or agents engaged in conducting the business for which it exists. *Idem.*

22. Section 60 of the Code does not provide for an action against a domestic insurance company in a county other than as provided by section 55. *Idem.*

Interest. See USURY.

1. In an action for wages, plaintiff can recover interest at seven per cent. from six months after payment was due. *Mullaly v. Dingman*..... 702

2. When money is due and withheld by unreasonable delay of payment, interest may be allowed at the rate of seven per cent. per annum. *Idem.*

3. Where a note stipulated for a lawful rate of interest from date and a higher lawful rate after maturing, both rates are enforceable. *Sanford v. Litchenberger*..... 501

4. Interest is chargeable upon a decree upon a creditor's bill ordering defendant to pay money into court forthwith. *Stuart v. Burcham*..... 84

5. A defendant in a suit to which all the claimants of a fund in his hands are parties, who, being ordered by the decree to pay the fund in his hands into court, excepts to such decree and participates in an appeal therefrom by one of the claimants, can not be heard to claim, after affirmance of the decree, that he was a mere stakeholder and therefore not chargeable with interest. *Idem.*

Intervener. See EVIDENCE, 7. GARNISHMENT, 1.

Intoxicating Liquors.

1. A physician can not sell or keep for sale intoxicating liquors without a license. *Holt v. State*..... 134

2. Keeping intoxicating liquors for home consumption, does not give right to sell without license. *Idem.*

3. A mother, pending an action on a liquor dealer's bond on her own behalf or that of her minor children, can not settle their rights without the approval of the court. *Zimmerman v. Smiley*..... 204

Judgment. See APPEAL AND ERROR. COURTS. DIVORCE AND ALIMONY. INTEREST.

Bar.

1. A judgment in favor of a defendant in an action for maliciously attaching plaintiff's property, *held* no bar to a subsequent action by plaintiff to recover the penalty of an attachment bond for wrongful issuance of the attachment. *Simons v. Fagan*..... 287

Judgment—*continued.*

Collateral Attack.

2. A judgment against a municipal corporation after answer day upon a written stipulation of defendant's attorney, *held* not subject to collateral attack. *Alter v. State*..... 239

Confession.

3. A resolution by a county board will not confer authority on the county attorney to confess judgment against the county. *Custer County v. Chicago, B. & Q. R. Co*..... 657

4. A county attorney can not enter a voluntary appearance and confess judgment against a county. *Idem.*

Conformity to Pleading.

5. A judgment must be founded on the issues made by the pleadings. *State v. Haverly*..... 767

Default.

6. A judgment entered against a municipal corporation without first entering its default after filing petition and service of summons, is irregular. *Alter v. State*..... 239

Lien.

7. A judgment of the district court in an action commenced before the term at which it was rendered, *held* a lien on the lands within the county from the first day of the term. *Doe v. Startzer*..... 718

8. Where a judgment is recovered against a vendor of realty, in the same county, who has not made a deed nor received the price, it is a lien against his interest. *Idem.*

Non Obstante Veredicto.

9. As against a motion for judgment for plaintiff *non obstante veredicto*, all the facts stated in both defenses will be considered together. *Connor v. Becker*..... 856

10. On a motion for a judgment for the plaintiff *non obstante veredicto*, allegations as regards limitations *held* to be construed as if they alleged payment by an assignee under an insolvency law. *Idem.*

Opening or Vacating.

11. Answer in an application to reopen a judgment in the foreclosure of a tax lien, *held* evasive. *Oakes v. Ziemer*..... 603

12. A full answer, on an application to open a judgment under section 82 of the Code, means a meritorious answer. *Idem.*

13. In an application to open a judgment under the provisions of section 82 of the Code of Civil Procedure a defendant will not be heard to question the sufficiency of the petition on which such judgment was rendered. *Idem.*

14. A refusal to set aside a decree when the cause was regularly set for trial, but rendered in the absence of one of

Judgment—*concluded.*

the parties, on the ground that his counsel did not hear the court make the order setting it for hearing, is not abuse of discretion. *Miller v. Fitz Gerald Dry Goods Co*..... 270

Right to Relief.

15. A plaintiff is entitled to relief to the extent that his petition is sustained by the proof. *Toy v. McHugh*..... 820

Revivor.

16. In a proceeding to revive a judgment, a plea of payment admits the validity of the judgment. *McCormick v. Carey*.. 494

Two Decrees.

17. The rendition of two decrees, each on a different day of the same term, is not, of itself, reversible error. *Plummer v. Park* 665

Judicial Notice. See EVIDENCE, 6.

Judicial Sale. See EXECUTION.

Jurisdiction. See COURTS. EQUITY.

Jury. See APPEAL AND ERROR, 13, 29, 64. EQUITY. NEW TRIAL. TRIAL.

Competency. Challenge.

1. Only an unqualified opinion disqualifies a juror. *Russell v. State* 512
2. The right to challenge a juror because he has been summoned and served in the same court within two years last past may be waived by not being interposed in apt time, or by lack of diligence. *Coil v. State*..... 15
3. A decision on a challenge for cause will not be disturbed, unless an abuse of discretion is shown. *Idem.*
4. It is a cause for challenge that a juror called to sit in a criminal case has been summoned and has served as a juror in the same court within the two preceding years. *Idem.*
5. An objection that a juryman has served in the same court within two years *held* good. *Idem.*

Impaneling. Conduct of Sheriff.

6. Ruling of the court as to misconduct of the sheriff during the impaneling of a jury, *held* to be supported by the evidence and free from error. *Idem.*

Qualifications.

7. To constitute a competent juror, one must have resided in the state six months, in the county forty days, in the precinct, township or ward ten days and must be twenty-one years old. *Russell v. State*..... 512

Right of Trial by Jury.

8. Where issue is joined in a proceeding to revive a judgment, it is error to deny a request for a jury. *McCormick v. Carey* 494

Justices of the Peace.

Entries by a justice of the peace upon his docket of material matters proper to appear there, are evidence of the facts therein stated. *Goldstein v. Fred Krug Brewing Co*..... 728

Landlord and Tenant. See MECHANIC'S LIEN. LEASES.

Obstruction of Stairway. Concealment of Signs.

1. A tenant of the lower floor of a building can not obstruct the stairway or entryway, or the street or sidewalk space immediately leading thereto, so as to impede access to rooms of other tenants on the upper floor. *Idem.* *Miller v. Fitz Gerald Dry Goods Co*..... 270

2. An obstruction by tenants of the lower floor of a stairway to the upper floor *held* a nuisance which can be enjoined. *Idem.*

3. On lease of rooms in an upper story for offices, a tenant has the right to use the entry and stairway leading to the same. *Idem.*

4. Where by the terms of his tenancy a tenant upon the upper floor is given the privilege of using a portion of the lower part of the building adjacent to the stairway for signs, a tenant of the lower floor has no right to conceal such sign. *Idem.*

Renting of Lands on Shares.

5. Evidence in an action on a lease to cultivate land on shares, *held* to sustain verdict for plaintiff. *Culley v. Taylor*..... 651

6. The owner of premises, renting them on shares, *held* not to have worked an eviction by entering after the season is too far advanced to plant the crop and clearing the lands of weeds. *Idem.*

7. When one commits a total breach of his contract to cultivate lands of another on shares a specific crop, the measure of damages is the injury to the lands, from allowing them to lie idle and become foul with weeds, plus the probable value of the landowner's share of the crop. *Idem.*

Law of the Case. See APPEAL AND ERROR, 42-44.

Leases. See LANDLORD AND TENANT.

A lease of a part of a building passes with it, as incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. *Miller v. Fitz Gerald Dry Goods Co*..... 270

Legislature. See CONSTITUTIONAL LAW, 1.

Liens. See ANIMALS. CREDITORS' BILL. JUDGMENT, 7, 8. MECHANIC'S LIEN. TAXATION.

Limitation of Actions. See ABATEMENT AND REVIVOR. MORTGAGE, 12.

1. Where premises were conveyed by warranty deed, and specific performance to convey to another was thereafter decreed, vendee's title failed at rendition of decree, and limitations began to run from that time. *Watson v. Heyn*.. 191
2. Where, after the maturity of a note secured by real estate mortgage, interest payments are made annually, a right of action accrues on the mortgage at any time within ten years after the date of the last payment. *Teegarden v. Burton* 639
3. Allegation that defendant has continuously resided in Nebraska ever since "on or about January 13, 1888," sufficiently indicates such a residence on and after January 24, 1889, as against a motion, after verdict in favor of defendant for judgment for plaintiff. *Connor v. Becker*..... 856
4. The statute of limitations does not begin to run against the action of covenant in a deed by a minor until the minor disaffirms the deed. *Pritchett v. Redick*..... 296
5. The right to damages for the obstruction of a stream by an insufficient culvert or drain, accrues when the overflow actually occurs. *Chicago R. I. & P. R. Co. v. Andreesen*..... 456

Machinery. See MASTER AND SERVANT. NEGLIGENCE.

Malicious Prosecution.

1. A petition, wherein it is alleged that a civil suit which resulted in impounding the defendant's property was prosecuted maliciously and without probable cause, states a cause of action without alleging that the attachment and garnishment proceedings were sued out maliciously and without probable cause. *Metcalf v. Bockoven*..... 877
2. Instructions in an action for malicious prosecution of a civil suit, *held* without error. *Idem.*
3. In a suit for malicious prosecution in suing out an attachment and garnishment, the pleadings and affidavit in the suit in which the attachment and garnishment issued are competent evidence. *Idem.*

Mandamus.

1. The title to an office can not be tried by mandamus. *State v. Haverly* 767
2. A peremptory writ of mandamus must essentially conform to the alternative writ. *Idem.*
3. A city will not be required by mandamus to levy a tax for water supply in excess of the limit existing at the time of the contract. *State v. City of Wahoo*..... 40
4. Mandamus will lie to enforce appellee's right in case of an attempted appeal where no appeal lies. *State v. Fields*, 520

Marriage. See DIVORCE AND ALIMONY. HUSBAND AND WIFE.

Where the minds of parties capable of entering into such a contract meet in a common consent, there is a valid marriage. *University of Michigan v. McGuckin*..... 489

Master and Servant. See RAILROADS.

Contributory Negligence.

1. A brakeman, going between cars moving at the rate of about four miles an hour, *held* not guilty of negligence, as a matter of law, precluding recovery for injuries resulting from his employer's negligence. *O'Neill v. Chicago, R. I. & P. R. Co.*..... 358

2. An instruction as to the burden of proof of contributory negligence, *held* proper. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*..... 180

Defective Machinery. Condition of Premises.

3. An instruction that the burden of proof is on an employee to show defect in machinery and negligence in allowing floors to be wet, together with an instruction to find for employer if machinery was not defective, was not ground for reversal at the suit of employer. *Swift & Co. v. Holoubek*.. 31

4. Statement as to employer's duty to furnish a reasonably safe place to work, *held* proper under the evidence. *Idem.*

5. An instruction that employer will not be held liable for an injury to employee from machinery operated by plaintiff if the same was in general use and in good repair, was properly refused. *Idem.*

Fellow Servant.

6. A foreman having charge of a branch of defendant's work, *held* not a fellow servant with a workman under him. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*.... 180

7. There being no conflict in the evidence as to the duties of the foreman in question, an instruction that he was not a fellow servant *held* proper. *Idem.*

Personal Injury.

8. Evidence in an action by a servant for personal injuries, *held* to support a verdict for plaintiff. *Idem.*

Risks Assumed by Servant.

9. An employee of a railroad company has the right to presume that his employer has taken ordinary precautions to protect him from injury. *O'Neill v. Chicago, R. I. & P. R. Co.*.. 358

10. Negligence of the employer, of which the employee is ignorant, is not one of the risks assumed by the latter in his contract of service. *Idem.*

Mechanics' Lien.

1. A tenant, without the authority of his landlord, can not charge the premises with a mechanic's lien. *Stevens v. Burnham* 672

2. In the absence of evidence showing that a building was not permanently annexed to the soil, or that it was intended as a mere agricultural fixture, it can not be subjected to a lien in favor of the person furnishing the material used in its construction. *Idem.*

Mercantile Agency. See FRAUD, 5.

Minors. See INFANTS.

Misconduct

of counsel. See TRIAL, 1-6.
of sheriff. See JURY, 6.

Misrepresentation. See FRAUD.

Mistake. See TAXATION, 13. USURY.

Mortgages. See EXECUTION.

Default. Option to Foreclose.

1. Where a mortgage is foreclosed for default in the payment of taxes, payment after action is brought is no defense. *Plummer v. Park*..... 665

2. A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute or contrary to public policy and may be enforced. *Idem.*

Deficiency Judgment.

3. Under sections 847-850, before the amendment of 1897, a creditor could not sue to recover a judgment for deficiency after foreclosure without leave of court. *Waugh v. Newell*.. 438

4. The lack of authorization to bring an action to recover a balance due after foreclosure is not a defense necessary to be pleaded. But such authority should be alleged or at least proved by the plaintiff. *Idem.*

Foreclosure. Pleading. Evidence.

5. In a foreclosure proceeding, the allegation of no action at law must be proved. *Plummer v. Park*..... 665

6. A plaintiff in foreclosure must plead in substantial compliance with the requirements of section 850 of the Code. *Durland v. Durland*..... 813

7. In a suit to foreclose a real estate mortgage brought subsequently to the maturity of the note it was given to secure, an averment in the petition that neither the mortgage nor any part thereof has been paid sufficiently pleads a breach of the condition of the mortgage. *Idem.*

Mortgages—*concluded.*

8. In a mortgage foreclosure the complainant shall state in his petition whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof and whether such debt or any part thereof has been collected and paid. *Idem*.....813, 815

9. Evidence in an action to foreclose a mortgage, *held* to sustain a finding for defendant. *Booth v. Kessler*..... 704

10. In an action to foreclose a mortgage, section 6 of the Code of Civil Procedure should be construed in connection with section 22 of such Code in determining the period of limitation. *Teegarden v. Burton*..... 639

Insurance.

11. Where a mortgage provides that the mortgagor shall keep the buildings insured for the benefit of the mortgagee, the latter is entitled to be reimbursed for insurance premiums paid by him. *Sanford v. Litchenberger*..... 501

Limitation of Action.

12. In an action to foreclose a mortgage, section 6 of the Code should be construed with section 22 in determining the period of limitation. *Teegarden v. Burton*..... 639

Sale. Disposition of Surplus.

13. The surplus of a sum for which premises sold under foreclosure, after paying decree and costs, should be paid to the mortgagor. *Hatch v. Shold*..... 764

Title Pending Confirmation.

14. The legal title to real estate remains in the mortgagor pending confirmation of foreclosure sale. *Idem.*

Motions. See APPEAL AND ERROR. CRIMINAL LAW AND PROCEDURE. JUDGMENT. NEW TRIAL. PLEADING. TRIAL.

Municipal Corporations. See BANKS AND BANKING, 5. MANDAMUS. WATER AND WATERCOURSES, 3.

Detachment of Territory.

1. Section 101, article 1, chapter 14, Compiled Statutes, relating to the detachment of territory from a city or village by petition, is available only to legal voters of the territory sought to be disconnected. *Village of Osmond v. Smathers* 509
Village of Osmond v. Matteson..... 512

2. The owner of agricultural lands within the boundaries of a city or village, although not a voter, may maintain a suit to have such lands detached. *Idem.*

Execution and Enforcement of Judgment.

3. Whether levy and collection of taxes and payment of the same upon the judgment will prevent the same from becoming dormant, *quære*. *Alter v. State*..... 239

Municipal Corporations—*concluded.*

4. Section 482 of the Code relating to the enforcement of dormant judgments, *held* to apply to a judgment against a municipal corporation. *Idem.*

5. A judgment against a municipal corporation will become dormant in five years if no tax is levied, and no proceeding begun to compel such levy. *Idem.*

6. After a judgment against a municipal corporation has become dormant, the levy of a tax payment on such judgment will not revive the same. The statutory method of revivor is exclusive. *Idem.*

7. Mandamus, brought in good faith to compel the collection of taxes to pay a judgment against a municipal corporation, *held* equivalent to the issuance of an execution thereon. *Idem.*

License Money. Default of Treasurer.

8. Liquor license money paid village treasurer under ordinance is received by the treasurer ex-officio, rendering his bondsmen liable therefor. *Hrabak v. Village of Dodge*..... 591

9. A village can maintain an action against its defaulting treasurer to recover money paid on liquor licenses, though it must ultimately go to the school district. *Idem.*

Taxes.

10. Cities of the second class can not be required to refund money received for illegal taxes imposed from a purchaser at tax sale. *Martin v. Kearney County*..... 538

11. The act of March 27, 1901, relating to the government of cities of 40,000 to 100,000 inhabitants, is not void for uncertainty as regards the office of tax commissioner. *State v. Aitken*..... 428

12. The act of March 27, 1901, relating to the government of cities of 40,000 to 100,000 inhabitants, and fixing the method of assessing property for taxation, is not amendatory of the revenue law and is not subject to the constitutional requirements as to amendments. *Idem.*

Water-Works. Bonded Debt.

13. A certificate by a clerk guaranteeing interest on the bonds of a water-works company, *held* not authorized by the ordinance by which the city contracted with such company. *Painter v. City of Norfolk*..... 330

14. Provisions of an ordinance with respect to the assessment of a bonded debt for water-works, or purchase thereof, *held* in violation of statute providing that no bonded debt should be incurred by the city for water-works unless first authorized by popular vote. *Idem.*

Murder. See HOMICIDE.

Nebraska Legal News. See NEWSPAPERS.

Negligence. See DEATH BY WRONGFUL ACT. ELECTRICITY. MASTER AND SERVANT. RAILROADS.

1. In an action to recover damages for negligence in threshing grain, an averment that the thresher represented that he had a good machine and could and would do a good job is immaterial and need not be established by proof. *Van Nortwick v. Holbine*..... 147
2. Directing a verdict in an action against a railroad for injuries to an employee *held* error. *O'Neill v Chicago, R. I. & P. R. Co*..... 358
3. One going on another's premises by express or implied invitation, *held* entitled to recover for injuries caused by the owner's failure to keep the premises reasonably safe. *Tucker v. Draper*..... 66
4. In an action for death of a child by wrongful act brought by the father as administrator, it is error to instruct the jury that contributory negligence of the father is no defense. *Idem.*
5. Evidence in an action for wrongful death by reason of dangerous premises, *held* sufficient to authorize the submission of the question of negligence to the jury. *Idem.*
6. In an action for wrongful death caused by the negligent condition of certain premises, the question of negligence is for the jury, unless the facts are undisputed or ordinary minds would not differ in their judgment concerning them. *Idem.*

Newspapers.

1. Definition of newspaper under section 497 of the Code. *Turney v. Blomstrom*..... 616
2. The Nebraska Legal News is a newspaper within the meaning of section 497 of the Code of Civil Procedure. *Idem.*

New Trial.

1. The verdict of a jury can not be impeached by one of the jurors on the ground that he misunderstood the evidence of one of the witnesses. *Coil v. State*..... 15
2. Affidavits of jurors to the effect that they believed that the jury could fix the term of imprisonment at five years, or they would not have agreed to a verdict of guilty of murder in the second degree, can not be received to impeach their verdict returned in open court. *Idem.*
3. A juror can not be heard to impeach a verdict by him returned as to any matter essentially inhering in the verdict. *Savary v. State*..... 166
4. Statements of a juror made after trial as to the method

New Trial—*concluded.*

of arriving at a verdict are hearsay when testified to by another and can not be used to impeach a verdict. *Idem.*

5. A statement made by a juror after conviction of defendant, tending to impeach his verdict, held insufficient to overcome the presumption that the verdict was the result of the deliberation of the jury on the evidence. *Idem.*
6. A juror can not be heard to impeach his own verdict by showing that he reasoned from false premises or adopted an illegitimate method in reaching a conclusion. *Idem*..166, 180
7. Granting of a new trial on a coroner's official bond, *held* proper. *Barton v. Shull*..... 570
8. Affidavits in support of the right of a witness to correct his testimony, *held* without merit. *Coil v. State*..... 15
9. Affidavits in support of a motion for a new trial on the ground that a witness for the state was not allowed to correct an alleged mistake in his testimony were without merit since from the record and the affidavits it appears that no mistake had been made. *Idem.*

Notice. See EXECUTION. INSURANCE. SERVICE.

Office and Officers. See BANKS AND BANKING. COUNTY ATTORNEY. JUSTICES OF THE PEACE. MANDAMUS. RECEIVERS. SHERIFFS AND CONSTABLES.

In an action on an official bond, the plaintiff, by general denial, is not relieved from proving the injury out of which his right of action arose. *Barker v. Wheeler*..... 150

Ordinances. See MUNICIPAL CORPORATIONS. WATER AND WATERCOURSES, 3.

Parent and Child. See BASTARDS. INFANTS.

1. The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children. *Eldred v. Eldred*..... 613
2. A mother can not compromise the rights of her children in pending action on liquor-dealer's bond. *Zimmerman v. Smiley* 204

Parties. See ABATEMENT AND REVIVOR. BANKS AND BANKING. FRAUDULENT CONVEYANCE, 15, 16.

A party holding a legal title to a chose in action in whose name a contract is made for another, may sue thereon without joining beneficiaries. *Meeker v. Waldron*..... 689

Partition.

In an action for partition the defendant in possession, claiming adversely to the plaintiff, will, by waiving a jury and participating in the trial, waive an irregularity in the procedure in this respect. *Schimpf v. Rhodewald*..... 105

Partnership.

1. A retiring partner remains liable for all the existing debts of the firm to the same extent as if he had not retired. An agreement with the remaining partner that he shall assume all debts binds only the parties to such agreement. *Grotte v. Weil* 478
2. The creditor of a partnership, after notice comes to him of the retirement of one partner, and the assumption of the firm debts by the other member, should deal with reasonable diligence in the matter of any securities in his hands for the payment of his claim. *Idem.*

Payment. See EXECUTORS AND ADMINISTRATORS. LIMITATION OF ACTIONS. TAXATION.

1. In an action on a contract for the unconditional payment of money, payment can not be proved under a general denial. *Barker v. Wheeler*..... 150
2. Evidence *held* insufficient to sustain a plea of payment. *Thompson Co. v. Baldwin*..... 530
3. When a payment is pleaded, the burden of proof is on the party pleading to prove the same by a preponderance of the evidence. *Mullally v. Dingman*..... 702

Personal Injuries. See ASSAULT AND BATTERY. ELECTRICITY. NEGLIGENCE. RAILROADS.

Physicians and Surgeons. See INTOXICATING LIQUORS.

Pleading. See APPEAL AND ERROR, 47. BILLS AND NOTES. DEATH BY WRONGFUL ACT. EQUITY. FRAUDULENT CONVEYANCE. HUSBAND AND WIFE. INDICTMENT AND INFORMATION. INSURANCE. JUDGMENT. LIMITATION OF ACTIONS. MALICIOUS PROSECUTION. NEGLIGENCE. SHERIFFS AND CONSTABLES.

Admissions.

1. In a suit to foreclose a tax lien answer, *held* an admission of the issuance and existence of the certificate of tax sale alleged. *Battelle v. McIntosh*..... 647

Amendment.

2. The granting or refusing amendment of a pleading, is committed to the sound discretion of the trial court. *Gage v. West* 612
3. It is an abuse of discretion to refuse an amendment tendered in furtherance of justice. *Idem.*

Inconsistency.

4. Where inconsistent defenses are pleaded, and one is eliminated by an instruction, plaintiff can not complain. *Green v. Tierney*..... 561

Information and Belief.

5. A matter of public record upon which a party can obtain

Pleading—*concluded.*

positive knowledge can not be pleaded on information and belief. *Oakes v. Ziemer*..... 603

New Matter.

6. Payment is not new matter within section 99 of the Code when offered to disprove official misconduct. *Barker v. Wheeler* 150

Petition. Defects.

7. Pleading that no part of a check sued on had been "pain" *held* to be construed as if the word written "pain" were "paid." *Connor v. Becker*..... 856

8. A petition is not fatally defective, merely because its averments could have been more certain. *Sanford v. Litchenberger* 501

9. An objection that a pleading is indefinite should be raised by a motion to make more definite. *Idem.*

Reply.

10. As a rule it is not good pleading to state a new cause of action or a part thereof in a reply. *Farmers & Merchants Ins. Co. v. Dobney*..... 213

11. An allegation of a fact in a reply, is taken as denied by the force of the Civil Code. *Solt v. Anderson*..... 153

Variance Between Pleading and Proof.

12. A variance between pleading and proof is not material unless misleading. *Toy v. McHugh*..... 820

Separating and Numbering Defenses.

13. Where defendant, in addition to a general denial, sets up a paragraph of affirmative defenses, the proper remedy is by motion to strike out, and not to separately state the same. *Schrandt v. Young*..... 254

Pledges.

The giving of a new note for an existing indebtedness will not of itself release collateral security held for payment of such indebtedness. *Meeker v. Waldron*..... 689

Principal and Agent.

1. Where a corporation takes title to tax receipts in the name of an agent, the latter is trustee for the former. *Concordia Loan & Trust Co. v. Parrotte*..... 629

Third Parties. Collection of Note.

2. Evidence examined, and *held* not to show agency for the collection of a negotiable note. *Gilbert v. Garber*..... 464

3. A course of dealing by which a loan company has received and receipted for interest payments on a negotiable promissory note from the mortgagor or his assigns, will not of itself be sufficient proof of its agency to receive and re-

Principal and Agent—*concluded.*

ceipt for the payment of the principal of said note, when said note is in the hands of an innocent person for value before maturity. *Idem.*

4. One who makes payment to a second person, not the owner of the note or in possession of it, assumes the burden of proving that such officer was authorized to collect. *Idem.*

5. The power of a collecting agent, by the general law, is limited to the receiving for the debt of his principal that which the law declares to be a legal tender, or what is, by common consent, considered and treated as money and passes as such at par. *Idem.*

Principal and Surety. See APPEAL AND ERROR, 55, 57, 58.

1. Collateral given by a principal as indemnity, may be applied in equity to the principal debt. *Meeker v. Waldron*... 689

2. Where there is no pretense that the surety was unable to read or that he lacked opportunity to examine the instrument and learn its contents, he can not escape liability on the ground that he did not know its contents and relied upon the statement of his co-maker that his signature was merely as a matter of form. *McKell v. Merchants Nat. Bank* 608, 610

3. It is elementary that a consideration moving wholly to the principal is a sufficient consideration for the promise of the surety. *Idem.*

4. The intent and liability of a contract of suretyship must be ascertained by a fair and liberal construction of the instrument in furtherance of what appears to have been the intention of the parties at the making. *Griswold v. Hazels* 888

Process. See ATTACHMENT. EXECUTION. GARNISHMENT. SERVICE.

Questions for Jury. See DIRECTING VERDICT. EQUITY. INSURANCE, 9.

Railroads. See MASTER AND SERVANT.

Accident at Crossing.

1. In an action for injuries to a child while crossing a railroad track, an instruction that if she left the place of safety after discovering the engine, it was immaterial whether signals were given, was error. *Geist v. Missouri P. R. Co.*..... 309

2. In an action for injury to a child while crossing a railroad track, the child's view having been obstructed, it was error to charge that if she was intelligent and realized the danger, she was guilty of contributory negligence as a matter of law. *Idem.*

Railroads—*concluded.*

3. In an action for injuries to a child at a railway crossing, an instruction that, if no signal was given, under all the circumstances of the case it was negligence to run the train across the crossing without signal, and, if this was the proximate cause of plaintiff's injury, she could recover, was improperly refused. *Idem.*

Obstruction of Watercourses.

4. A railroad has no right to obstruct a natural watercourse. *Chicago, R. I. & P. R. Co. v. Andreesen*..... 456
5. A landowner can recover against a railroad company for maintaining an insufficient culvert, whereby his lands are flooded, notwithstanding he has recovered damages for the location of the road. *Idem.*

Rape.

1. In an information under subdivision 2, section 12 of the Criminal Code, it is not necessary to allege that the offense was committed with consent. *Reinoehl v. State*..... 619
2. Rulings on instructions, *held* not prejudicially erroneous. *Idem.*
3. Evidence *held* sufficient to sustain a conviction. *Idem.*

Reasonable Doubt. See INSTRUCTIONS, 12, 13.

Receivers. See EJECTMENT.

1. Authority is conferred upon a judge of the district court to appoint a receiver. *Morris v. Linton*..... 731
2. A receiver will not be appointed in an action of ejectment to take charge of the property and to collect rents and profits before judgment entered. *Smith v. White*..... 56

Release. See PLEDGES.

Replevin. See BANKS AND BANKING.

Action. Pleading. Evidence.

1. When personal property has been taken by a constable under a writ of replevin and he is proceeding according to law and has not yet delivered the property to the plaintiff nor returned it to the defendant, replevin against him to recover possession will not lie. *Yost v. Schleicher*..... 601
2. A verdict in replevin finding a special ownership in the defendant and fixing its value, is sustained by evidence of an agister's lien for the sum so fixed. *Schrandt v. Young*.. 254
3. A defendant in replevin, under a general denial, may prove and recover any item of damage properly allowable to him in such an action. *Idem.*

Damages.

4. Damages for detention can only be had where there is a return of the property and depreciation. *Idem.*

Replevin—*concluded.*

5. The damages recovered in replevin must be connected with, and incident to, the contest over possession of the property. *Idem.*

6. Where use of the property has a value exceeding the interest, the defendant in replevin may recover such value. *Idem.*

7. The damages for withholding the property which a defendant in replevin may recover under section 191*a* of the Code, do not include anticipated profits under a contract by which defendant held the property in controversy, nor for failure to comply with subsequent oral modifications thereof, nor for misrepresentations inducing him to enter into the contract. *Idem.*

Liability on Bond.

8. Where want of power in a surety on a replevin bond is palpable, defendant can not rely upon delivery of the property to the plaintiff by the sheriff as estopping the surety to make such defense. *Sturdevant v. Farmers & Merchants Bank* 472

Res Judicata. See APPEAL AND ERROR. JUDGMENT.

Rescission. See CONTRACTS, 4. SALES.

Residence. See INFANTS.

Review. See APPEAL AND ERROR.

Revivor. See ABATEMENT AND REVIVOR.

Road. See HIGHWAYS.

Sales. See EXECUTION. INTOXICATING LIQUORS. TAXATION. VENDOR AND VENDEE.

Actions Between Seller and Third Persons.

1. Where the title to merchandise is in issue, *held* error to refuse an instruction defining the transaction in controversy as a sale, when no other instruction has been given. *Omaha Nat. Bank v. Kraus* 77

Conditional Sale.

2. Where property has been delivered on a conditional sale, and notes for price are past due, *held* that vendor under the contract could regain possession. *Thompson Co. v. Baldwin* 530

Misrepresentations. Rescission.

3. The rule charging a party with notice of the truth of positive representations of existing facts affecting sale of goods, *held* not to apply to mere expression of opinion. *Hamilton Brown Shoe Co. v. Milliken* 116

4. In an action by a seller to rescind the sale for fraud, the

Sales—*concluded.*

bringing of an action within reasonable time for that purpose *held* sufficient notice of his intention to rescind. *Idem.*

5. In an action to rescind a sale for false representations as to the financial condition of the buyer corporation, its annual statement, showing its debts, may be relied on by the vendor, notwithstanding the source from which he received the statement. *Idem.*

6. Contract as to chattels construed and *held* a contract of sale with an option to rescind. *Omaha Nat. Bank v. Kraus*.. 77

Warranty.

7. Evidence *held* insufficient to sustain a recovery for an alleged breach of warranty. *Dodds v. McCormick Harvesting Machine Co*..... 759

Service. See ATTACHMENT. EXECUTION. GARNISHMENT. NOTICE. SHERIFFS AND CONSTABLES.

By Publication.

1. Affidavit *held* sufficient to give the court jurisdiction. *Leigh v. Green*..... 344

2. Where an affidavit for publication enables the court to determine whether the action is one authorizing such a service, service based thereon is valid. *Idem.*

3. An affidavit for service by publication is sufficient if made on information and belief. *Idem.*

4. Service by publication *held* sufficient, though affidavit is sworn to two days before the filing of the petition. *Idem.*

5. Affidavit for service is to inform the court and not the defendant. *Idem.*

Services. See WORK AND LABOR.

Sheriffs and Constables. See ATTACHMENT. CORONERS. EXECUTION. JURY, 6. TRIAL, 14.

Assistants.

1. Under the provisions of section 42, chapter 28, Compiled Statutes, 1899, a sheriff can not employ assistants at public expense without authority from the county commissioners. *Drexel v. Douglas County*..... 862

Compensation.

2. A sheriff can not claim credit on account for stenographer whose employment was unauthorized by county board. *Idem.*

3. A sheriff need not account for moneys received by him while acting as temporary receiver. *Idem.*

4. The fee of $3 a day allowed to sheriffs by the state for conveying convicts to the penitentiary and the insane to the Nebraska hospital for the insane should be accounted

Sheriffs and Constables—*concluded.*

for to the county. The fee allowed to guards and assistants he is not required to account for. *Idem.*

Replevin Bonds. Approval. Negligence.

5. Where sureties on replevin are excepted to, and the sheriff fails to have them justify, he is responsible for their sufficiency when defendant seeks to enforce a judgment in his favor in the replevin action. *Barton v. Shull*..... 570
6. Evidence in an action by a sheriff against a coroner for having negligently approved an insufficient undertaking in replevin, *held* not to sustain a verdict for defendants. *Idem.*
7. Where property levied on attachment is taken in replevin, and is levied on by the officer from whom replevied, it is a defense to an action on the replevin bond or in an action for taking insufficient sureties. *Idem.*
8. In an action against an officer for taking an insufficient replevin bond, the plaintiff need not allege that he has prosecuted the sureties to judgment and execution without satisfaction. *Adams v. Weisberger*..... 325
9. In an action to enforce an officer's liability for taking an insufficient replevin bond, it is immaterial whether the justice exceeded his jurisdiction in rendering replevin judgment. *Idem.*
10. Since an officer taking a replevin bond guarantees the sufficiency of the sureties, it is not necessary to allege, in an action against an officer, that he acted wrongfully or negligently. *Idem.*

Specific Performance. See STATUTE OF FRAUDS.

1. An agreement to convey ten acres of forty owned by vendor, "being every fourth block in said forty acres," when the forty acres consists of blocks 59 and 60, 73 and 74, 75 and 76 and the north half of 91 and 92, it too indefinite and uncertain for specific enforcement. *Omaha Loan & Trust Co. v. Goodman*..... 197
2. Petition in an action for specific performance, *held* to state a cause of action. *Solt v. Anderson*..... 153
3. In order to justify a decree of specific performance of a verbal agreement for the sale of real estate the acts of part performance relied on to escape operation of the statute of frauds, must be clearly, definitely and satisfactorily shown, and it must also appear that such acts were done with reference to and in pursuance of the contract. *Lewis v. North*..... 552
4. Continued possession by an alleged vendee under a parol contract for the sale of land, *held* not part performance when he was occupying the land as a former owner. *Idem.*

Specific Performance—*concluded.*

5. Continued possession by a tenant *held* not a part performance of a verbal contract for the sale of land by the landlord. *Idem.*

State and State Officer. See COURTS.

It is no valid ground for the dismissal of an action brought by the state against a corporation that the federal court has granted an injunction to restrain the attorney general from the prosecution thereof. *State v. Chicago, R. I. & P. R. Co.*..... 123

Statute of Frauds.

Agreements Not to be Performed Within One Year.

1. Any agreement which by its terms is not to be performed within one year from the making thereof is void unless the same or a memorandum thereof be in writing and subscribed by the party to be charged thereby. *Reynolds v. First Nat. Bank*..... 747

2. The contract set out in the petition *held* unenforceable, as not to be performed within one year. *Idem.*

3. A parol contract, to be void, must be one that by its terms is not to be performed within one one year from the making thereof. *Idem.*

4. Where by the specific terms of a contract or where it appears that it was not the intention of the parties to perform it within one year, the contract is void. *Idem.*

5. An oral contract by which the bank agrees to hold the surety on a liquor bond harmless in consideration of the fact that the principal is their debtor and by being allowed to engage in the liquor business will be able to pay his debt, is void under the statute. *Idem*.....747, 753

Promise to Answer for Debt of Another.

6. Where goods, money or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original, and the promisor will be liable although the promise is not in writing. *Williams v. Auten*.. 832

7. Where goods are furnished to a third party at the request of a promisor, with reliance on his credit, and the transaction is such that the third party is liable therefor to the promisee as an original undertaking on his part, and there being no joint contract, the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds. *Idem.*

Real Property. Possession Under Contract.

8. Where a vendee is occupying land as a former owner, there is no such taking possession under a verbal contract for

Statute of Frauds—*concluded.*

the purchase of the land as will avoid the statute of frauds. *Lewis v. North*..... 552

9. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of lands as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract, and not the lease. *Idem.*

Statutes. See BASTARDS, 1. CONSTITUTIONAL LAW. HUSBAND AND WIFE. INTOXICATING LIQUORS. LIMITATION OF ACTIONS.

Amendments.

1. The act of March 10, 1895, to amend section 69 of the act of March 1, 1879, as to cities and villages not invalid because of that section's having been amended in 1881, a new section substituted and section 69 as enacted in 1879 repealed. *State v. City of Wahoo*..... 40

Construction.

See MORTGAGE, 10.

2. A statute will not be declared void as against public policy since such statute, when duly enacted, is the expressed public policy of the state on that subject. *State v. Heldenbrand* 136

3. In construing a statute form should give way to substance. *State v. Frye* 817, 819

4. Where one construction leaves a portion of a statute meaningless and nugatory and another construction gives to the entire statute an intelligent and consistent meaning, the latter will ordinarily be adopted. *Taylor v. Western Travelers Accident Ass'n*..... 783

Enactment.

5. An act of the legislature is not invalid, merely because the journal of one house is silent as to its concurrence in an amendment by the other house. *State v. City of Wahoo*.... 40

General and Special Laws.

6. The provisions of the act of March 27, 1901, are not, as to tax commissioner, void as being forbidden special legislation. *State v. Aitken*..... 428

7. Chapter 54 of the Criminal Code, authorizing the prosecution of capital offenses by information filed by the county attorney or by indictment by the grand jury in each and every county in the state, is not violative of section 19, article 6 of the constitution, requiring all laws to be of uniform operation. *Coil v. State*..... 15

Subjects and Titles.

8. The constitution does not prohibit the legislature from adopting comprehensive titles to bills. *State v. Heldenbrand*.. 136

Statutes—*concluded.*

9. A law will not be declared unconstitutional merely because the title is broader than the act. *Idem.*

10. The title of an act of the legislature of 1877 (Session Laws, p. 5) "to prevent the fraudulent transfer of personal property" with sufficient clearness indicates the subject of the proposed legislation. *Idem.*

11. The title to the act of March 27, 1901, relating to the government of cities of from 40,000 to 100,000 inhabitants, sufficiently covers its provisions as to tax commissioner. *State v. Aitken* 428

Witness Fees.

12. Prior to the amendment in 1885 of section 461 of the Criminal Code, a county was not liable for defendant's witness fees where he was indicted for a felony. *Worthen v. County of Johnson*..... 754

Summons. See SERVICE.

Where an action is brought against a nominal defendant in one county, summons can not properly be issued to a party in another county. *Goldstein v. Fred Krug Brewing Co*..... 728

Supersedeas. See APPEAL AND ERROR, 54-60.

Sureties. See APPEAL AND ERROR, 57, 58. PRINCIPAL AND SURETY.

Taxation. See COUNTIES. MUNICIPAL CORPORATIONS, 10-12. STATUTES.

Assessment. Collection and Enforcement.

1. The law presumes that the officer making the assessment performed his full duty, and until the contrary is made to appear it will not be presumed that the lots were so situated as to render their assessment together necessary. *Pettibone v. Fitzgerald*..... 869

2. The mere fact that the pleadings show that two contiguous lots owned by the same person were assessed, taxed and owned together does not of itself render the tax proceeding illegal. *Idem.*

3. Injunction will lie to restrain the collection of personal taxes by distress, when the assessment was without jurisdiction. *Rothwell v. Knox County*..... 50

4. When a taxing officer acts within jurisdiction, an injunction will not lie for irregularities in assessment. *Idem.*

5. Where a tax is void, that is, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144, article 1, chapter 77, Compiled Statutes. *Grand Island & W. C. R. Co. v. Dawes County* 44

Taxation—*continued.*

Lien. Payment.

6. The tax lien upon real estate existing in favor of the public is, ordinarily, extinguished by payment. The exception to the rule is where land has been sold by the county treasurer and taxes against the same, becoming afterward delinquent, are paid by the holder of the tax sale certificate. *Toy v. McHugh* 820

7. Taxes are a specific statutory lien upon lands against which they are charged. *Idem.*

8. In a suit to foreclose a tax lien, answer *held* an admission of the issuance and existence of the certificate of tax sale alleged. *Battelle v. McIntosh*..... 647

Payment and Recovery.

9. Under section 144, chapter 77, Compiled Statutes, where it is claimed that the taxes were levied for an illegal or unauthorized purpose or that they were invalid for any reason other than that the property was not liable for taxation or that it had been twice assessed in the same year, no formal protest is required. *Custer County v. Chicago, B. & Q. R. Co*..... 657

10. The demand for a return of taxes required by section 144, chapter 77, Compiled Statutes, is sufficient if it specifies the taxes sought to be recovered, the ground upon which their return is demanded, and includes a demand for repayment. *Idem.*

11. A party must bring himself within the terms of the statute if he wishes to recover taxes illegally paid. *Martin v. Kearney County* 538

12. The purchaser of real estate at delinquent tax sale is a volunteer and subject, ordinarily, to the rules applicable to voluntary payment of taxes. *Idem.*

13. Irregular action by a city council in making a levy of taxes for municipal purposes, resulting in the levy being declared illegal and void, is not a "mistake or wrongful act of the county treasurer or other officer," within the meaning of section 131, article 1, chapter 77, Compiled Statutes, for which the county can be held liable to refund to a purchaser at a delinquent tax sale the illegal taxes so attempted to be levied. *Idem.*

Sale for Non-Payment.

14. An attaching creditor *held* not an owner within section 4, article 5, chapter 77, Compiled Statutes, relating to the enforcement of tax liens. *Leigh v. Green*..... 344

15. A land tax creates no personal liability against the ownership of the land and must be collected by a sale of the particular tract against which it is charged. *Toy v. McHugh*, 820

Taxation—*concluded.*

Tax Deeds and Titles.

16. The description in a sheriff's deed is sufficient, where it provides means of identification. *Abbott v. Coates*..... 247
17. Title based on sheriff's deed upon tax foreclosure, is insufficient as to lots specifically excepted in decree. *Idem.*
18. The rule of *caveat emptor* applies to the purchaser of real estate at tax sales. *Martin v. Kearney County*..... 538
19. A purchaser of real estate at a delinquent tax sale is charged with notice of the public records showing the manner in which taxes for municipal purposes were levied by the city authorities. *Idem.*

Uniformity.

20. The act of March 27, 1901, *held* not to violate the constitutional requirement of uniform taxation. *State v. Aitken*.... 428

Tender. See TRIAL, 19.

A tender, in order to be effectual, must be absolute and unconditional. *Schrandt v. Young*..... 254

Threshing Grain. See WORK AND LABOR.

Title. See MORTGAGES, 14. TAXATION. STATUTES.

Transcript. See APPEAL AND ERROR, 61-67.

Trespasser.

There may be and often are circumstances under which one owes some active duty to a trespasser upon his premises. *Tucker v. Draper*.....66, 72

Trial. See APPEAL AND ERROR. INSTRUCTIONS. NEW TRIAL. WITNESSES.

Argument and Conduct of Counsel.

1. In a prosecution for murder it is proper for the county attorney to outline to the jury the evidence which the state expects to produce. *Russell v. State*..... 512
2. Alleged misconduct of counsel not prejudicial. *Coil v. State*, 15
3. Where counsel for the state referred in an argument to facts not in evidence and upon objection the district court instructed the jury to disregard such statements, no ground for complaint remained. *Argabright v. State*..... 402
4. Where counsel argues dehors the record, misconduct may be cured by court's instructions. *Idem.*
5. Misconduct of counsel for the state in the argument of the case, must be such as to work a prejudice. *Idem.*
6. Misconduct of counsel, in order to work prejudicial error, must have been in disregard of the rules of legitimate argument of the evidence, and sufficient to unduly influence the jury. *Idem.*

Trial—*continued.*

Directing Verdict.

7. It is proper to direct a verdict, where the evidence is undisputed and the conclusion is foregone. *Bender v. Kingman* 469

8. It is not error to take from the jury an immaterial issue concerning which there is not sufficient evidence to sustain a verdict, even though there be a scintilla of evidence thereon which was admitted without objection. *Boggs v. Boggs* 274

9. Where the evidence is undisputed and unequivocal, it is not error for the trial court to direct a verdict. *Nelson v. City of Omaha* 823

10. When the petition states a cause of action and the answer states no defense, it is not error to direct a verdict for the amount for which suit was brought. *Hrabak v. Village of Dodge* 591

11. Where the proof of plaintiff admissible under the pleadings is insufficient to entitle him to recover, an instruction directing the jury to find for the defendant will be upheld. *Anders v. Life Ins. Clearing Co.* 585

Jury.

12. Where a point in a criminal trial is answered in an instruction given, the court may refer to such instruction as answering an inquiry submitted by the jury during their deliberation. *Savary v. State* 166

13. The *voir-dire* examination is no part of the trial. *Coil v. State* 15

14. Record *held* to show the jury were in the custody of the sheriff during the entire trial. *Bush v. State* 128

Rulings on Evidence.

15. The admission of immaterial testimony not easily separated from that which is material, is error curable by an instruction. *Schrandt v. Young* 254

16. The refusal to call witnesses impeached upon a former trial is not the suppression of evidence. *Argabright v. State* .. 402

17. A refusal to receive evidence embraced within an offer to prove, but not covered by any question propounded to the witness on the stand, is not error. *Erickson v. Schmill* 368

18. A question is not prejudicial if the objection to it is sustained. *Argabright v. State* 402

19. When in direct examination an objection to a question is interposed and sustained there must be an offer to prove the facts sought to be elicited and a ruling of the court to present a question for review. *Brennan-Love Co. v. McIntosh* .. 522

Trial—*concluded.*

Striking Cause from Docket.

20. Striking a cause from the docket suspends, but does not dismiss, the action. *Hayden v. Huff*..... 375

Verdict. Findings.

21. A jury, after consideration and discussion of the evidence in a case, agree to find for plaintiff in a sum equal to one-half the amount claimed in the petition. *Held* not error. *Metcalf v. Bockoven*..... 877
22. Where the jury retires after finding a verdict and thereafter returns an amended verdict, *held* not error. *Coil v. State* 15
23. Where the court finds all the facts from which the law will infer fraudulent intent in a conveyance, a decree will not be reversed as contrary to law because it fails to state that the fraudulent intent existed. *Cochran v. Cochran*.... 450
24. The jury are bound to give their verdict in obedience to the instructions of the court. *Union State Bank v. Hutton*.. 664
Barton v. Shull 570

Trusts.

1. Terms of trust agreement construed. *Patterson v. Lanning*, 634
2. An owner of property who conveys it to a trustee to be used in the payment of another's debts has the right to prescribe the terms and conditions of its sale and application. *Idem.*

Usury.

1. When in the computation of interest a mistake is made and more than 10 per cent. is charged, the contract will not be declared usurious for that reason. *Dodds v. McCormick Harvesting Machine Co*..... 759
2. Before a contract may be declared usurious, there must be an agreement between the parties to charge and receive a greater rate of interest than that allowed by law. *Idem.*
3. Action of trial court in withdrawing question of usury from jury, *held* proper. *Idem.*

Variances. See PLEADING, 12.

Vendor and Vendee.

1. A vendee in a contract for a sale of land, while in default, can not maintain an action to recover back payments on the ground of the rescission of the contract by the vendor. *Maloy v. Muir*..... 80
2. Evidence in a suit to recover back money paid in part performance, *held* to sustain judgment for defendant. *Idem.*

Venue. See COSTS. CRIMINAL LAW AND PROCEDURE, 5, 6. INSURANCE, 20, 22.

Verdict. See APPEAL AND ERROR. TRIAL.

Vested Rights. See COMMON LAW.

Waiver. See APPEAL AND ERROR, 18, 19. CRIMINAL LAW AND PROCEDURE, 15. INDICTMENT AND INFORMATION, 7. INSURANCE.

Water and Watercourses.

1. Definition. See page 461, note. *Chicago, R. I. & P. R. Co. v. Andreesen* 456
2. A right to damages for the obstruction of watercourses does not accrue until the overflow results. *Idem.*
3. An ordinance extending the right of a water company to exercise its franchise free from the city's option to purchase, without compensation, without submission of the question to a popular vote, is forbidden by section 19, chapter 12*a*, Compiled Statutes, 1897. *Poppleton v. Moores*... 851

Wills.

Life Estate. Betterments.

1. A will by a tenant for life only, which purports to devise the fee of the lands which are the subject of tenancy, does not operate as a bequest of an equitable lien upon the reversion in behalf of the testator because of his having paid off an incumbrance upon the premises existing at or prior to the creation of the life estate. *Schimpf v. Rhodewald*... 105
2. A will consisting of a simple sentence in the German language, of which the following is, as nearly as possible, a literal translation into English, omitting names: "I do will and bequeath to my wife all my property, she has entire control [sie habt zu verfugen] over the same after my death as long as she lives," devises a life estate only, and the reversion, at the death of the testator, vests in his heir or heirs at law. *Idem.*
3. Where a life tenant is entitled to be reimbursed for improvements, such right will not pass by will devising the lands in fee and the occupying claimants' act is not available to the devisee. *Idem.*
4. The fact that that which the law implies is unnecessarily expressed in writing a will is insufficient to enlarge an estate therein devised. *Idem*.....105, 110

Undue Influence.

5. Undue influence must be such as would destroy the free agency of the testator. *Boggs v. Boggs*..... 274
6. There must be such a degree of urgent solicitation that, considering testator's condition of mind and body, he was too weak to resist. *Idem.*
7. Although in general confidential relations may raise strong suspicion of undue influence, this is not true to the

Wills—*concluded.*

same extent of the relation of husband and wife, where the relation has subsisted for a long time under circumstances which give rise to a strong legitimate influence, and the disposition in question is not unjust or unnatural. *Idem.*

8. The burden is upon the contestants to establish undue influence, and in so doing it is not enough to show that the circumstances attending the execution of the will are consistent with the hypothesis of its having been obtained with undue influence. It must be shown that they are inconsistent with a contrary hypothesis. *Idem.*

Witnesses. See CRIMINAL LAW, 4. DEPOSITIONS. EVIDENCE, 8. INSTRUCTIONS, 19. STATUTES, 12.

Compensation.

1. Under section 461 of the Criminal Code the county is not liable for the fees and mileage of witnesses for the defendant unless the statutory affidavits have been filed. Such liability arises only by provision of statute. *Worthen v. County of Johnson* 754

2. Petition in an action against a county to recover witness fees, *held* not to state a cause for action. *Idem.*

Credibility.

3. The weight to be attached to the testimony of different witnesses, is peculiarly and especially a question for the jury. *Lammers v. Boehmer*..... 159

Cross-Examination.

4. To prevent a miscarriage of justice, the trial judge may, sparingly and discreetly, cross-examine a witness for the accused. *Nightingale v. State*..... 371

5. Questions calling for evidence tending to show the improbability of statements made in the examination in chief, or to throw doubt thereon, are proper upon cross-examination, especially where such statements were in the nature of expert opinions. *Schrandt v. Young*..... 254

6. A written statement of a witness, inconsistent with and contradictory to his testimony, and offered for the purpose of impeachment, is not admissible unless the witness's attention has been called thereto with reasonable certainty, and unless properly authenticated or admitted by the witness. *Omaha Loan & Trust Co. v. Douglas County*.. 1

Words and Phrases.

1. "A full answer." *Oakes v. Ziemer*..... 603
2. "Adopted into his family." *Estate of Morton v. Morton*..... 420

Words and Phrases—*concluded.*

3. "Collection." *Durland v. Durland*.....813, 815
4. "Evasive answer." *Oakes v. Ziemer*..... 603
5. "Mistake or wrongful act of the county treasurer or other officer." *Martin v. Kearney County*..... 538
6. "Newspaper." *Turney v. Blomstrom*..... 616
7. "Pain" for "Paid." *Connor v. Becker*..... 856
8. "Plaintiff's own testimony." *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*..... 180
9. "Recovery." *Durland v. Durland*.....813, 815
10. "Resident alien." *Glynn v. Glynn*..... 872
11. "To my children, share and share alike." *Estate of Morton v. Morton* 420

Work and Labor.

One undertaking to do work requiring special skill impliedly warrants that he has such skill as the nature of the services requires, and that machinery is sufficient. *Van Nortwick v. Holbine* 147